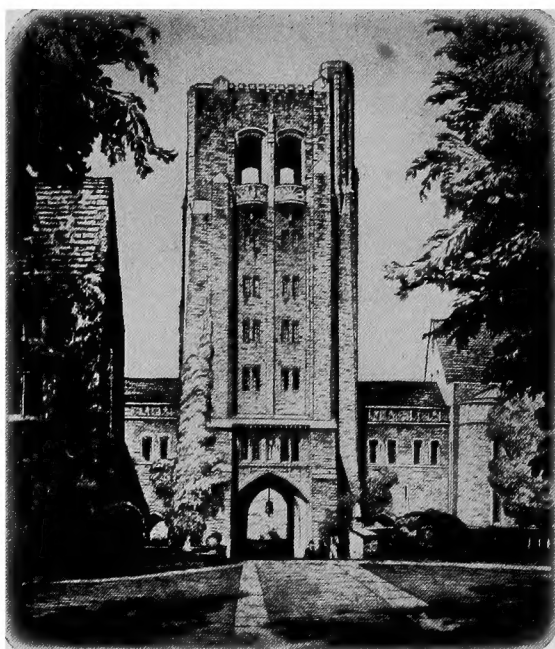


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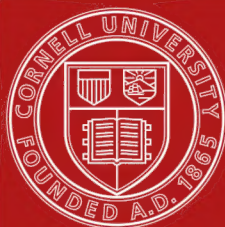
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A TREATISE
ON THE
LAW OF MUNICIPAL CORPORATIONS

VOLUME THREE

COMMENTARIES
ON THE LAW OF
MUNICIPAL CORPORATIONS.

BY

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CONTENTS

[In designating the sections it has been found convenient to omit numbers at the end of each chapter.]

CHAPTER XXI

§§ 970-999. CORPORATE PROPERTY	Pages 1553-1599
§ 970. Corporate Capacity in the Roman Law	1553
§ 971. Subsequent Modification in Europe; Statutes of Mortmain	1554
§ 972. These Restrictions not in Force in this Country	1555
§ 973. Result of Legislation in Europe	1555
§ 974. Grants to Unincorporated Communities; Definite Grantee	1555
§§ 975-978. Corporate Property; Capacity in this Country	1556-1560
§ 979. Grants upon Conditions Subsequent	1562
§ 980. Real Estate beyond Corporate Limits	1566
§ 981. Gifts and Grants to and for the Benefit of a Municipality	1567
§ 982. Power to take and hold in Trust; Charitable Uses	1569
§ 983. Girard Will Case; Devise to City in Trust for the Education and Support of Orphans	1571
§ 984. McDonough Will Case; Devise to New Orleans and Baltimore to educate the Poor	1573
§ 985. McMicken Will Case; Devise to Cincinnati for the Education and Support of Poor and Orphan Children	1574
§ 986. Mullanphy's Will; Devise to St. Louis in Trust for the Relief of Poor Emigrants	1574
§ 987. Devise for Erection and Support of Hospital	1575
§ 988. Charitable Trusts Germane to Corporate Purposes	1575
§ 989. Devises and Grants for Objects Foreign to Corporate Purposes	1578
§ 990. When the State alone can question the Power	1580
§ 991. Power of Alienation	1581
§ 992. Sale on Execution	1585
§ 993. Mechanics', Maritime, and Attorneys' Liens	1587
§ 994. Mode of Alienation; "City Slip Cases"	1589
§ 995. Sale or Lease of Property to the Highest Bidder	1590
§ 996. Power to Mortgage	1591
§ 997. Leases of Corporate Property	1593
§§ 998, 999. Conveyances by Municipalities	1598

CHAPTER XXII

§§ 1010-1062. EMINENT DOMAIN	Pages 1600-1684
§ 1010. Mode of Treatment	1600
§ 1011. Nature and Scope of the Power	1601
§ 1012. Constitutional Provisions	1602
§ 1013. Federal Constitution; Fifth and Fourteenth Amendments	1602
§ 1014. General Effect of the Constitutional Limitation stated	1605

	Page
§ 1015. Constitutional Amendments ordaining Liability for Property "damaged"	1606
§ 1016. Same Subject; Meaning of the Word "Property"	1606
§ 1017. Same Subject; Meaning of the Word "taken"	1608
§ 1018. Same Subject; Scope and Purpose of the Amendment	1610
§ 1019. Power as applicable to Private Corporations	1611
§ 1020. Extension of Streets across Railroads	1613
§ 1021. Same Subject; Measure of Compensation	1614
§ 1022. Lands of Municipality devoted to Public Use	1618
§§ 1023, 1024. What may be taken or condemned	1619-1621
§ 1025. Same Subject; Quantity; Estate	1622
§ 1026. Same Subject; Condemnation of Entire Lot	1622
§ 1027. Quantity or Amount of Property taken	1624
§ 1028. Condemnation of Lands beyond Municipal Limits	1626
§ 1029. Mapping or Platting Streets and other Improvements	1627
§ 1030. Effect of accepting Damages	1631
§ 1031. Public Use; What constitutes such a Use	1631
§ 1032. Public Use; Individual Contributions to Expense	1632
§ 1033. Public Use; Water Supply, &c.	1633
§ 1034. Same Subject; Public Parks	1635
§ 1035. Same Subject; Ornamental Purposes	1638
§ 1036. Legislative and Judicial Domain distinguished	1640
§§ 1037, 1038. Municipal Exercise of Power	1643
§ 1039. Construction of Power	1644
§ 1040. Power must be strictly pursued	1646
§ 1041. Conditions Precedent	1647
§ 1042. Notice	1648
§ 1043. Procedure	1650
§ 1044. Discontinuance of Proceedings	1651
§ 1045. Remedy of Land-owner	1653
§ 1046. When Municipality concluded	1654
§ 1047. Revisory Proceedings; <i>Certiorari</i>	1655
§§ 1048-1050. Compensation to Owner; Remedies	1657-1659
§ 1051. When Payment to be made	1661
§ 1052. Apportionment of Damages among Lots benefited	1665
§ 1053. Same Subject; Benefits	1666
§ 1054. Tribunal or Body to assess Damages	1667
§ 1055. Measure of Value or Damages	1669
§ 1056. Commissioners to ascertain Damages; Constitutional Provi- sions construed	1671
§ 1057. Power of City Council construed	1671
§ 1058. Amount of Damages	1672
§ 1059. Elements of Compensation; Adaptability for Particular Uses	1672
§ 1060. Elements of Compensation for Lands taken	1674
§§ 1061, 1062. Rules to measure Damages. General and Special Benefits	1676-1679

CHAPTER XXIII

§§ 1070-1107 DEDICATION	Pages 1685-1764
§ 1070. Dedication founded in Public Convenience	1685
§ 1071. Statutory Dedication	1686
§ 1072. Statutory Dedication; Character of Estate vested in Muni- cipality	1691

CONTENTS

vii

	Page
§ 1073. Common-Law Dedication; <i>Rationale</i> and Requisites	1693
§ 1074. Same Subject; General Features	1694
§ 1075. Dedications subject to Condition or Reservation	1696
§ 1076. Common-Law Dedication; Estate or Interest of Public	1698
§ 1077. <i>Alluvium</i> and Accretions	1700
§ 1078. Dedication must be made by the Owner	1702
§ 1079. Intention Essential	1705
§ 1080. Intent to Dedicate Presumed from User for Prescriptive Period	1709
§ 1081. User as affecting Question of Intent	1712
§ 1082. Same Subject; Widening Street	1715
§ 1083. Dedication by Platting and Sale	1715
§ 1084. Extent of Interest acquired by Purchaser under Sale according to Plat	1718
§ 1085. Plat as Evidence of Intention	1721
§ 1086. Acceptance by Public Necessary	1723
§ 1087. Acceptance by Municipal Authorities	1727
§ 1088. Partial Acceptance of Dedication	1732
§ 1089. Time of Acceptance	1735
§ 1090. Dedication by Platting and Sale; Necessity of Acceptance by Public	1737
§ 1091. Revocation of Dedication	1741
§ 1092. Acceptance; Revocation	1745
§ 1093. Province of Court and Jury; Burden of Proof	1745
§ 1094. Parks and Public Squares	1746
§ 1095. Same Subject; Dedication	1746
§ 1096. Park Uses	1748
§ 1097. Uses of Public Squares	1750
§ 1098. Enclosure and Ornamentation of Public Squares	1754
§ 1099. Use of Public Square by County	1755
§ 1100. Dedication for other Public or Charitable Purposes	1755
§ 1101. Use of Dedicated Land for Wharves	1756
§ 1102. Alienation of Dedicated Lands; Change of Use	1758
§ 1103. Same Subject; Legislative Authority	1759
§ 1104. Same Subject	1760
§ 1105. Civil Law Doctrine; Alienation in Louisiana	1761
§ 1106. Reverter; Misuser; Remedy	1762
§ 1107. Concluding Observations	1764

CHAPTER XXIV

§§ 1120-1194. STREETS	Pages 1765-1903
§ 1120. Prefatory	1766
§ 1121. Streets defined; Statutory Construction	1766
§ 1122. Public Nature of Streets and Extent of Legislative Control	1769
§ 1123. True Nature of a Public Street; Respective Rights of the Abutter and of the Public	1771
§ 1124. Same Subject; Result of the New York Cases stated	1773
§ 1125. Abutter's Easements; Effect of Later New York Decisions	1775
§ 1126. Nature of the Abutter's Rights in the Streets	1777
§ 1127. Abutter's Easements; How far protected by Fourteenth Amendment of Federal Constitution	1779
§ 1128. Legislative Power over Streets	1781
§ 1129. Delegation of Power to Municipality	1783
§ 1130. Obstruction; Remedy of Public by Indictment and in Equity	1784

	Page
§ 1131. Obstructions; Liability of Author of Obstruction; Remedy . . .	1786
§ 1132. Jurisdiction in Equity at Instance of Abutters	1789
§ 1133. Obstruction; Remedy of Corporation; Ejectment	1792
§§ 1134, 1135. Remedy of Abutter	1794-1796
§ 1136. Effect of Fee being in the Abutter or the Municipality	1796
§ 1137. Ejectment; Effect of Judgment or Decree against Municipal Corporation	1797
§§ 1138, 1139. Control of Highways within Municipal Limits	1798-1801
§§ 1140, 1141. Same Subject; General Law and Special Charter Provisions construed	1802, 1803
§ 1142. Power to establish and open Streets	1803
§ 1143. Appropriation to Street Uses of Lands Subject to Private Easements	1804
§ 1144. Power to Improve and Pave Streets	1807
§ 1145. Power to improve and graduate	1810
§ 1146. Power to pave Streets; "Pavement" defined	1812
§ 1147. Power to compel Building of Sidewalks	1813
§ 1148. Construction of Drains and Sewers	1814
§ 1149. Right of City to use or dispose of Soil	1816
§ 1150. Street Uses: Parkways, Bicycle Paths	1819
§ 1151. Power is Continuing and Discretionary	1819
§ 1152. Liability for Change of Grade	1820
§ 1153. Right of Lateral Support	1824
§ 1154. Municipal Control over Uses; Right to make Sewers, Drains, &c.	1824
§ 1155. Nature and Extent of Public Rights in City Streets	1826
§ 1156. Right of City to construct Cisterns in Streets for Public Uses	1829
§ 1157. Bridges; Duty of Repair; Municipal Control	1831
§ 1158. Municipal Power to construct Free Bridges over Streams	1833
§ 1159. Bridge Approaches and Elevated Viaducts	1834
§ 1160. Vacation of Streets	1835
§ 1161. Extent of Power over Street Uses	1846
§ 1162. Ordinances on the Subject	1848
§ 1163. Public Nature of Streets; Paramount Legislative Control	1849
§ 1164. Legislative Power; Right or Privilege to use Streets	1849
§ 1165. Open to all Suitable and Proper Uses; Steam-threshing Machine	1851
§ 1166. Regulation of Traffic	1852
§ 1167. Hack Stands	1855
§ 1168. Necessary and Temporary Obstructions to Use of Street are Justifiable	1856
§ 1169. Temporary Obstructions for Loading and Unloading Goods	1860
§ 1170. Temporary Obstructions by Building Material	1862
§ 1171. Municipal Control over Use of Streets by Deposit of Building Materials	1863
§§ 1172, 1173. Same Subject	1864
§ 1174. Public Displays, Shows, Exhibitions, &c.	1864
§ 1175. Erection of Public Buildings in Street	1866
§ 1176. Appropriation to Private Uses	1866
§ 1177. Obstructions; Fruit, Candy, and Market Stands	1869
§§ 1178, 1179. Openings in Sidewalks; Vaults under Sidewalks and Streets	1870, 1871
§ 1180. Areas, Cellar-ways, and Vaults	1872
§ 1181. Stepping Stones, Hitching Posts, Shade Trees, &c.	1875
§ 1182. Porches, Bay-windows, Cornices, and Ornamental Projections	1876
§ 1183. Abutter's Rights in Respect of Doors, Shutters, Iron Gratings, &c.; Usage	1881
§ 1184. Abutter's Rights; Porches and Bay-windows in or over Streets	1882

CONTENTS

ix

	Page
§ 1185. Same Subject; Massachusetts Cases	1885
§ 1186. Awnings	1885
§§ 1187, 1188. Prescription and Adverse Possession; Statute of Limitations	1886, 1887
§ 1189. No Title by Adverse Possession as against the Public	1889
§ 1190. Same Subject; Civil Law Doctrine	1890
§ 1191. Statutes of Limitation; Estoppel; Illinois Doctrine	1892
§ 1192. Adverse Possession of Streets; West Virginia	1894
§ 1193. Adverse Possession of Streets and Highways	1896
§ 1194. Same Subject; The Author's Views and Suggestions as to the True Doctrine	1900

CHAPTER XXV

§§ 1210-1281. STREET FRANCHISES	Pages 1904-2087
§ 1210. Nature of Right or Privilege	1905
§ 1211. Extent of Public Right in Street: Fee in Abutter	1907
§ 1212. Water Pipes and Mains	1910
§ 1213. Public Lighting no Additional Servitude	1912
§ 1214. Gas Pipes and Electric Lighting Appliances in Public Streets	1915
§ 1215. City cannot, without Express Legislative Authority, grant Exclusive Rights	1917
§§ 1216, 1217. Municipal Grant of Exclusive Rights to lay down Gas Pipes; Connecticut Decisions	1918, 1919
§§ 1218, 1219. Same Subject; Connecticut Decision commented on and criticised	1920-1922
§ 1220. Telegraph and Telephone Poles in Streets and Highways	1922
§ 1221. Same Subject; Right of Abutter to Compensation; Additional Servitude	1928
§ 1222. Scope of Legislative Power	1932
§§ 1223, 1224. Special Constitutional Limitation on Legislative Power over Streets and their Uses	1933-1937
§ 1225. Same Subject; New York Arcade Railway Cases	1939
§ 1226. Municipal Consent; Essential to Exercise of Franchise Rights	1942
§ 1227. Municipal Consent; By what Body given	1945
§ 1228. Constitutional Requirement of Municipal Consent; Power of Legislature	1948
§ 1229. Consent of Municipality; Power to attach Conditions	1952
§ 1230. Municipal Consent; Validity of Conditions	1955
§ 1231. Time of Completion; Forfeiture and Damages for Breach of Condition	1958
§ 1232. Railroads in Streets; Consent of Abutters	1963
§ 1233. Authority to occupy and use Streets; How conferred and construed	1970
§ 1234. Delegated Municipal Authority	1972
§§ 1235, 1236. Horse Railways in Streets; Municipal Control; Davis v. New York	1975, 1976
§ 1237. Legislative Sanction necessary to authorize Railways in Streets and Highways	1977
§ 1238. Special Charter Provision construed	1978
§ 1239. Charter Power of Municipalities as to Street Railways	1979
§ 1240. Rights and Liabilities of the Company	1980
§ 1241. Railroad Uses must not exclude Public Travel	1982

	Page
§ 1242. Contract Rights which cannot be impaired	1984
§ 1243. Exercise of Conflicting Franchises	1986
§ 1244. Unauthorized Use of Street for Railroads and other Utilities; Remedies	1989
§ 1245. The Doctrine of Abutters' Easements	1993
§ 1246. Liability of City for Damages sustained by Abutter	1998
§ 1247. Legislative Authority protects from Public Prosecution, but not from Liability to Abutter where his Property Rights are invaded	1999
§ 1248. Use for Horse Railway not an Additional Servitude	2000
§ 1249. Street Railways operated by Mechanical Power	2004
§ 1250. Railroads; Where the Fee is in the Public	2009
§ 1251. Railroads; Where the Fee is in the Abutter	2010
§ 1252. Steam Railroad an Additional Burden	2011
§ 1253. Railroads in Streets: Rule in Illinois	2016
§ 1254. Railroads in Streets: Rule in Missouri	2020
§ 1255. Railroads in Streets: Rule in New York	2023
§ 1256. Railroads in Streets: Rule in Pennsylvania	2025
§ 1257. Railroads in Streets: Rule in Texas	2028
§ 1258. Interurban Street Railways	2029
§§ 1259, 1260. Elevated Railways in Streets; New York Legislation and its Construction; Correlative Rights of the Abutting Owner and of the Public; Scope of Legislative Power	2033, 2034
§ 1261. Same Subject; Nature and Extent of Abutter's Rights	2034
§ 1262. Elevated Railroad Cases; Development of the Law	2038
§ 1263. Measure of Damages; Benefits	2042
§ 1264. Remedies of Abutters at Law and in Equity: Right to Injunction	2045
§ 1265. Duration of Franchise; Rights in Perpetuity	2050
§ 1266. Duration of Franchise; Right Limited by Life of Public Ease- ment	2054
§ 1267. Duration of Franchise; Term Limited by Life of Municipality	2055
§ 1268. Duration of Franchise; Term Limited by Corporate Life of Grantee	2058
§ 1269. Police Power as affecting Franchise Rights	2060
§ 1270. Police Power; Reasonable Regulations	2063
§ 1271. Franchise subject to Paramount Municipal Duty to maintain and improve Streets	2065
§ 1272. Municipal Control; Police Authority; Rate of Speed of Railway Trains; Obstructions	2066
§ 1273. Police Power; Permits to open Streets	2068
§ 1274. Police Power; Removal of Overhead Wires	2069
§ 1275. Rental Charges; Charges for Inspection and Supervision	2072
§ 1276. Railroads; Obligation to restore Street; Paving and Repaving	2076
§§ 1277-1280. Conclusions as to Railways in Streets summed up	2083-2084
§ 1281. Concluding Observations	2085

CHAPTER XXVI

§§ 1290-1341. PUBLIC UTILITIES. — TRANSPORTATION, WATER, LIGHT	Pages 2088-2309
§ 1290. Construction, Operation, and Regulation of Public Utilities	2089
§ 1291. Municipal Trading	2090
§ 1292. Municipal Trading; Constitutional Questions	2094

	Page
§ 1293. Municipal Ownership; Public and City Purposes defined	2100
§ 1294. Same; Construction and Ownership of Railways	2102
§ 1295. Power of State to prevent Extra-territorial Interference with Waters and Water Supply	2104
§ 1296. Power to provide Water and Light	2107
§ 1297. Public Nature of the Service	2115
§ 1298. Power of Municipality to furnish Water and Light for Use of Inhabitants	2118
§ 1299. Power of City to supply Water to other Cities and beyond its Limits	2121
§ 1300. Power to apply Surplus to Private Purposes	2124
§ 1301. Property acquired by Municipality is held in Trust for Public Purposes	2128
§ 1302. Power to contract for Public Service of Water and Light . . .	2130
§ 1303. Capacity in which Municipality acts in furnishing or contracting for Water or Light	2133
§ 1304. Grants of Franchises to Corporations and Individuals	2136
§ 1305. Sale of Franchises to Highest Bidder	2146
§ 1306. Constitutional Prohibition against impairing the Obligation of Contracts	2148
§ 1307. Term of Contract	2151
§ 1308. Exclusive Franchises and Contract Rights	2157
§ 1309. Exclusive Franchises and Contract Rights; Rule in Pennsylvania .	2168
§ 1310. Agreements by Municipality to satisfy or pay Taxes	2173
§ 1311. Breach of Conditions by Company; Forfeiture; Specific Per- formance	2176
§ 1312. Purchase of Works of Company by Municipality	2183
§ 1313. Acquisition by Municipality of Works of Public Service Corpora- tion under Power of Eminent Domain	2195
§ 1314. Compensation; Elements; Measure of Damages	2196
§ 1315. Rights of Municipality and Grantee at Expiration of Franchise .	2199
§ 1316. Contamination of Water Supply	2201
§ 1317. Consumers; Duty of Municipality or Corporation to furnish Supply	2204
§ 1318. Consumers; Reasonableness of Rates	2211
§ 1319. Consumers; Rules and Regulations	2213
§ 1320. Consumers; Meters	2215
§ 1321. Consumers; Failure to pay for Service	2218
§ 1322. Consumers; Clandestine Abstraction of Water	2222
§ 1323. Water Rates; Lien	2223
§ 1324. Legislative Regulation of Rates	2225
§ 1325. Delegation to Municipalities of Power to regulate Rates . .	2230
§ 1326. Stipulations as to Rates in Ordinances and Contracts	2236
§ 1327. The Province of the Courts as to Rates	2246
§ 1328. Same Subject; Remedies; General and Federal Jurisdiction in Rate Regulation Cases	2256
§ 1329. Power of Judiciary to fix or prescribe Rates	2259
§ 1330. What are Reasonable Rates? General Considerations	2265
§ 1331. What are Reasonable Rates? Elements of Value; Property and Franchises	2268
§ 1332. What are Reasonable Rates? Cost of Construction	2274
§ 1333. What are Reasonable Rates? Cost of Reproduction of Works . .	2277
§ 1334. What are Reasonable Rates? Risks and Incidents of Business; Other Sources of Supply	2278
§ 1335. What are Reasonable Rates? Elements of Value of Property; Capitalization and Bonded Indebtedness	2281

	Page
§ 1336. What are Reasonable Rates? Cost of Operation; Maintenance; Depreciation	2284
§ 1337. What are Reasonable Rates? Net Profit or Return to Corpora- tion	2287
§ 1338. Liability of Municipality for Water and Light furnished; Implied Contracts	2292
§ 1339. <i>Ultra Vires</i> ; Executed and Executory Provisions	2299
§ 1340. Liability for Property destroyed by Fire	2300
§ 1341. Diversion of Sub-surface Waters by Municipal Water Works . .	2307

THE LAW OF MUNICIPAL CORPORATIONS

CHAPTER XXI

CORPORATE PROPERTY

	Section		Section
Corporate Capacity in the Roman Law	970	McMicken Will Case; Devise to Cincinnati for the Education and Support of Poor and Orphan Children	985
Subsequent Modification in Europe; Statutes of Mortmain	971	Mullanphy's Will; Devise to St. Louis in Trust for the Relief of Poor Emigrants	986
These Restrictions not in Force in this Country	972	Devise for Erection and Support of Hospital	987
Result of Legislation in Europe	973	Charitable Trusts Germane to Corporate Purposes	988
Grants to Unincorporated Communities; Definite Grantee	974	Devises and Grants for Objects Foreign to Corporate Purposes	989
Corporate Property; Capacity in this Country	975-978	When the State alone can question the Power	990
Grants upon Conditions Subsequent	979	Power of Alienation	991
Real Estate beyond Corporate Limits	980	Sale on Execution	992
Gifts and Grants to and for the Benefit of a Municipality	981	Mechanics', Maritime, and Attorneys' Liens	993
Power to take and hold in Trust; Charitable Uses	982	Mode of Alienation; "City Slip Cases"	994
Girard Will Case; Devise to City in Trust for the Education and Support of Orphans	983	Sale or Lease of Property to the Highest Bidder	995
McDonough Will Case; Devise to New Orleans and Baltimore to educate the Poor	984	Power to mortgage	996
		Leases of Corporate Property	997
		Conveyances by Municipalities	998, 999

§ 970 (556). **Corporate Capacity in the Roman Law.** — We have next to consider the *powers of municipal corporations in respect of taking, holding, and alienating property.*¹ The *history of the capacity* of such corporations to acquire and hold property is so clearly

¹ The extent of legislative authority over the *property* of municipal and public corporations has been considered in a previous chapter (chap. iv.). The *liabilities* of such corporations in respect of property owned by them is treated of in a subsequent chapter. Chap. xxxii. § 1671 *et seq.*

given by Mr. Justice Campbell, in his learned judgment in the great McDonough Will Case,¹ in the Supreme Court of the United States, that it fittingly serves as an introduction to the more special discussion and treatment of the subject. "The Roman jurisprudence," he observes, "seems originally to have denied to cities a capacity to inherit, or even to take by donation or legacy. They were treated as composed of uncertain persons, who could not perform the acts of volition and personality involved in the acceptance of a succession. The disability was removed by the Emperor Adrian in regard to donations and legacies, and soon legacies *ad ornatum civitatis* and *ad honorem civitatis* became frequent. Legacies for the relief of the poor, aged, and helpless, and for the education of children, were ranked of the latter class. This capacity was enlarged by the Christian emperors, and after the time of Justinian there was no impediment. Donations for charitable uses were then favored; and this favorable legislation was diffused over Europe by the canon law, so that it became the common law of Christendom."²

§ 971 (557). **Subsequent Modification in Europe; Statutes of Mortmain.** — "When the power of the clergy began to arouse the jealousy of the temporal authority, and it became a policy to check their influence and wealth, — they being, for the most part, the managers of the property thus appropriated, — limitations upon the capacity of donors to make such gifts were first imposed. These commenced in England in the time of Henry III.; but the learned authors of the history of the corporations of that realm affirm that *cities were not included in them*, 'perhaps upon the ground that the grants were for the public good'; and although 'the same effect was produced by the grant in perpetuity to the inhabitants, . . . the same practical inconvenience did not arise from it, nor was it at the time considered a mortmain.'³ . . . A century later there was a *direct inhibition upon grants to cities, boroughs, and others, which have perpetual commonalty*,' and others, 'which have offices perpetual,' and therefore 'be as perpetual as people of religion.' The English statutes of mortmain forfeit to the king or superior lord the estates granted, which right is to be exerted by entry; a license, therefore,

¹ McDonough Will Case, 15 How. (U. S.) 367, 403. The nature of Mr. McDonough's will, in favor of the cities of New Orleans and Baltimore, will be found stated further on in this chapter, *post*, § 984.

² See *ante*, §§ 3, 4, as to the property rights of municipal corporations in the Roman law, and as to the necessity of such corporations having the capacity to acquire, take, and hold property for the benefit of the incorporated community.

³ Mereweth. & Steph. Hist. Corp. 489, 702.

from the king severs the forfeiture. The legal history of the Continent on this subject does not materially vary from that of England. The same alternations of favor, encouragement, jealousy, restraint, and prohibition are discernible. The Code Napoleon, maintaining the spirit of the ordinances of the monarchy, in 1731, 1749, 1762, provides 'that donations, during life or by will, for the benefit of the hospitals, of the poor of a commune, or of establishments of public utility, shall not take effect, except so far as they shall be authorized by an ordinance of the government.' The learned Savigny, writing for Germany, says: 'Modern legislation, for reasons of policy or political economy, has restrained conveyances in mortmain, but those restrictions formed no part of the common law.' The laws of Spain contained no material change of the Roman and ecclesiastical laws upon this subject."

§ 972 (558). **These Restrictions not in Force in this Country.** — "This legislation of Europe was directed to check the wealth and influence of juridical persons who had existed for centuries there, some of whom had outlived the necessities which had led to their organization and endowment. Political reasons entered largely into the motives for this legislation, — reasons which never extended their influence to this continent, and consequently it has not been introduced into our system of jurisprudence."¹

§ 973 (559). **Result of Legislation in Europe.** — "The precise result of the legislation is that corporations there (in England, and Europe generally), with the capacity of acquiring property, must derive their capacity from the sovereign authority, and the practice is to limit that general capacity within narrow limits, or to subject each acquisition to the revival of the sovereign."²

§ 974 (560). **Grants to Unincorporated Communities; Definite Grantee.** — It is a settled rule of the common law that a *grant*, to be valid, must be to a corporation, or to some certain person named, who can take, by force of the grant, and hold either in his own right or as trustee.³ Therefore, a grant by an individual of a lot

¹ 2 Kent. Com. 282, 283; Whicker Dig. tit. *Capacity*, B. 1; Shep. Touch. v. Hume, 14 Beav. 509. See also 236. "It is a general rule, that corporations must take and grant by their corporate name." 2 Kent Com. 291. Chambers v. St. Louis, 29 Mo. 543, 575, and remarks of Scott, J.

² Per Mr. Justice Campbell, McDonough Will Case, 15 How. (U. S.) 367, 404-407. A corporation aggregate can have no predecessor, and in a writ of right can only count on its own seizin. A statute of 1772, in Massachusetts, provided that

³ Co. Litt. 3a; 10 Co. 26 b; Com. of 1772, in Massachusetts, provided that

of land to "the people of" a specified county, not incorporated, is void.¹ So a *reservation* in a deed, in favor of the inhabitants of an unincorporated place, is invalid.² But a grant by the State or by the *sovereign authority* having the right to create corporations, to one or more persons who are *named* as patentees, for themselves and the inhabitants of a designated town, is valid, because the grant itself, coming from this source, confers a capacity to take and hold the lands in a corporate character.³

§ 975 (561). **Corporate Property; *Capacity in this Country.** — At *common law*, prior to and aside from the Statutes of Mortmain, corporations, it is laid down, might, in the absence of special restraints, take, hold, and alien lands *for any purposes not inconsistent with those for which they were created*.⁴ Such is not, and cannot be, we think, the rule in this country. Here all corporations are created by the legislature. They have such powers only as the legislature expressly confers, and such as are necessarily or fairly incident to the express powers, which would include such as are absolutely essen-

twelve persons should be chosen annually by the inhabitants of the town of Boston as overseers of the poor, and they were duly incorporated. In 1822 the town of Boston was changed to a city, the act providing for the election of a board of overseers for the city, "who shall have all the powers, and be subject to all the duties, now by law appertaining to the overseers of the poor for the town of Boston." It was decided, upon great consideration, — *Shaw, C. J.*, delivering the opinion, — that this was a *continuance*, and not a *dissolution or suspension*, of the corporation of 1772 [see *ante*, chap. ix., on Dissolution of Corporations]; that the bodies were public corporations, aggregate and not sole, with perpetual succession; that a grant to them of real estate carried the fee to their successors; and that in a writ of right they can count only upon their own seizin within thirty years next before the commencement of the action. *Boston Overseers of Poor v. Sears*, 22 Pick. (Mass.) 122.

¹ *Jackson v. Cory*, 8 Johns. (N. Y.) 385; *Jackson v. Hartwell*, 8 Johns. (N. Y.) 422.

² *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 73. See reference to this case and *Jackson v. Cory*, 8 Johns. (N. Y.) 385, by *Savage, C. J.*, in *North Hempstead v. Hempstead*, 2 Wend. (N. Y.)

109, 133. Although a deed may not operate as a *grant*, because of a want of legal capacity in the grantee to take, yet if it contains a general covenant of warranty it may operate by way of *estoppel*. *Terrett v. Taylor*, 9 Cranch (U. S.), 43, 52, 53; *Mason v. Muncaster*, 9 Wheat. (U. S.) 445. As to grants and devises for charitable purposes, see *infra*, §§ 982 *et seq.*

³ *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109, 133; and see also *Denton v. Jackson*, 2 Johns. Ch. (N. Y.) 320; *People v. Schermerhorn*, 19 Barb. (N. Y.) 540, 555; *Goodell v. Jackson*, 20 Johns. (N. Y.) 706; *Jackson v. Leroy*, 5 Cow. (N. Y.) 397; *Bow v. Allenstown*, 34 N. H. 351, 372. The right of a municipal corporation to its grants of property is not destroyed by a change of its name and an enlargement of its territory and a reconstruction of its powers. *Girard v. Philadelphia*, 7 Wall. (U. S.) 1; *ante*, § 233; chap. ix. §§ 337-339. Effect of *absolute repeal of municipal charter*, and of declaring the municipal corporation to be dissolved, upon its property rights and upon the rights and remedies of creditors. See *ante*, chap. ix.

⁴ 1 Wash. Real Prop. (4th ed.) 50, pl. 26; *Sutton First Parish v. Cole*, 3 Pick. (Mass.) 232, 239; 1 Blacks. Com. 475, 478; 1 Kyd, 108; *Hunnicut v. Atlanta*, 104 Ga. 1, citing text.

tial to the declared objects of the corporation.¹ The same doctrine applies to and measures the corporate capacity in respect of property. The principles, therefore, which apply to the capacity of a corporation in this country in respect of acquiring and holding property seem to the author to be plain. In the absence of express prohibitory statutes, or of statutes which in terms confer and limit, and therefore define and measure, the power, the capacity to acquire and hold property, real or personal, must be fairly incidental to some power expressly granted or absolutely indispensable to the declared purposes of the corporation. Any greater right than this is not only not granted, but is impliedly denied. The sound and true doctrines on this subject in this country are, it is believed, those that are laid down in this and in the three succeeding sections.

§ 976 (562). **Same Subject.** — The *English statutes of mortmain* are not in force in this country, unless by virtue of express legislation to that effect;² and consequently a municipal corporation has the *common law*, or more accurately, perhaps, *the implied power*, unless restrained by charter or statute, to purchase and hold all such real estate as may be reasonably or fairly necessary to the proper exercise of any power specifically granted, or essential to those purposes of municipal government for which it was created.³

¹ *Ante*, §§ 237-240, and cases there cited. For the public policy which underlies the principles of construction stated in the text, as applied to corporations taking and holding lands, see *Thompson v. Waters*, 25 Mich. 214.

² *Perin v. Carey* (charitable devise to Cincinnati), 24 How. (U. S.) 465; *Davidson College v. Chambers's Executors*, 3 Jones Eq. (N. Car.) 253; 2 Kent Com. 282, 283; *Chambers v. St. Louis*, 29 Mo. 543, 575, *per Scott, J.*; *Washb. Real Property* (4th ed.), 76; *Downing v. Marshall*, 23 N. Y. 366; *Page v. Heineberg*, 40 Vt. 81. The English statutes of mortmain have never been in force in *Wisconsin*. *Dodge v. Williams*, 46 Wis. 70; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106. They do not extend to *Massachusetts*. *Jackson v. Phillips*, 14 Allen (Mass.), 59.

³ *Ketchum v. Buffalo*, 14 N. Y. 356, 360, *per Selden, J.*; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; 2 Kent Com. 281; Co. Litt. 44 a, 300 b; 1 Kyd on Corp. 76, 78, 108, 115; *State v. Mansfield Com'rs*, 23 N. J. L. 510; *Nicoll v. N. Y. & E. R. Co.*, 12 N. Y. 121, 127; *McCartee v. Orphan As.*

Soc. of N. Y., 9 Cow. 437; *Peru Iron Co., In re*, 7 Cow. (N. Y.) 540, 552; *Reynolds' Heirs v. Stark County*, 5 Ohio, 204; *Perin v. Carey*, 24 How. (U. S.) 465; *State v. Brown*, 27 N. J. L. 13; *Davidson College v. Chambers's Executors* (full discussion), 3 Jones Eq. (N. Car.) 253; *Page v. Heineberg*, 40 Vt. 81; *State v. Madison*, 7 Wis. 688; *Louisville v. Commonwealth*, 1 Duvall (Ky.), 295; *Leeds v. Richmond*, 102 Ind. 372; *Avery v. United States*, 104 Fed. 711, citing text. Implied or express restrictions on the right to take and hold real estate are not, in this country, construed in a spirit of hostility and jealousy. *Per Scott, J.*, in *Chambers v. St. Louis*, 29 Mo. 543, 573, 576; *Pacific R. Co. v. Seely*, 45 Mo. 212; *Coleman v. San Rafael Turnpike Co.*, 49 Cal. 517. In *Nebraska*, see *Root v. Shields*, Woolw. C. C. 340.

A *public park* is a municipal purpose for which a city may purchase land under power to acquire property for municipal purposes, and to purchase real or personal property for the use of the city. *Lexington v. Kentucky Chautauqua Assembly*, 114 Ky. 781. Power

This power may be, and indeed often is, conferred in terms; but it may result, in the absence of express provision, as a reasonable or necessary incident to powers specifically granted. To illustrate the last proposition: Power is given to a city to "establish markets," that is, public places for the sale of commodities. To establish such place, ground is necessary. A market-house on the public streets, or on the public square, would be a nuisance. It could not be erected or established upon private property without consent or grant. Thus, by this course of reasoning, the result is reached that power "to establish a market" reasonably, if not necessarily, implies or carries with it the power to acquire by lease or purchase the requisite site. Such an authority could not probably be deduced from the words "*to regulate markets*," because the words "*to regulate*" "naturally, if not necessarily, presuppose the existence of the thing to be regulated."¹

"to purchase or lease such lands and to erect such buildings as may be necessary for city purposes" authorizes the temporary or permanent leasing of lands for a public park. *Holder v. Yonkers*, 39 N. Y. App. Div. 1, rev'g 25 N. Y. Misc. 250, 254. Under power to acquire land necessary or convenient for municipal purposes, a city may acquire land for an engine house; and it is not necessary that it should provide contemporaneously for the erection of a building. It will be presumed, in the absence of evidence to the contrary, that the city is acting in good faith. *Santa Barbara v. Davis*, 142 Cal. 669.

¹ *Ketchum v. Buffalo*, 14 N. Y. 356. See also *Peterson v. New York*, 17 N. Y. 499, rev'g 4 E. D. Smith, 413; *Le Couteux v. Buffalo*, 33 N. Y. 333.

Authority to establish and maintain libraries necessarily includes power to provide buildings, and land upon which to erect them. *Attorney-General v. Nashua*, 67 N. H. 478. Power to build detention hospitals confers by implication power to acquire by purchase or otherwise sites therefor. *Yegen v. Yellowstone County*, 34 Mont. 79. Power to light the city streets includes the power to purchase a building for that purpose. *Hay v. Springfield*, 64 Ill. App. 671; *Blanchard v. Benton*, 109 Ill. App. 569. An act of the legislature of California authorized a municipal corporation to enter into a contract to supply water to a city, also machinery and pipes; this was held not to authorize the municipal authorities to purchase a site upon which to

erect the water works. *People v. McClintock*, 45 Cal. 11. But although a city has power to acquire lands for a water plant for its own use, it cannot acquire lands for the purpose of donating them, or the use thereof, as a site for water works to a person who contracts to construct a water plant and furnish water to the city. *Cain v. Wyoming*, 104 Ill. App. 538.

As an incident to the power to erect and maintain a city hall, school-houses, and other public buildings, the municipality has the right to contract for indemnity against loss by fire by insuring these buildings; and, having the power to insure, it may insure them in a corporation organized on the mutual plan under the laws of the State in which the city is located. Giving premium notes for losses incurred by such company on other insurance is neither a loan of the credit of the city, nor the owning of stock or bonds of the company in violation of constitutional prohibitions. *French v. Millville*, 66 N. J. L. 392, aff'd 67 N. J. L. 349. The common council of a city, with the approval of the mayor, adopted a resolution accepting a written proposition for the sale to the city of certain real estate. A deed was made and delivered to the city clerk, and by him to the city treasurer. A warrant was drawn for the purchase money, although it was not delivered. The assessment maps were changed, and the deed was recorded in the county clerk's office. It was held that there was a valid delivery to and acceptance

§ 977 (563). **Same Subject.** — *The charter or other legislative acts is the source of power* in respect to the property rights of the corporation. If the charter be silent, the implied power exists, at least to the extent just stated, to acquire, hold, and alienate or dispose of property. But it is not unusual for the charter to grant the power and to fix its limits. Where this is done, the terms and purpose of the grant determine the nature, extent, and limitations of the power, the charter being construed, of course, in the light of the general legislation of the State.¹ And general authority to purchase and hold property should, doubtless, be construed to mean for purposes authorized by the charter, and not for speculation or profit.²

of the deed by the city; that a subsequent formal resolution by the council accepting the deed was not necessary to perfect title to the property; and that the fact that such subsequent resolution was vetoed by the mayor did not defeat the vendor's right to recover the contract price by an action at law. *Beckrich v. North Tonawanda*, 171 N. Y. 292, rev'g 57 N. Y. App. Div. 563.

¹ Statutory authority to a city to purchase the property of a water-works company, and in case the city and company could not agree upon a purchase, to acquire the same by eminent domain "*within two years thereafter*" construed to limit the power of the city to purchase the property within the two years allowed for the condemnation proceedings. *Ziegler v. Chapin*, 126 N. Y. 342.

Illinois. In this State it is held that where the method by which property shall be obtained by a municipality has been prescribed by the legislature that method is exclusive, and where the law provides for *acquiring property by condemnation*, and does not in express terms authorize the use of any other method, a municipality cannot acquire it by private purchase, which might lead to favoritism, corruption, private bargain, and the exercise of improper influence. *Hyde Park v. Spencer*, 118 Ill. 446; *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141, 162; *Chicago v. Hayward*, 176 Ill. 130, 135; *Snydaker v. West Hammond*, 225 Ill. 154, 158; *Litz v. West Hammond*, 230 Ill. 310, 316.

When a special power is granted to a city to purchase land for a *specific purpose*, e. g., public buildings, and no power is conferred to sell these lands, the city cannot, after having pur-

chased lands for such purpose, purchase for the same purpose other lands not adjacent thereto and not available as a part of the original site purchased. The specific power cannot be construed, in the absence of power to sell, as authorizing a purchase of successive and unnecessary sites. *McGuire v. Atlantic City*, 63 N. J. L. 91, distinguishing *Konrad v. Rogers*, 70 Wis. 492, cited *post*, § 991.

² *Bank of Michigan v. Niles*, 1 Doug. (Mich.) 401; *Davidson College v. Chambers's Executors*, 3 Jones Eq. (N. Car.) 253; *State Bank of Indiana v. Brackenridge*, 7 Blackf. (Ind.) 395; *Hunnicutt v. Atlanta*, 104 Ga. 1, 5, quoting text; *Alleghany County v. Parrish*, 93 Va. 615, 619, citing text; *ante*, chaps. vii., viii., xv., xviii.

Acquisition for profit. A county cannot purchase property for profit or revenue. *Buell v. Arnold*, 124 Wis. 65. A borough which has statutory authority to hold, purchase, and convey such real and personal estate as the purposes of the borough shall require, cannot lease from a private owner an *enclosed pleasure park* with the object of deriving a revenue therefrom by subletting or charging an admission fee. *Bloomsburg Imp. Co. v. Bloomsburg*, 215 Pa. 452. A city had authority to purchase or acquire for the use of the city *lands for corporate purposes*. It made a contract with the county *with a view to acquiring the county court-house*, which was incapable of being used at the same time for both county and city purposes. The contract provided that upon the payment of one-fifth of the price the city should become the owner of one-fifth interest in the court-house, but did not confer upon the city any right of occupancy. It also provided that the city might,

§ 978 (564): **Same Subject**, — “The inference,” says Chancellor Kent, “from the statutes creating corporations and authorizing them

if it so elected, in each of the four succeeding years acquire additional fifth parts until it acquired the entire fee; but this right was optional to the city and it was not bound to acquire these additional fifth parts. It was held that this contract was not a proper exercise of the power to purchase and acquire real estate for corporate purposes; that as to the fifth interest which it acquired by the first payment, inasmuch as it had no right of occupancy in connection therewith, that interest must be regarded as purchased for profit or investment, and that the fact that the city had the option to acquire the remaining four-fifths interest did not validate its agreement for the acquisition of the one-fifth which vested in it upon the first payment. *Hunnicut v. Atlanta*, 104 Ga. 1. In *Alter v. Cincinnati*, 56 Ohio St. 47, it was held that a constitutional provision prohibiting any city from raising money for or loaning its credit to or in aid of any company, corporation, or association, precluded a city from *owning part of a water plant property* which was owned in part by another, so that the parts owned by both when taken together constituted but one property. Hence, the legislature cannot authorize the city to contract for the construction of extensions and additions to its water plant at the expense of and to be owned by the person constructing the same, but managed and operated by the city as an integral part of its water system. But it might be suggested that the city did not raise money for, or loan its credit to another person in this transaction, but that the other person raised money for, and loaned his credit to the city.

With reference to the *powers of corporations to take and hold real estate*, they have been classified in an opinion in the Supreme Court of *Indiana* as follows: *First*. Those whose charters, or laws of creation, forbid that they should acquire or hold real estate. Such corporations cannot take and hold real estate, and a deed or devise to such a corporation can pass no title. *Second*. Those whose charters or laws of creation are silent as to whether they may or may not acquire or hold real estate. In such a case, if the objects for which the corporation is formed

cannot be accomplished without acquiring and holding real estate, the power so to do will be implied. *Third*. Those whose charters or laws of creation authorize them, in some cases, and for some purposes, to take and hold the title to real estate. *Fourth*. Those whose charters or laws of creation confer upon them a general power to acquire and hold real estate. Corporations thus empowered may, it is said, take and hold real estate (for corporate purposes) as fully as natural persons. *Counties* are *quasi* corporations, and fall within the third class above mentioned, and in some cases, and for some purposes, are authorized to take and hold title to real estate. They are in this State expressly empowered to acquire and hold title to real estate for a location for county buildings and for a poor-farm, and there may be other instances. *Hayward v. Davidson*, 41 Ind. 212.

A special provision in a charter, authorizing the corporation to take and hold real estate by purchase, was construed as meaning that it may do this, subject to the restrictions created by the general statutes of the State relating to this matter. *McCartee v. Orphan Asylum Society*, 9 Cow. (N. Y.) 437. Where power to purchase exists, the municipal corporation has the incidental power to secure the purchase money by mortgage of the property purchased. *Edey v. Shreveport*, 26 La. An. 636. Charter and general law construed together, being *in pari materia*. *Chambers v. St. Louis (Mullanphy Will Case)*, 29 Mo. 543; *Jefferson City v. Curry*, 71 Mo. 85. A city, owning the soil, may, like other owners, reclaim the *land between high and low water mark*, and when thus reclaimed a highway may be laid out upon it. *Richardson v. Boston*, 24 How. (U. S.) 188, and cases cited; *ante*, § 268. Rights to *alluvium* within corporate limits. *Kennedy v. Municipality*, 10 La. An. 54; *Barrett v. New Orleans*, 13 La. An. 105; *Ib.* 145; *Ib.* 349; *Remy v. Municipality*, 11 La. An. 148; *Carrolton R. Co. v. Winthrop*, 5 La. An. 36; *Beaufort v. Duncan*, 1 Jones (N. Car.) Law, 234; *Richardson v. Boston*, 24 How. (U. S.) 188, and cases cited. *Rights of municipality as riparian proprietor to wharf out. Ante*,

to hold real estate to a certain limited extent is, that our statute corporations cannot take and hold real estate for purposes foreign to their institution."¹ Not only so, but if the charter is silent on the subject, the further inference is, we think, that they can only take and hold such property as a means of carrying out or accomplishing the declared and specified purposes and objects of the corporation. In an important case in Louisiana it was decided that a purchase of real estate by the corporation defendant, for \$247,000, payable in bonds at twenty-five years from date, for the purpose of platting and re-selling the same, and thereby improving the salubrity of the city, and promoting the convenience of citizens as to

§ 264; *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118; *People v. Broadway Wharf Co.*, 31 Cal. 33; *San Francisco v. Calderwood*, 31 Cal. 585; *Bell v. Gough*, 23 N. J. L. 624; *ante*, §§ 264, 272.

A municipality owning land is not estopped to claim title to it because its officers, without authority, have assessed the same for taxation to a private person, returned the same as delinquent, and subsequently sold it at a tax sale. The reason is, that all these acts of its officers are unauthorized and void, and a purchaser at a tax sale is bound to take notice of the extent of their powers. *St. Louis v. Gorman*, 29 Mo. 593. Same principle. *Rossire v. Boston*, 4 Allen (Mass.), 57; *McFarlane v. Kerr*, 10 Bosw. (N. Y.) 249; *Ellsworth v. Grand Rapids*, 27 Mich. 250.

In *Iowa*, the doctrine is laid down that a corporation, by levying a tax upon land as the plaintiff's, may be estopped afterwards to deny his title, in an action by him to restrain the collection of the tax. *Brandriff v. Harrison County*, 50 Iowa, 164. So where it permits one, under claim of right, to occupy and pay taxes levied by itself, it cannot deny his ownership. *Simplot v. Dubuque*, 49 Iowa, 630. This is on the ground of a recognition of another's title to the land. *Am. Em. Co. v. Iowa R. L. Co.*, 52 Iowa, 323; *Big. Estoppel* (3d ed.), 577; *Herman on Estoppel*, chap. xix., where many of the cases are collected. *Estoppel by contract*. *Calhoun County v. Am. Emigrant Co.*, 93 U. S. 124. In *Massachusetts*, a town may acquire a private right of way as appurtenant to a public fiurial ground by prescription. *Deerbeld v. Connecticut River R. Co.*, 144 Mass. 325.

As to adverse possession against public corporation. *Herman on Estoppel, supra*; *Turney v. Chamberlain*, 15 Ill. 271; *Alton v. Illinois Transportation Co.*, 12 Ill. 38, 60; *Burbank v. Fay*, 65 N. Y. 57; *Fort Smith v. McKibbin*, 41 Ark. 45. *Post*, §§ 1080, 1187. In *California* no one can acquire by adverse possession, as against the public, the right to a street or square dedicated to public uses. *San Leandro v. Le Breton*, 72 Cal. 170, following *Hoadley v. San Francisco*, 50 Cal. 265, and *People v. Pope*, 53 Cal. 447. A municipal corporation may acquire realty by adverse possession, and may use it for other than municipal purposes. *New Shoreham v. Ball*, 14 R. I. 566; *Sherman v. Kane*, 86 N. Y. 57; *New York v. Carleton*, 113 N. Y. 284. See also *Eldridge v. Binghamton*, 120 N. Y. 309; *post*, §§ 1187-1192.

Special powers construed. *State v. Nashville Univ.*, 4 Humph. (Tenn.) 157; *State v. Madison*, 7 Wis. 688; *Beaver Dam v. Frings*, 17 Wis. 398; *Galloway v. London*, Law Rep. 1 H. L. 34; *Heyward v. New York*, 7 N. Y. 314; *Lauenstein v. Fond du Lac*, 28 Wis. 336. Under the power to purchase and hold property, a city and county may own buildings as tenants in common to be used for their respective public purposes. *De Witt v. San Francisco*, 2 Cal. 289. See *Bergen v. Clarkson*, 1 Halst. (N. J.) 352; *ante*, § 300. Rights of county and city respecting jail built by the corporate authorities of the city. *Felts v. Memphis*, 2 Head (Tenn.), 263. See *Callam v. Saginaw*, 50 Mich. 7; noted *ante*, § 300, note.

¹ 1 Kent Com. 283; *Champaign v. Harmon*, 98 Ill. 491; 1 Wash. Real Prop. (4th ed.) p. 76, pl. 28.

streets, was legal.¹ If the court was right in holding that the charter and laws authorized the purchase of real estate without restriction, — which we strongly doubt, — the case shows the wisdom of the usual limitations in charters disabling such corporations from acquiring, by purchase, real estate for other than corporate purposes.

§ 979. **Grants upon Conditions Subsequent.** — A grantor, in conveying real property to a municipal corporation for a specific public purpose, may, by the use of apt terms, subject the title to liability to *forfeiture for breach of a condition* expressed in the deed; and upon the failure of the municipality to comply with the condition, the title will revert to the grantor, as in the case of a similar grant to an individual.² The question whether a *deed is to be construed as containing a condition subsequent* in the case of grants to a city or other municipality, is to be determined upon the same principles as in the case of other grants. If the deed merely specifies the use or purpose for which the land is granted to the city, *e. g.*, “for a public street” or “for the erection thereon of a city hall” or “for school purposes,” *the purpose expressed does not qualify the estate taken*, but simply regulates and defines the use for which the land granted shall be held. The specification of the purpose is not construed as a condition subsequent, and the property does not revert to the grantor or his heirs upon a discontinuance of the use.³

¹ Municipality No. 1 v. McDonough, 2 Rob. (La.) 244.

² Hayden v. Stoughton, 5 Pick. (Mass.) 528; Howe v. Lowell, 171 Mass. 575; Baker v. St. Louis, 75 Mo. 671, s. c. 7 Mo. App. 429; Clark v. Brookfield, 81 Mo. 503, 514; Rose v. Hawley, 118 N. Y. 502, 511, rev'g 45 Hun (N. Y.), 592, s. c. 141 N. Y. 366, 376; Union College v. New York, 173 N. Y. 38, aff'g 65 N. Y. App. Div. 553; Stuyvesant v. Mayor, &c. of New York, 11 Paige Ch. (N. Y.) 414; Pepin County v. Prindle, 61 Wis. 301.

As to covenants and conditions in such and like cases, and their effect, see Berkley v. Union Pacific R. Co., 33 Fed. Rep. 794, Brewer, J.; Indianapolis, P. & C. R. Co. v. Hood, 66 Ind. 580; Jeffersonville, M. & I. R. Co. v. Barbour, 89 Ind. 375; Close v. Burlington, C. R. & N. R. Co., 64 Iowa, 149; Taylor v. Cedar Rap. & St. P. R. Co., 25 Iowa, 371; Varner v. St. Louis & C. R. Co., 55 Iowa, 677; Ayer v. Emery, 14 Allen (Mass.), 67; Memphis & C. R. Co. v.

Neighbors, 51 Miss. 412; Hubbard v. St. Joseph & C. B. R. Co., 63 Mo. 68; Aikin v. Albany, Vt. & C. R. Co., 26 Barb. (N. Y.) 289; Hornback v. Cinc. & Z. R. Co., 20 Ohio St. 81; Mead v. Ballard, 7 Wall. (U. S.) 290; Urch v. Portsmouth, 69 N. H. 162. See chapters on Streets and Dedication, *post*.

³ Avery v. United States, 104 Fed. Rep. 711, aff'g 98 Fed. Rep. 512; Harris v. Shaw, 13 Ill. 456; Warren County v. Patterson, 56 Ill. 111; Stephens v. Murray, 132 Mo. 468; Tift v. Buffalo, 82 N. Y. 204; Coffin v. Portland, 16 Oreg. 77.

A specification of the purpose in deeds otherwise absolute in their terms has been held *not to create a condition subsequent*, under varying conditions, some of which are noted, *viz.*:

Street purposes. Deed containing declaration that land is conveyed “as and for a public street of said city,” is not a grant on condition subsequent. Avery v. United States, 104 Fed. Rep. 711, aff'g 98 Fed. Rep. 512. Recital in

The fact that the city could have acquired the fee of the premises granted by condemnation proceedings is a persuasive reason for

deed to city that "this deed is made upon condition that said strip of land shall be forever kept open and used as a public highway, and for no other purpose" held not to create a condition subsequent. *Greene v. O'Conner*, 18 R. I. 56. *Habendum* to city and its successors "forever as and for a street to be kept as a public highway," does not import a condition subsequent, and the land does not revert to grantor, although it may have been diverted to another use. *Kilpatrick v. Baltimore*, 81 Md. 179. Deed to city "for the sole and only use of a public road forever" vests an unconditional fee. *Mitchell v. Einstein*, 105 N. Y. App. Div. 413.

City and Town Halls. Deed to town "for the use of the town as a meeting house" passes an unqualified fee. *State v. Woodward*, 23 Vt. 92. Deed containing provision that "no buildings for any other municipal purpose than that of a city hall shall ever be erected on the granted premises" does not create a condition subsequent. *Ecroyd v. Coggeshall*, 21 R. I. 1. Deed to township, its successor or successors "for the express purpose of erecting a township hall" vests absolute title in township. *Wellington v. Wellington Township*, 46 Kan. 213. An ordinance of Baltimore provided for the purchase of property as a site for the proposed *McDonough Institute*. A deed was made to the city "in trust for the uses and purposes and subject to the trusts, limitations, powers, and conditions imposed, expressed, and declared in and by" the ordinance. It contained no other conditions. Held that the city acquired an indefeasible fee simple title to the property conveyed. *Newbold v. Glenn*, 67 Md. 489.

Court Houses. Deed to county for court house purposes held to convey an absolute estate in fee simple. *Garfield Township v. Hetman*, 66 Kan. 256. A grant to county commissioners of land "for the use of the members of Delaware County to accommodate the public service of the county" does not create a base or conditional fee. *Kerlin v. Campbell*, 15 Pa. St. 500. A grant to certain persons as trustees for a county "in trust to and for the erecting thereon of a court-house for the public use and service of the said county, and to and for no other use, intent, or purpose whatsoever," does not import a limita-

tion upon the fee granted. *Stuart v. Easton*, 170 U. S. 383. See also *Seebold v. Shitler*, 34 Pa. St. 133. In a contract of sale of land to a county was this clause: That the party of the first part "agrees to sell to the said party of the second part [certain described property] for court-house and other county buildings." And the same clause was contained in the deed to the county. *It was held that these words* did not operate to limit or restrain the power of alienation by the proper county authorities. *Warren County v. Patterson*, 56 Ill. 111. A deed to county commissioners of a strip of land eight feet wide adjoining the county jail reserved the use thereof to the grantor for an open yard, &c., and declared the purpose to be that the same should "be and remain forever hereafter unbuilt on in order to prevent any prisoner or prisoners making their escape over the said prison wall by reason or means of any building to be erected contiguous to said wall." Held under the special circumstances and peculiar terms of the grant, to convey only a base or conditional fee which terminated upon the sale of the jail property. *Slegel v. Lauer*, 148 Pa. 236.

School Purposes. A deed expressly stated to be for school purposes held to convey an estate in fee simple and not to be subject to condition subsequent. *Higbee v. Rodeman*, 129 Ind. 244. Deed to board of school district "for the erection of a school-house thereon and for no other purpose" is not a grant upon condition. *Curtis v. Topeka Board of Education*, 43 Kan. 138. Deed to school district providing that "said lot of land to be used, occupied, and improved by said inhabitants as a school-house only and for no other purpose" is a deed in fee and not upon condition. *Barker v. Barrows*, 138 Mass. 578. Deed to township board of education, its successors and assigns forever, "for the use of school purposes only," is not upon condition, and the grantor cannot re-enter for condition broken, although the property has been sold to highest bidder at public sale and conveyed. *Taylor v. Binford*, 37 Ohio St. 262. Warranty deed to a county "for the special use and none other of educational purposes, and upon which block shall be erected a college or institution of learning," &c., held to convey

construing the grant as a grant of a fee.¹ But if the city has authority to acquire real property by grant, the fact that when property is dedicated by the owner to a public use or is appropriated by proceedings *in invitum*, the city acquires only an easement terminable with the cessation of the use, is not sufficient to limit the effect of a deed purporting to convey a fee of the land to the city, although it may contain a declaration of the public use to which the land is to be devoted.²

When the language used is such as to express a condition subsequent, *the condition will be strictly construed* and will not be extended beyond the plain terms of the clauses in which it is expressed and the obvious purposes for which it was introduced.³ The ground upon which the title of a grantee upon condition

an unqualified fee. *Raley v. Umatilla County*, 15 Oreg. 172. Land was conveyed for full consideration to a county "for a public school-house as the property of the schools of said county, and for no other purpose in fee." Held, in action of ejectment after sale and conveyance and diversion of the use of the premises to dwelling purposes, that the deed was not upon condition subsequent, and no forfeiture was incurred. *Faith v. Bowles*, 86 Md. 13.

Cemeteries and burying grounds. Words "for a burying ground forever" in deed to town held not to create an estate upon condition. *Rawson v. School Dist. No. 5*, 7 Allen (Mass.), 125, 127. See also *Field v. Providence*, 17 R. I. 803; *Portland v. Terwilliger*, 16 Oreg. 465. An act of Congress authorized the mayor of Denver to enter lands at a minimum price "to be held and used as burial place for said city and vicinity." A patent was issued conveying the lands to the "mayor in trust for said city and to his successors." Held that the city acquired a title in fee simple absolute. *Wright v. Morgan*, 191 U. S. 55. A quitclaim deed to a village by the heirs of one who had previously dedicated the land as a burying ground is not rendered a conditional grant by inserting therein the words "to be under the authority and control of its proper council and municipal authority in conformity with the act of the legislature of Ohio in that behalf." This language is merely descriptive of the purpose of the grantor as to the use to which the property should be appropriated, and does not make the fee conditional. *Mahoning County v. Young*, 59 Fed. Rep. 96, rev'g 51 Fed. Rep. 585.

Conveyance of land to town "for the use of a common" held to pass an alienable fee. *Beach v. Haynes*, 12 Vt. 15. When by statute a municipality is authorized and directed to convey to a historical society a lot on a certain street "for the erection of a hall for the use of said society," it is not within the power of the municipality to attach to the conveyance the condition that a building shall be erected thereon by the society within two years. The mere statement in the statute that the lot should be conveyed "for the erection of a hall" imposed no condition upon the title directed to be conveyed, and did not make it dependent upon the application of the land by the society to the use expressed. *Wilkesbarre v. Wyoming Historical Society*, 134 Pa. 616.

¹ *Mitchell v. Einstein*, 105 N. Y. App. Div. 413, 420.

² *Avery v. United States*, 104 Fed. Rep. 711, aff'g 98 Fed. Rep. 512.

³ *French v. Quincy*, 3 Allen (Mass.), 9; *Wellington, Petitioner*, 16 Pick. (Mass.) 87, 99; *Crane v. Hyde Park*, 135 Mass. 147; *Howe v. Lowell*, 171 Mass. 575; *Rose v. Hawley*, 118 N. Y. 502; s. c. 141 N. Y. 366, 376. Land was conveyed to a town upon condition that it should "not be used for any other purpose than as a place for a town house for said inhabitants." A town house was erected, and the town rented the hall for meetings, lectures, theatrical entertainments, &c. Some rooms were also rented for business purposes. Held that the condition was not broken. *French v. Quincy*, 3 Allen (Mass.), 9. *Chapman, J.*, said: "A town, having in its town-house rooms which it had authority to construct, as part of such

may be defeated and which will support a claim for forfeiture as for breach of condition subsequent, must be substantial and clearly established.¹ When the grant is upon condition that the municipality shall erect a building upon the granted premises, or requires some other affirmative act, and no time is prescribed within which the condition may be complied with, a failure to comply with the condition within a reasonable time is sufficient ground to declare

building, and not having occasion to use them for the time being, is not obliged to keep them unoccupied, but may derive a revenue from them by renting them, or may allow them to be used gratuitously. Such a use of the property is within its legal authority. And if this be so, the condition of the deed is not broken. For it cannot be construed more strictly than to require of the town to maintain a town-house on the land which shall not be put to any illegal or unauthorized use."

A municipal corporation, having by its charter full power to purchase, hold, and convey lands, received, for a valuable consideration, a deed of a parcel of land containing one acre, "*for the use of the said town, for the purposes mentioned in the deed.*" The deed stated in substance, that the land was conveyed for a court-house and jail to be erected and kept thereon, with a proviso that if it ceased to be used for such purposes, the property should re-vest in the grantor. While the land was used by the town for the specified purposes, the title was held to be in the town, and it was held that the grantor could not interfere to prevent the town from leasing portions of the tract not needed for the purposes specially named in the deed. The court was of opinion that the true construction of the grant was that, while the condition on which the corporation held the lot was not broken, they had full dominion over it, and might use it as they saw fit. *Bolling v. Petersburg*, 8 Leigh (Va.), 224. A grant of lands was made on condition that they should be used only for a "common, park, or boulevard." It was held that the condition of the grant was not broken by laying water pipes underneath the surface, as the pipes did not interfere with the prescribed use, but that the erection of a pumping station as part of the water works to supply the city in general was not incidental to a common, park, or boulevard, interfered with the use of the lands for these purposes, and

was a breach of the condition. *Howe v. Lowell*, 171 Mass. 575.

Where lands were conveyed upon condition subsequent *for use as a public street*, it was held that the fact that the city permitted a covered area to be constructed was not a breach of the condition. *Rose v. Hawley*, 118 N. Y. 502, rev'g 45 Hun (N. Y.), 592; s. c. 141 N. Y. 366. *Bradley, J.*, said: "It cannot be assumed that what is usually or commonly permitted or required in streets of villages or cities comes within the prohibitory provision of the deed. It would not be reasonable to give it the effect to deny the erection of lamp-posts above, and the construction of sewers and the laying of water pipes beneath the surface. Sidewalks are essentially within and part of a street or highway in villages and cities, and constitute one of its legitimate uses for the purposes of travel upon the street. The maintenance of the sidewalk is clearly no breach of the condition. It is, however, urged that the outer wall of the area is an erection upon the land in contravention of the provision of the deed. It is below the surface and the sidewalk rests upon it. So far as relates to the support of the walk it is not important whether it be eight feet or one foot in height from its base. It is true that the area was made to supply light to the basement of the building, by means of the gratings in the walk, and thus results beneficially to the occupant but that does not render it, nor is it necessarily inconsistent for that reason with the use of the walk, as part of the street."

¹ *Rose v. Hawley*, 118 N. Y. 502, 511, rev'g 45 Hun (N. Y.), 592; s. c. 141 N. Y. 366; *Chapin v. Winchester School Dist.*, 35 N. H. 445. The estate granted to the municipality cannot be forfeited by proof that a trespasser without permission or authority from the city, express or implied, has appropriated to his own use an inconsequential portion of the grant. *Rose v. Hawley*, 141 N. Y. 366, 377.

a reverter.¹ A condition annexed to a grant of land to a city may, as in the case of a similar condition in a deed to an individual, *be dispensed with or waived by the grantor by his acts as well as by express agreement*;² but mere silent acquiescence or failure to insist upon the forfeiture is not sufficient to waive the performance of the condition. There must be something in the nature of estoppel.³

§ 980 (565). **Real Estate beyond Corporate Limits.** — Municipal corporations being created chiefly as governmental agencies, and for the attainment of local objects merely, the general rule is that they *cannot purchase and hold real estate beyond their territorial limits*, unless the power is conferred by the legislature.⁴ It has been expressly decided that a conveyance to a municipal corporation of lands *beyond its boundaries, for the purpose of a street*, is void, though the corporation has by its charter power "to purchase, hold, and convey any real property for the public use of the corporation."⁵

¹ Hayden v. Stoughton, 5 Pick. (Mass.) 528, 535; Union College v. New York, 173 N. Y. 38, aff'g 65 N. Y. App. Div. 553. Neglect for twenty-five years to erect a city hall, held to be sufficient to establish a failure of the city to comply with a condition subsequent in a deed conveying premises for the purpose of building a city hall thereon. Union College v. New York City, 173 N. Y. 38, aff'g 65 N. Y. App. Div. 553.

² Sharon Iron Co. v. Erie, 41 Pa. St. 341.

³ Union College v. New York City, 173 N. Y. 38, aff'g 65 N. Y. App. Div. 553. See also Jackson v. Crysler, 1 Johns. Cas. (N. Y.) 125; Gray v. Blanchard, 8 Pick. (Mass.) 283.

⁴ Bullock v. Curry, 2 Met. (Ky.) 171; Girard's Heirs v. New Orleans, 2 La. An. 897; Houghton v. Huron Copper Min. Co., 57 Mich. 547; Chambers v. St. Louis, 29 Mo. 543; Concord v. Boscawen, 17 N. H. 465; Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109; Riley v. Rochester, 9 N. Y. 64, rev'g 13 Barb. 321; Choate v. Buffalo, 39 N. Y. App. Div. 379; Allentown v. Wagner, 27 Pa. Super. Ct. 485, 490, citing text; Duncan v. Lynchburg (Va.), 34 S. E. Rep. 964, quoting text; Elizabethtown v. Brockville, 10 Ont. 372. In Thompson v. Moran, 44 Mich. 602, Cooley, J., said that a city would hold land *without its*

limits for a park, "not in its public capacity as an agency of the government, and subject to the unrestricted control of the State, but as a corporate individual, having private rights of its own, which it is at liberty to enjoy undisturbed by the State, and in the enjoyment of which the Constitution will protect its people." See further as to the acquisition lands outside of a city for park purposes, Matter of Mayor, &c. of New York, 99 N. Y. 569; ante, §§ 111, 112, 113, 120; post, § 1034. The right of a municipality to hold lands beyond its limits is cognizable at law and is not, ordinarily at least, within the jurisdiction of a court of chancery. State v. Trenton (N. J. Eq.), 63 Atl. Rep. 897; Attorney-General v. Paterson, 9 N. J. Eq. 624, 626.

Under power to purchase, hold, sell, and convey real and personal property necessary for its use and purposes, and its power to pave the city streets, a city cannot acquire a rock quarry outside the limits of the city. Duncan v. Lynchburg (Va.); 34 S. E. Rep. 964. But in Schneider v. Menasha, 118 Wis. 298, the contrary view was adopted, and it was held that the power to pave the city streets authorized the municipality to purchase a quarry outside the city limits for the purpose of obtaining paving stone.

⁵ Riley v. Rochester, 9 N. Y. 64, rev'g 13 Barb. 321.

The author is, however, of opinion that there are purposes for which such a corporation may, without special grant, purchase and hold extra-territorial lands, as for a pest-house, cemetery, park, and the like objects of a municipal character.¹

§ 981 (566). **Gifts and Grants to and for the Benefit of a Municipality.** — Municipal and public corporations *may be the objects of public and private bounty*. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing within restricted and narrow limits, to meet which property and revenues are abso-

¹ See observations of *Scott, J.*, *Chambers v. St. Louis*, 29 Mo. 543, 574, 575, as to object of express authority to hold lands beyond corporate limits for such purposes. In *Somerville v. Waltham*, 170 Mass. 160, it was held that a city may acquire by purchase *land in another city or town* for municipal purposes, if it be necessary or expedient for the interests of its inhabitants to do so, in the absence of anything in the statutes to prevent such acquisition. In *Hafner v. St. Louis*, 161 Mo. 34, it was held that a city had, by virtue of power "to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require," authority to purchase, receive, and hold property beyond its corporate limits, not prohibited by its charter, and essentially necessary for carrying out one of its proper corporate functions and duties, as the establishment, construction, and maintenance of a general wharf system along its river front. See also *Haeussler v. St. Louis*, 205 Mo. 656. See Index, *Boundaries*; also chap. x., and *ante*, § 277 a; *infra*, § 986.

In *Schneider v. Menasha*, 118 Wis. 298, citing the text, a *distinction was drawn* between the exercise by a city of its governmental authority outside its limits and the exercise of its mere right to own and use property for legitimate city purposes outside its boundaries. In reply to the contention that if land outside of the city could be held for park or other purposes, the city could acquire property regardless of distance, the court said that in determining whether corporate authority has been exceeded by reason of distance

from the city limits, it must solve that question by an appeal to reason and good sense, keeping in mind that municipal corporations in their business matters are governed by very much the same rules as private corporations. In *Lester v. Jackson*, 69 Miss. 887, the court recognized the same distinction, and held that a municipal corporation *may take and hold land convenient and accessible for a park*, although it lies outside of the corporate limits and the charter confers no express authority to own land outside. The city cannot exercise its sovereignty over it, but it can exercise all the rights and powers pertaining to ownership. As to express power to purchase and acquire *land for city purposes* beyond the municipal limits and what are city purposes under such power, see *People v. Kelly*, 76 N. Y. 475, 487, cited *ante*, § 277 a; *Matter of Mayor, &c. of New York*, 99 N. Y. 569; *ante* § 277 a. Index, *City Purpose*.

Municipal corporations may, for proper or authorized purposes, *hold lands in other States*, unless restrained by the laws of the latter State. The right depends upon comity, or the consent, expressed or implied, of the sister State. *McDonough Will Case*, 15 How. (U. S.) 367; *Angell & Ames Corp. chap. v.* § 161; 1 Wash. Real Property, 50, pl. 27; *Chambers v. St. Louis*, 29 Mo. 543; *Seebold v. Shitler*, 34 Pa. St. 133; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 584; *Runyan v. Coster's Lessee*, 14 Pet. (U. S.) 122. In these last two cases the extra-territorial rights of private corporations are very elaborately discussed and examined. See *infra*, § 990; *ante*, § 277 a; *infra*, § 986.

lutely necessary, and, therefore, legacies of personal property, devises of real property, and grants or gifts of either species of property directly to the corporation for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burdens of its citizens, are, in the absence of disabling or restraining statutes, valid in law.¹ Thus, a conveyance of land to a town or other public corporation, *for benevolent or public purposes*, as for a site for a school-house, city or town house, and the like, is based upon a sufficient consideration,² and such conveyances are liberally construed in support of the object contemplated.³

¹ McDonough Will Case, 15 How. (U. S.) 367; *infra*, § 984; Hamden v. Rice, 24 Conn. 350; Sutton First Parish v. Cole, 3 Pick. (Mass.) 232, 238, *per Parker, C. J.*; Worcester v. Eaton, 13 Mass. 371, 378; Dunbar v. Soule, 129 Mass. 284; Sargent v. Cornish, 54 N. H. 18; Coggeshall v. Pelton, 7 Johns. (N. Y.) Ch. 292 (bequest to erect town house); Fosdick v. Hempstead, 125 N. Y. 581, 590; Matter of Crane, 12 N. Y. App. Div. 271, 273, *aff'd* 159 N. Y. 557, citing text; Brown v. Brown, 7 Oreg. 235; McIntosh v. Charleston, 45 S. Car. 584, 587, quoting text; Beurhaus v. Cole, 94 Wis. 617, 627, citing text; 2 Kent Com. 285; Angell & Ames, §§ 177, 178.

Speaking of *Missouri*, Scott, J., says: "There is nothing in our statute concerning wills which prohibits corporations from taking by devise; so that, as to their capacity to take by devise, they stand on the same ground as natural persons." Chambers v. St. Louis, 29 Mo. 543, 574. In *Missouri*, a county may be devisee of land in fee simple. Fulbright v. Perry County, 145 Mo. 432, 434. See also Abernathy v. Dennis, 49 Mo. 468; Bell County v. Alexander, 22 Tex. 350. Under general authority to hold, purchase, receive, and alienate real estate, and in the absence of any legal restraint, a city may take and hold property by devise. McIntosh v. Charleston, 45 S. Car. 584. In *Ohio*, a municipality may take by devise. Perin v. Carey, 24 How. (U. S.) 465, 505, *per Wayne, J.*

In *New York*, by the statute of wills, following the English statutes of Henry VIII., "bodies politic and corporate" are incapacitated to take real estate; and a devise *directly* to a corporation, and not to a natural person in trust for the corporation, was adjudged to be void by the statute, and this notwith-

standing the corporate devisee was by its charter declared to be "capable in law of purchasing, holding, and conveying real estate for the use of the said corporation." This special authority to take by "*purchase*" (which term was held not to include a *devise*) was, by the majority of the Court of Errors, considered to mean subject to the restrictions and incapacities created by the general statutes. McCartee v. Orphan Asylum Society, 9 Cow. (N. Y.) 437. The provisions of the *New York statute* which prohibit the gift, under certain circumstances, by a testator of more than one-half of his estate, apply only to benevolent, charitable, religious, and other similar corporations, and do not apply to the State or to public or municipal corporations. Matter of Crane, 12 N. Y. App. Div. 271, *aff'd* 159 N. Y. 557. As to devises in *New York* in trust for a corporation, under a new Statute of Wills, see Auburn Theol. Sem. v. Childs, 4 Paige (N. Y. Ch.), 419; Wright v. M. E. Church, 1 Hoff. (N. Y.) Ch. 225. But authority to a corporation to take land "by direct purchase or otherwise," gives capacity to take by devise. Downing v. Marshall 23 N. Y. 366; Kerr v. Dougherty, 79 N. Y. 327; Fox's Will, 52 N. Y. 530; s. c. 94 U. S. 315. Authority "to hold, purchase, and convey" confers capacity to receive a devise of lands. American Bible Society v. Marshall, 15 Ohio St. 537. Devises to corporations and construction of Statute of Wills, see Morawetz on Corp. (2d ed.) §§ 331-334.

² Castleton v. Langdon (land conveyed to town for school-house), 19 Vt. 210; Jackson v. Pike (land conveyed to county for court-house and jail), 9 Cow. (N. Y.) 61; State v. Atkinson ("public common"), 24 Vt. 448; Le Couteulx v. Buffalo (conveyance for

§ 982 (567). **Power to take and hold in Trust; Charitable Uses.**

— Not only may municipal corporations take and hold property in their own right by direct gift, conveyance, or devise, but the cases firmly establish the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of *taking property*, real and personal, *in trust for purposes germane to the objects of the corporation*, or which will promote, aid, or assist in carrying out or perfecting those objects. So such corporations may become *cestuis que trust*, within the scope of the purposes for which they are created. And where the trust reposed in the corporation is for the benefit of the corporation, or for a charity within the scope of its powers or duties, it may be compelled, in equity, to administer and execute it.¹ In Pennsylvania, it has been held that the legisla-

"free school"), 33 N. Y. 333; French v. Quincy (conveyance for "town house"), 3 Allen (Mass.), 9; Kelley v. Kennard, 60 N. H. 1 (donation for erection of a bridge).

The erection of a drinking fountain is a proper municipal purpose, and a city may take a devise therefor. A bequest of money and property to a city "with the request that the same be expended, if such expenditure is sanctioned by law, in the erection of a drinking fountain in the city to my memory," vests absolute title in the city. Matter of Crane, 12 N. Y. App. Div. 271, aff'd 159 N. Y. 557. Where the municipality has power to accept a gift it may do so subject to conditions imposed by the donor. Attorney-General v. Nashua, 67 N. H. 478. But, of course, the conditions must not be inconsistent with municipal purposes. Construction of bequest to town "for the reclamation and embellishment of the common," see Newell v. Hancock, 67 N. H. 244.

Corporations may for such purposes purchase and take the fee of lands, and change the location at will. This is unlike the ordinary case of the dedication by an individual of the use of lands to some public purpose, — *e. g.*, a town common, — in which case the corporation cannot alien the land. Beach v. Haynes, 12 Vt. 15; State v. Woodward, 23 Vt. 92. That municipal corporations may be authorized to take, hold, and alienate lands *in fee*, see also 2 Kent Com. 281; Heyward v. New York, 7 N. Y. 314; People v. Mauran, 5 Denio (N. Y.), 389; Reynolds' Heirs v. Stark County, 5 Ohio, 204; Nicoll v. N. Y. & E. R. Co., 12

N. Y. 121; Page v. Heineberg, 40 Vt. 81. In Maine the right of cities and towns to receive money by devise or bequest for school purposes is recognized by statute. Piper v. Moulton, 72 Me. 155. In Kansas it has been held that a city may take and receive real and personal property by will for the purpose of prospecting for and developing a coal mine near it. Delaney v. Salina, 34 Kan. 532, quoting text; *infra*, § 1100, note.

¹ Vidal v. Philadelphia, 2 How. (U. S.) 127; *infra*, §§ 983-988; McDonough Will Case, 15 How. (U. S.) 367; Perin v. Carey, 24 How. (U. S.) 465; Miller v. Lerch, 1 Wall. Jr. (U. S. C. C.) 210; Girard v. Philadelphia, 7 Wall. (U. S.) 1; Handley v. Palmer, 103 Fed. Rep. 39, citing text; Skinner v. Harrison Township, 116 Ind. 139, citing text; Phillips v. Harrow, 93 Iowa, 92, 102, citing text; Girard's Heirs v. New Orleans, 2 La. An. 897; McDonough's Suc. (in Supreme Court of Louisiana), 8 La. An. 171; Barnum v. Baltimore, 62 Md. 275 (where, however, the power was expressly conferred by charter); Webb v. Neal, 5 Allen (Mass.), 575; Phillips Acad. Trs. v. King, 12 Mass. 546; Chambers v. St. Louis, 29 Mo. 543; Sargent v. Cornish, 54 N. H. 18, citing text; Orford Union Cong. Soc. v. West Cong. Soc., 55 N. H. 463; Lovell v. Charlestown, 66 N. H. 584, 586; Jackson v. Hartwell, 8 Johns. (N. Y.) 422; Columbia Bridge Co. v. Kline, Bright. (Pa.) 320; Philadelphia v. Elliott, 3 Rawle (Pa.), 170; Pickering v. Shotwell, 10 Pa. 27; Bell County v. Alexander, 22 Tex. 350; Beurhaus v. Cole, 94 Wis. 617, 627, citing text; 2

ture may, in the absence of constitutional restriction on its power, divest a municipal corporation of the power to administer the charitable trusts conferred upon it, and appoint or provide for the appointment of new trustees independent of the corporation, and vest in them the management of such trusts.¹ But in Massachusetts the

Wash. Real Prop. 205, pl. 3; 2 Kent Com. 279, 280; 1 Kyd, 72; Green v. Rutherford, 1 Ves. 462; Angell & Ames Corp. § 168; Willis Trust, 33-45.

It is quite usual in England for municipal corporations to hold property for charitable trusts of a public nature, over the administration of which chancery has jurisdiction, and the subject of such trusts is regulated by the Municipal Corporations Act of 5 and 9 Wm. IV. chap. lxxvi., § 71. See *Rex v. Sankey*, 5 A. & E. 423; *Grant Corp.* 136, and *post*, § 1575 *et seq.*, where the remedy for abuses of trust by municipalities is considered. Tolls granted by charter to a corporation, for the reparation of walls and bridges within the borough, are gifts for charitable purposes, within 39 Eliz., chap. v., to be administered in chancery. *Attorney-General v. Shrewsbury*, 6 Beav. 220; *Newcastle, Re*, 12 Clark & Fin. 402; *Ib.* 487; *Dublin v. Attorney-General*, 3 Cl. & F. 289; 2 Spence, Eq. Jurisd. 33 *et seq.*; *post*, §§ 1398, 1575 *et seq.* A perpetual lease to a municipal corporation, for corporate purposes, of land devised to trustees for a charitable use, upheld in *Richmond v. Davis*, 103 Ind. 449.

In *Peynado's Devises v. Peynado's Executors*, 82 Ky. 5, a foreign will devising the proceeds of property situated in this country to a foreign city in trust for a charitable use, was sustained. *Infra*, §§ 1100, 1103. In *Massachusetts*, a charitable bequest may be made by a citizen of that State to a town in another State. Such bequest is not void because the town lacks the capacity to take the trust under the laws of the State where it is situated, and it will be ordered paid over to the town upon its subsequently and within a reasonable time receiving legislative authority to take and execute the trust. *Fellows v. Miner*, 119 Mass. 541. Validity in *New York* of bequest to municipality of foreign country, see *Matter of Huss*, 126 N. Y. 537. Validity in *New York* of devise of personal property in trust of charities to be established in a foreign country. See *Hope v. Brewer*, 136 N. Y. 126.

¹ *Philadelphia v. Fox*, 64 Pa. St. 169. In this case the constitutionality of the act of June 30, 1869, depriving the city of Philadelphia of the power to administer the trusts under wills of Mr. Girard and others, and vesting the powers of the city in this respect in an independent and separate board, not appointed by the city, was sustained. In giving the judgment of the court Mr. Justice Sharswood, in the course of his interesting and learned opinion, remarks:

"A municipal corporation may be a trustee, under the grant or will of an individual or private corporation, but only, as it seems, for public purposes, germane to its objects. *Philadelphia v. Elliott*, 3 Rawle (Pa.), 170; *Cresson's Appeal*, 30 Pa. St. 437; *Vidal v. Philadelphia*, 2 How. (U. S.) 127. I am aware that it has been said by high authority in England that it may take and hold in trust for purposes altogether private. *Gloucester v. Osborn*, 1 H. of Lords Cases, 285. But the administration of such trusts, and the consequent liabilities incurred, are altogether inconsistent with the public duties imposed upon the municipality. It could hardly be pretended, I think, in this country, that it could be a trustee for the separate use of a married woman, to educate the children of a donor or testator, or to accumulate for the benefit of particular persons. It certainly is not compellable to execute such trusts, nor does it seem competent to accept and administer them. The trusts held by the city of Philadelphia which are enumerated in the bill before us, are germane to its objects. They are charities, and all charities are in some sense public. If a trust is for any particular persons, it is not a charity. Indefiniteness is of its essence. The objects to be benefited are strangers to the donor or testator. The widening and improvement of streets and avenues; planting them with ornamental and shade trees; the education of orphans; the building of school-houses; the assistance and encouragement of young mechanics; rewarding ingenuity in the useful arts; the establishment and support of hospitals;

Supreme Judicial Court appears to have adopted a more limited view as to the power of the legislature.¹

§ 983 (568). **Girard Will Case; Devise to City in Trust for the Education and Support of Orphans.** — The *leading case in this country* on the subject mentioned in the last section is the celebrated *Girard Will Case*, in the Supreme Court of the United States, re-

the distribution of soup, bread, or fuel to the necessitous, — are objects within the general scope and purpose of the municipality. The king himself may be a trustee, though he cannot be reached by the process of any court without his consent. Hill on Trustees, 49. And so may the State, though, as I take it, under the Constitution, only for objects germane to the purpose of government. The Government of the United States has accepted and administered such a trust under the will of James Smithson 'for the promotion of knowledge among men.' When, therefore, the donors or testators of these charitable funds granted or devised them in trust to the municipality, they must be held to have done so with the full knowledge that their trustee so selected was a mere creature of the State, an agent acting under a revocable power. Substantially they trusted the good faith of the sovereign. It is plain — too plain, indeed, for argument — that the corporation, by accepting such trusts, could not thereby invest itself with any immunity from legislative action. Such an act could not change its essential nature. It is surely not competent for a mere municipal organization, which is made a trustee of a charity, to set up a vested right in that character to maintain such organization in the form in which it existed when the trust was created, and thereby prevent the State from changing it as the public interest may require. *Montpelier v. East Montpelier*, 29 Vt. 12, 21. This whole question is put at rest, and that as to one of the most important of these trusts and as to its trustees, by the opinion of the Supreme Court of the United States in *Girard v. Philadelphia*, 7 Wall. (U. S.), 1, 14. 'It cannot admit of a doubt,' says Mr. Justice Grier, 'that where there is a valid devise to a corporation, in trust for charitable purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the

trusts, either by changing the administrator if the corporation be dissolved, or if not, by modifying or enlarging its franchises, provided the trust be not perverted, and no wrong done to the beneficiaries. Where the trustee is a corporation, no modification of its franchises or change in its name, while its identity remains, can affect its right to hold property devised to it for any purpose.' With equal plausibility might it be pretended that the acceptance by the Government of the United States of the bequest of James Smithson limited the power of amendment contained in the Federal Constitution. If it could have such effects, the only logical consequence would be that the acceptance of a trust would be *ultra vires* and void; and so if the acceptance of a trust by a municipal corporation can operate to impair the power of the sovereign over it as such, the acceptance is a nullity." By a constitutional provision subsequently adopted in *Pennsylvania*, the legislature is thereafter forbidden to enact legislation, such as the act of June 30, 1869, which was sustained in *Philadelphia v. Fox*, 64 Pa. St. 169. Constitution, 1870, Art. 3, § 32; *ante*, § 122.

¹ In *Cary Library v. Bliss*, 151 Mass. 364, it appeared that money had been donated by a person deceased, to the selectmen, school committee, and the settled ministers of a town in trust to maintain a public library for the use of the town. Subsequently a statute was enacted by the legislature creating a library corporation, and provision was made for the transfer to it of the property donated for the library on the vote of the town assenting thereto. It was held that the statute creating the library corporation and providing for the transfer of the library property to it exceeded legislative authority; that the legislature could not change the trustees of the gift otherwise than in case of emergency; and that the statute impaired the obligation of the contract. See *ante*, chapter iv,

ported under the name of *Vidal v. Girard's Executors*.¹ The act incorporating the city of Philadelphia expressly provided that the corporation should have power "to purchase, take, possess, and enjoy lands, franchises, goods, chattels," &c., without limitation as to value or amount; and the acts of 32 and 34 Henry VIII., disabling corporations from taking by devise, were declared not to be in force in Pennsylvania. Under these circumstances, it was held that the corporation of the city had the capacity to take real and personal property by *devise and bequest*, as well as by deed. The city also possessed general power "for the suppression of vice and immoral-

Index, Constitution; Corporate Powers.

¹ *Vidal v. Girard's Executors*, 2 How. (U. S.) 127. The court lays down this rule: "Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But it will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust." Reaffirmed, *Perin v. Carey*, 24 How. (U. S.) 465; *Girard v. Philadelphia*, 7 Wall. (U. S.) 1; *infra*, § 989, note. The following further observations of Mr. Justice Story (who delivered the opinion of the court in the *Girard Will Case*) are of especial value: "If the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote and aid and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) 'to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness,' where is the law to be found which prohibits the corporation from taking the devise upon such trust, in a State where the statutes of mortmain do not exist (as they do not in *Pennsylvania*), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or pro-

hibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government, and regulation, and powers. If, for example, the testator by his present will had devised certain estate of the value of \$1,000,000 for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the uses of its citizens, from the River Schuylkill, why, although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid, and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustees?" The learned judge further observes: "Neither is there any positive objection, in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of the institution, but collateral to them." See also 24 How. 465, *supra*. By this it is not meant that a corporation may take and execute trusts for objects "utterly *dehors* the purposes of the incorporation."

Literature relating to Girard Will Case: "Life of Horace Binney," by Charles C. Binney, 1903, pp. 214-234. The biographer's conclusion is well justified (p. 229), "that as long as the law of charitable trusts shall exist as a part of American jurisprudence, his [Binney's] name will be inseparably connected with it." See also "Great American Lawyers" edited by William Draper Lewis, Vol. IV. p. 195, 1908, article on Horace Binney by Charles C. Binney. Justice Story's description of the arguments of Mr. Sergeant, Mr. Binney, and Mr. Webster; see "Story's Life and Letters," Vol. II. p. 467. Mr. Webster's argument on the proposi-

ity, the advancement of the public health and order, and the promotion of trade, industry, and happiness." Girard's devise was *to the city, in trust*, for the establishment of a *college for the education and support of indigent orphan boys*. This presented the inquiry whether the corporation was capable of taking real and personal estate in trust and of executing the trust, and the affirmative of both propositions was adjudged.

§ 984 (569). **McDonough Will Case; Devise to New Orleans and Baltimore to educate the Poor.** — The *McDonough Will Case*, also decided by the Supreme Court of the United States, affords an interesting and instructive illustration of the foregoing principles. John McDonough died in New Orleans, and by will gave a large amount of real and personal property to the city of New Orleans (his adopted residence), and to the city of Baltimore (his native place), and to their successors forever, with a prohibition against any alienation or division of the real estate, under penalty of forfeiture. This devise was made for the purpose of "*educating the poor, without the cost of a cent to them, in the cities of New Orleans and Baltimore, and their respective suburbs.*" The estate thus devised was to be managed by six agents, three to be selected annually by each city; and the municipal authorities were, by the will, excluded from the management of the estate or the application of its revenues. By the civil code of Louisiana, corporations created by law are permitted to possess an estate, *receive donations and legacies*, make valid contracts, and manage their own business; and the city of New Orleans was, by statute, authorized and required to establish *public schools* for gratuitous education, &c. The city of Baltimore was authorized, by statute, to establish *public schools*, and to receive property in trust, and to control and exercise the trust for any of its general corporate purposes, including educational and charitable purposes of any description, within its limits. This will was contested by the heirs. It was held by the Supreme Court of the United States that these cities, under the powers conferred upon them, had the right to receive this devise, and that the will was valid. It was

tions that Christianity is part of the common law of the land and of Pennsylvania, and that the provision in Girard's will that "no ecclesiastic, missionary or minister of any sect whatsoever" should ever set foot, even as a visitor, within the college grounds, &c., was designed to foster atheistic or anti-Christian doctrines and therefore in-

valid, will be found in "Webster's Works," edition 1851, Vol. VI. p. 132, under the title of "The Christian Ministry and the Religious Instruction of the Young." See *infra*, § 989, note.

See *Augustav. Walton*, 77 Ga. 517, holding that the State of Georgia had not conferred power upon the city of Augusta to accept or administer a particular trust.

also held that under the Louisiana code (C. C. 2026), the prohibition against alienation did not invalidate the will.¹

§ 985 (570). **McMicken Will Case; Devise to Cincinnati for the Education and Support of Poor and Orphan Children.** — The subject again underwent a full examination in the *McMicken Will Case*, reported under the name of *Perin v. Carey*.² Charles McMicken devised and bequeathed a large amount of real and personal property "to the city of Cincinnati and its successors, in trust, for the purpose of building, establishing, and maintaining two colleges for the education of boys and girls; and if there shall remain a sufficient surplus of funds, the same to be applied to the support of poor white male and female orphans." By the will, the city was directed to make and establish all necessary regulations, and to appoint directors to the institution; and it was prohibited from ever selling any portion of the real estate devised, or any which the city should purchase for the benefit of said institution. By its charter, the city had express power given it to acquire and hold real estate for the legitimate objects of the city. There was nothing in the charter or statutes of the State prohibiting the city from taking and administering charitable trusts. The court decided that the will was valid; that the city, as a corporation, was capable of taking and administering the devises and bequests for the charitable uses specified; and that the restraint upon alienation created no perpetuity in the sense forbidden by the law.

§ 986 (571). **Mullanphy's Will; Devise to St. Louis in Trust for the Relief of Poor Emigrants.** — By the will of Mr. Bryan Mullanphy (founding a charity still in beneficent operation), he devised "one-third of all his property, real and personal, to the city of St. Louis in trust, to be and constitute a fund to furnish relief to all poor emigrants and travellers coming to St. Louis on their way, bona fide, to settle in the West." The greater part of his estate, valued at over \$1,500,000, consisted of lands in St. Louis County, but outside of the city limits. It was held, under special provisions of the statute and charter of the city, that the city corporation had the capacity to take, and that

¹ McDonough Will Case, 15 How. (U. S.) 367; referred to *supra*, §§ 970-973. The same will was previously adjudged to be valid by the Supreme Court of Louisiana. Mr. Chief Justice Eustis, in delivering the opinion of the State court, sustaining McDonough's will, says: "That without a positive prohibition municipal corporations in Louisiana should be incapacitated from receiving legacies for the public purposes of health, education, and charity, seems to me repugnant to all sound ideas of policy and to the reason of the law." McDonough's Suc., 8 La. An. 171. The Girard legacy was sustained by the same court. Girard Heirs v. New Orleans, 2 La. An. 897.

² Perin v. Carey, 24 How. (U. S.) 465. In *Maryland* (where, however,

as the statute concerning wills did not prohibit it, it could take by devise the same as natural persons. It was further held that the city could take upon the trusts mentioned in the will, and could execute them subject to the control of the court of equity, whose jurisdiction in Missouri was considered to be founded, not upon the statute of 43 Elizabeth, but upon the common law.¹

§ 987 (572). **Devise for Erection and Support of Hospital.** — So a bequest to the city of Philadelphia, in trust, to purchase a lot of ground in the city or neighborhood, and erect thereon a hospital for the indigent, blind, and lame, and to apply the income of the remainder to the comfort and accommodation of as many or such persons as it will admit of, giving preference to persons resident in Philadelphia or its neighborhood, is valid, since it is in trust for objects within the scope of the corporate duties of the city.²

§ 988. **Charitable Trusts Germane to Corporate Purposes.** — The result of the decisions would seem to be that a municipality, in the

the statute of 43 Elizabeth is not in force), a devise to the city of Baltimore, "to be applied, under the direction of said corporation, to the relief and support of the indigent and necessitous poor persons who may, from time to time, reside within the limits, as now known, of the twelfth ward of said city," was adjudged void, as being "too vague and indefinite, and too difficult of being correctly ascertained, to be enforced." The case was regarded as being embraced in the prior decisions. *Trippe v. Frazier*, 4 Har. & Johns. (Md.) 446; *Dashiell v. Attorney-General*, 5 Har. & Johns. (Md.) 392; 6 Har. & Johns. (Md.) 1; *infra*, §§ 1100, 1103.

¹ *Chambers v. St. Louis*, 29 Mo. 543; followed in *Hafner v. St. Louis*, 161 Mo. 34; *ante*, § 980. But in *Boyce v. St. Louis*, 29 Barb. (N. Y.) 650, an action which also involved the validity of *Mullanphy's Will*, it was held, upon a construction of the charter of St. Louis, that not only were the purposes for which the city might receive and hold property beyond the city limits particularly specified and limited, but also that the property, if real estate and beyond the limits of the city, must be near enough to the city to admit of its being used or held for one or more of the specified purposes; that the city was not entitled to take or hold real estate in New York for any purpose,

and the court expressed the opinion that it was not authorized by its charter to receive real property within or without the city in trust for the charitable use and purpose mentioned in the will of the testator. The court further held that an adjudication upon the question of the corporate power of the city of St. Louis by the courts of Missouri could have no further effect or authority in determining the validity of a devise of real estate in New York than the reasoning upon which it may have been founded gives it, and that it was for the courts of New York to construe the charter and determine whether the city was authorized thereby to take or hold such real estate. This will was also involved in the case of *Clemens v. Clemens*, 37 N. Y. 59, aff'g 60 Barb. 366, where the Court of Appeals referred to the decision of the Supreme Court in the case of *Boyce v. St. Louis*, 29 Barb. 650, *supra*, and added that the devise might also have been held to be void because in contravention of the provisions of the New York statutes which had abolished all uses and trusts in real estate within that State except as authorized and modified thereby, the trust created by the will not being one of those authorized by the statutes.

² *Philadelphia v. Elliott*, 3 Rawle (Pa.), 170.

absence of statutory restrictions, may take and hold under, and administer a *trust for a charitable use* under a gift or devise, when the charitable use is *germane to the corporate purposes*; and that such use may be germane thereto, although the trust is not specifically enumerated as among the purposes of the municipality, if the trust is such that it will promote and perfect them.¹ The fact that the charitable purpose is one for which the municipality is not specifically authorized to raise money by taxation does not make the trust inconsistent with the corporate purposes in such sense as to prevent the municipality from accepting it.² It may be laid down as a general rule *that educational purposes* are public purposes, and are not to be considered unrelated to the objects of a municipal corporation, unless made so by the statute laws of the State, or excluded from the objects for which the particular corporation was formed by the law of its creation.³ And, therefore, cities and other municipal corporations have generally been held to have capacity to take and administer trusts which have for their object the promotion of

¹ *Vidal v. Girard's Ex'rs*, 2 How. (U.S.) 127. See *supra*, § 983, and note, and extracts there given, from this case. For the legal history of the *Girard Will Case*, see "Life of Horace Binney" by Charles Chauncey Binney, 1903, pp. 214-228, also "Life and Letters of Joseph Story" by his son, Vol. II, pp. 460-469, and "Webster's Works" (Ed. 1851), Vol. VI, p. 133, where Webster's argument in part is given. A devise to a town of property "to be used by the town in repairing its *highways and bridges* yearly," being in its character both public and charitable, is valid, not only by a special statute in *Connecticut*, but also, it would seem, without the aid of any special enactment. *Hamden v. Rice*, 24 Conn. 350; *Coggeshall v. Pelton*, 7 Johns. (N. Y.) Ch. 292 (bequest to erect *town-house*). See also *Attorney-General v. Shrewsbury*, 6 Beav. 220. A bequest "to the citizens of W. to purchase a *fire engine*" was regarded as a charitable gift, and sustained, the court considering the name, whether to the corporation or the citizens composing it, as immaterial, and that, as the object was meritorious, the testator's intention should be allowed to take effect, notwithstanding any misnomer or other defect in name or form. *Wright v. Linn*, 9 Pa. St. 433; see *Kirk v. King*, 3 Barr, 436; *Tyrone Tp. School Directors v. Dunkleberger*, 6 Pa. St. 31. As to *name and misnomer*, see *ante*, § 349-351.

In *Sargent v. Cornish*, 54 N. H. 18, it was held that municipal corporations, in *New Hampshire*, may take and hold property in trust for any purpose not foreign to their institution, nor incompatible with the objects of their organization. A town is capable of receiving by bequest and holding in trust a sum of money, the income of which shall be invested yearly in the purchase and use for display of United States flags, although it has not the power of raising money by taxation for the purpose of executing the trust. Where a testator bequeathed a sum of money to a town "on condition that the same be accepted, and invested by said town so as to yield an income of not less than six per centum per annum, which income shall be invested yearly in 'United States flags,' to be used within the said town on all proper occasions," with provision for a forfeiture of the legacy in case the town should omit to fulfil the condition, held that the town might properly expend a reasonable portion of the income of the fund in the purchase and erection of flagstuffs, ropes, halliards, and other necessary paraphernalia.

² *Sargent v. Cornish*, 58 N. H. 18; *Lovell v. Charlestown*, 66 N. H. 584.

³ *Per Gray, J.*, in *Handley v. Palmer*, 103 Fed. Rep. 39, 42.

education.¹ *Libraries* may be regarded as educational in their nature, or closely related to educational purposes, and devises and bequests in trust to erect and maintain libraries have been sustained.² Other trusts which are generally sustained as germane to municipal purposes and not inconsistent therewith are gifts, devises, and bequests

¹ *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 127 (college for the education and support of indigent orphan boys); *McDonough Will Case*, 15 How. (U. S.) 367 (bequest to educate the poor); *Perin v. Carey*, 24 How. (U. S.) 465 (devise to establish colleges). City held to have power to take and administer devise in trust "to be expended in said city in the erection of school-houses for the education of the poor." *Handley v. Palmer*, 103 Fed. Rep. 39, aff'g 91 Fed. Rep. 948. A school society in *Connecticut* is a corporation, and as such it is held that it may, upon well-settled principles, take a devise or bequest in trust for *educational purposes*. *Southington First Cong. Soc. v. Atwater*, 23 Conn. 34.

In *Indiana*, the statute of 43 Elizabeth, chap. iv., is in force (*McCord v. Ochiltree*, 8 Blackf. (Ind.) 15), and a devise of real property in a town in that State, to be "forever appropriated to the education of — children of this town" is within that statute, and valid, and trustees will be appointed by the court to manage the trust. *Richmond v. State*, 5 Ind. 334. A township is by statute a distinct municipal corporation for school purposes and is capable of becoming a trustee to receive funds bequeathed to it for the use of the public schools. *Skinner v. Harrison*, 116 Ind. 139. In this State, also, a county has the legal capacity to take a devise of the property of a testator as a permanent fund, the income from which is to be used in educating a specified class of children of the county. *Craig v. Secrist*, 54 Ind. 419. In this case the county only had power to "prosecute and defend suits" and for the exercise of "all other duties, rights, and powers incident to corporations not inconsistent with the provisions of this act." The court held that the purposes of the trust created by the will were not foreign to, or inconsistent with, the general purposes for which the county was created a corporation.

As towns in *Massachusetts* were liable by statute, under a penalty, for neglect to support schools (*ante*, § 40),

and as *parishes* (organizations created for parochial or religious purposes) may legally establish schools and raise taxes to maintain them, though not required to do so under a penalty for neglect, as towns are, it was decided by the Supreme Court of that State, that a parish, as well as a town, was capable of taking and holding a devise of real estate, "to be applied for the use of schools." *Sutton First Parish v. Cole*, 3 Pick. (Mass.) 232. In this case the court seemed to be of opinion that such corporations could not take or hold real property for purposes wholly foreign to the objects for which they were created. 2 Washb. Real Prop. (4th ed.) p. 519, pl. 3. A gift to a town to apply the income "to the support of the public schools in said town in such way as the town shall judge best" is a gift for a charitable use, which the town may properly take. *Davis v. Barnstable*, 154 Mass. 224.

In *Tennessee* it is held that a devise of land to directors of a school district for the purpose of erecting a college of learning on the land is valid. *State v. Smith*, 16 Lea (Tenn.), 662. In *Texas*, it is decided that a bequest to a county "for the benefit of public schools" is not void for uncertainty, and that it is consistent with the object and function of the corporation, which may take and administer such a trust. *Bell County v. Alexander*, 22 Tex. 350. Bequest held void because the "school commissioners" named were not a corporate body. *Janey's Executor v. Latane*, 4 Leigh (Va.), 327.

² Under charter power "to acquire by . . . devise . . . lands for . . . any other public purpose," a city may accept a devise of either real or personal property to establish and maintain a public library. *Beurhaus v. Cole*, 94 Wis. 617. Under power to towns to "grant and vote such sums of money as they shall judge necessary . . . to establish and maintain public libraries and reading rooms for the free use of all the inhabitants of the town," a town may accept a gift for these purposes, and may provide additional money by taxation. *Attorney-General v. Nashua*, 67 N. H. 478.

in trust for the relief or aid of *the poor and indigent* in varying forms.¹

§ 989 (573). **Devises and Grants for Objects Foreign to Corporate Purposes.** — But municipal corporations cannot, for the same rea-

¹ *Philadelphia v. Elliott*, 3 Rawle (Pa.), 170, cited *ante*, § 987. A devise of property to "be used in the discretion of the acting selectmen of Bridgeport for the special benefit of the worthy *deserving poor* white, American, protestant, democratic, *widows and orphans* residing in Bridgeport until all is expended" held not to be void for uncertainty, and to be a valid devise in trust. *Beardsley v. Bridgeport*, 55 Conn. 489. Devise of real estate to county commissioners "in trust for the use and benefit of the *orphan poor*, and for other destitute persons in said county," held valid. *Lagrange County v. Rogers*, 55 Ind. 297. The board of county commissioners in *Indiana* can accept a trust under the will of an individual to establish a *home for worthy unfortunate persons and orphan boys*. *Rush County v. Dinwiddie*, 139 Ind. 128. A city may accept a devise in trust for the establishment and maintenance of a *foundling hospital* for the specific purpose of relieving unfortunate females and caring for and protecting their offspring. Such devise is in effect a provision for the poor and is therefore a proper municipal object. *Phillips v. Harrow*, 93 Iowa, 92. Bequest "*to the orphans*" of a municipal corporation sustained. *Mary, Succession of*, 2 Rob. (La.) 438. Bequest to a town for the *worthy and unfortunate poor* held valid. *Dascomb v. Marston*, 80 Me. 223. A town may take and administer a trust fund for the benefit of a worthy class of inhabitants, *e. g.*, *widows in straitened circumstances*, although they are not strictly paupers and notwithstanding the fact that it has no power to raise money by taxation for the purpose. *Lovell v. Charlestown*, 66 N. H. 584.

In *Ohio*, "gifts, grants, and devises to the poor of any township" are by statute (Swan's Stat. 637) "good and valid in law" when made *directly* to the poor; and they are held to be good when made to a trustee, in trust for the *poor of a township*. *Urney's Executors v. Wooden*, 1 Ohio St. 160. Counties in *Pennsylvania* had authority "to take and hold real estate within their corporate limits and also personal prop-

erty." It was held that a bequest to a county to "be put at interest in the county treasury for ten years and the interest yearly of it to be applied for the *support of the poor* of" a certain township, and "at that period they stop the interest and keep all that is in the treasury for the use of the county forever" was a valid devise to the county in trust to apply the interest for the prescribed period; that the charity was public in its character; and that the county had power to administer it. *Lawrence County v. Leonard*, 83 Pa. 206. A bequest for the benefit of *indigent persons* residing in the county is valid, counties being charged with the duty of providing for the support of the poor. *Bell County v. Alexander*, 22 Tex. 350. Under authority conferred by charter to acquire by devise lands for certain enumerated purposes and for "any other public purpose," a city may accept a devise of either real or personal property to *provide a home for aged and poor residents*. *Beurhaus v. Cole*, 94 Wis. 617.

But in *New York*, it has been held that in the absence of a *special grant* of power by statute, a town cannot act as trustee of property given for charitable purposes. Hence, although it may take a devise for all or one of its corporate purposes, — *e. g.*, the support of the poor that it is obliged by law to maintain, — it cannot, without express statutory authority, take a devise in trust for charitable purposes or for a purpose which is not corporate, — *e. g.*, for the benefit of poor persons for whose support it is not under statutory liability. *Fosdick v. Hempstead*, 125 N. Y. 581. This decision, unless resting upon local legislation, seems to be contrary to the weight of authority. In other jurisdictions it would seem to be generally and, in our view, properly held that if a municipality has authority, in the absence of statutory restriction, to take a devise for the support of the poor that it is by statute obliged to support, a devise in trust for the support of persons in straitened circumstances, although not legally paupers, is germane to its corporate purposes and is not in-

sons applicable to ordinary corporations aggregate, hold lands *in trust for any object or matter wholly foreign and not germane to the purpose* for which they are created, and in which they have no interest.¹ Thus, while the supervisors of a *county*, who are made, by statute, a corporation for special purposes, may take by grant a parcel of land in trust that they should erect a *court-house and jail*, these being county purposes, they cannot be seized without legislative authority as trustees for the use of an individual, or in trust for building a church or schoolhouse for the use of the inhabitants of a *particular town* in the county.² So a corporation, with au-

consistent therewith. See cases cited above.

¹ Plowd. 103; 1 Kyd on Corp. 72; Howe, *In re*, 1 Paige (N. Y.), 214; So. Newmarket Meth. Sem. Trs. v. Peaslee, 15 N. H. 317, 331; Farmers' Loan & T. Co. v. Carroll, 5 Barb. (N. Y.) 613; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73; North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109; Coggeshall v. Pelton (legacy for townhouse), 7 Johns. Ch. (N. Y.) 292; Sloane v. McConahy, 4 Ohio, 157; Maysville v. Wood, 102 Ky. 263, quoting text and holding that a municipal corporation cannot hold land interest for *religious purposes*. See this and other cases cited *infra* in notes to this section. *Supra*, § 982; *infra*, §§ 1100, 1103.

In Franklin's Estate, 150 Pa. 437, 449, Heydrick, J., who delivered the opinion of the court, said: "A municipal corporation, like a private corporation, is a legal entity, existing only in contemplation of law, and in virtue of law. Being the creature of law, it can have only those capacities which are imparted, and exercise only those powers which are expressly or by necessary implication granted to it. Its objects being governmental, its appropriate functions are all necessarily governmental. In the absence, therefore, of an express grant of power to accept and hold property upon purely private trusts, and to execute such trusts, it can no more do so than can a non-entity. Indeed, as to everything *dehors* its legitimate field of operations, it is as if it were not. Instances are not wanting in which municipal corporations have executed trusts committed to them by private persons, but these have been, for public purposes, germane to the objects of the corporation, and they have been upheld for that reason."

² Jackson v. Hartwell, 8 Johns. (N. Y.) 422. See also Jackson v. Cory, 8 Johns. (N. Y.) 385.

"Our laws are full of instances of persons clothed with corporate powers for certain special purposes. The loan officers of a county are a corporation; and could they, as such, receive a grant of land for the use of a town or of a church? Certainly not. Nor can the supervisors of Oneida County take a grant of land for the use of the town of Rome. Such a grant must be deemed void upon every principle, whether we consider the special and defined objects of a corporate capacity in the board of supervisors; whether we consider the power given them by statute to take conveyances of land for the *use of the county*; or, lastly, whether we refer to the incapacity of all corporations to hold lands in trust for any other object than that for which the corporation was created. Whether the court of equity would or would not prevent the trust as to the inhabitants of Rome from failing for want of a trustee is not a question for a court of law (in an action of ejectment) to decide." *Per Curiam*, in Jackson v. Hartwell, 8 Johns. (N. Y.) 422. See *ante*, § 983, note. *Legislature or chancery may, in proper cases, appoint trustees*. Bryant's Lessee v. McCandless, 7 Ohio, Part 2, 135; Chapin v. Winchester School District, 35 N. H. 445; Girard Will Case, 2 How. 127; Shotwell v. Mott, 2 Sandf. (N. Y.) Ch. 46. It was said by Mr. Justice Story, in Vidal v. Philadelphia, 2 How. (U. S.) 127, that there is "no positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of its institution, but collateral to it; nay, for the benefit of a stranger or another corporation." See also Perin v. Carey,

thority to establish, in a designated town, an institution "for the instruction of youth," cannot be a trustee under a will or grant to hold funds and pay over the income thereof for the support of missionaries.¹ In this country, generally speaking, *a trust for religious purposes, especially if of a denominational or sectarian character, is foreign* to the purposes for which municipal corporations are created, and when it is so the municipality cannot accept and hold property in trust for these purposes.²

§ 990 (574). **When the State alone can question the Power.**—Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, *has acquired and is holding such property for other purposes*, is a question which can only be determined in a proceeding instituted at the *instance of the State*. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale; and whether the corporation, in purchasing, exceeds its power is a question between it and the State, and does not concern the vendor or others.³

24 How. 465, *per Wayne, J.* But Chancellor *Kent*, in stating that a corporation may be a trustee, adds: "And at this day, the only reasonable limitation is, that it cannot be seized of land in trust for purposes foreign to its institution." 2 Kent Com. 280.

¹ South Newmarket Methodist Seminary Trustees v. Peaslee, 15 N. H. 317. But towns in *New Hampshire*, it has been decided, may legally hold lands in trust for the *support of religion within their limits*. The Dublin Case, 38 N. H. 450, 459. "Such instances," says *Perley, C. J.*, giving the judgment of the court (*Ib.* p. 577), "are, it is believed, very numerous in this State. . . . Under our Constitution no one can entertain a doubt that to *maintain the institutions of religion* is an object quite consistent with the general purpose for which towns are created, and that towns have at least an indirect interest in promoting religion within their limits."

² Maysville v. Wood, 102 Ky. 263. In this case land was dedicated for "meeting house square." This dedication was construed by the court as a devoting of land to "religious purposes and making it a place of religious instruction and worship." It was held that the city could not take and hold the land under the dedication for that

purpose; that it was not a municipal purpose; that it was intended that church and State should be separate; and that a gift to a public corporation in trust for religious purposes was foreign to the institutions of the country. See also *Corning v. Christ Church*, 11 N. Y. Supp. 762. But in *Phillips v. Harrow*, 93 Iowa, 92, it was held that a devise in trust for the benefit of the religious societies of the city, *without regard to sect, and to include all denominations* professing to work for the good and well-being of mankind, was for a legitimate purpose, and might be accepted by the city. *Supra*, § 983, note.

³ *Smith v. Sheely*, 12 Wall. (U. S.) 35; *Myers v. Croft*, 13 Wall. (U. S.) 291; *New York L. Ins. Co. v. Cuyahoga County*, 106 Fed. Rep. 123, 137, citing text; *Barnes v. Multnomah County*, 145 Fed. Rep. 695; *Eufaula v. McNab*, 67 Ala. 588; *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 544; *Commonwealth v. Wilder*, 127 Mass. 1, 6, citing text; *Jefferson County v. Grafton*, 74 Miss. 435; *Chambers v. St. Louis* (Mullanphy's devise to city of St. Louis), 29 Mo. 543, 577; *Land v. Coffman*, 50 Mo. 243; *Hafner v. St. Louis*, 161 Mo. 34; *Gilbert v. Berlin*, 70 N. H. 396, citing text; *Camden County v. Collins*, 60 N. J. L. 367, citing text; *Davidson*

§ 991 (575). **Power of Alienation.** — Municipal corporations possess the *incidental or implied right to alienate* or dispose of the prop-

College v. Chambers's Ex'rs, 3 Jones Eq. (N. Car.) 253, 258, *per* Pearson, J.; Raley v. Umatilla County, 15 Oreg. 172; Leazure v. Hillegas, 7 Serg. & Rawle (Pa.), 313, 320; Goundie v. Northampton Water Company, 7 Pa. St. 233; Barrow v. Nashville & C. Turnp. Co., 9 Humph. (Tenn.) 304; Bell v. Platteville, 71 Wis. 139, 147, citing text.

A corporation cannot *hold* property in violation of its charter, nor can it *take* it in violation of its charter by an *act of the law*. Cases last cited, and see also Bank of Mich. v. Niles, 1 Doug. (Mich.) 401; Bank of Va. v. Poitiaux, 3 Rand. 136; Martin v. Branch Bank, 15 Ala. 587; Baird v. Bank of Wash., 11 Serg. & R. 411; Goundie v. Northampton Water Co., 7 Pa. St. 233; Angell & Ames Corp. §§ 152, 153. "If a corporation be forbidden by its charter to *purchase or take* land, a deed made to it would be void." *Ib.*; Leazure v. Hillegas, 7 Serg. & Rawle (Pa.), 313. Distinction between prohibition to *take*, and a prohibition merely to *hold*. See Bank v. Niles, 1 Doug. (Mich.) 401; Bank v. Poitiaux, 3 Rand. (Va.) 136; Leazure v. Hillegas, *supra*. *Legislative recognition* of the municipal ownership of real property *validates* its acquisition, although the municipality lacked capacity to take and hold at the time of acquisition. New York Life Ins. Co. v. Cuyahoga County, 106 Fed. Rep. 123, 137. A deed of real estate was made by Betsy Flagg to the town of *Worcester*, in consideration of five dollars (nominal), and that the town should support her (she being lawfully settled in the town while single). The court, without deciding that the acceptance of a deed by the officers of the town, the consideration of which imposes upon the inhabitants any expense or burden, would create a binding contract on the part of the town, or that the grantor might not avoid a deed of which such obligation was the only consideration, held that the town, on the delivery of the deed to it, became seized of the estate, could maintain ejectment against a dis-seisor, and that the deed would remain good until avoided by the grantor, or by some one in privity of estate. *Worcester v. Eaton*, 13 Mass. 371. The court says (*Ib.* p. 378), "Whether the inhab-

itants of a town can be assessed to raise money to purchase lands to be used for any other purpose than the execution of some lawful requisition, is a different question." Text approved. Commonwealth v. Wilder, 127 Mass. 1; Matthews v. Alexandria, 68 Mo. 115; Plaquemines Par. Pol. Jury v. Foulhouze, 30 La. An. 64.

"The rule stated by Dillon [in this section] has been indorsed by two well considered cases in Indiana, — *Hayward v. Davidson*, 41 Ind. 212, 214, and *Baker v. Neff*, 73 Ind. 68. Other States where the question has been presented adopted the same rule, and the Supreme Court of the United States, in *Union Nat. Bk. v. Matthews*, 98 U. S. 628, holds to the same doctrine." *Per Craig, J.*, in *Barnes v. Suddard*, 117 Ill. 237. See also *Hough v. Cook County Land Co.*, 73 Ill. 23; and *Alexander v. Tolleston Club*, 110 Ill. 65; *ante*, § 980.

A village had power "to acquire by purchase or otherwise, and to hold real estate or any interest therein, . . . for the use of the corporation and to sell or lease the same." It bought certain lands for the express purpose of donating them for the construction of a manufacturing plant within its limits, and the lands were conveyed by the village for that purpose. In a suit by the village to set aside the deed made by it as unauthorized and invalid, it was held that the village had no authority or capacity to purchase the lands for the purpose referred to; that, being without capacity to purchase for the purpose, it never acquired title, either legal or equitable; that although the donee had no title under the circumstances, yet as he was in possession and the village could not prevail without the aid of the illegal transaction, the court would refuse to aid either party, but leave them where it found them, both parties being *in pari delicto*. The court suggested that the remedies of the city were to sue the vendors who knew of the illegal purpose in acquiring the lands for the purchase price, or possibly the village officers might be liable for misfeasance. *Markley v. Mineral City*, 58 Ohio St. 430. The village had power to acquire real estate and received a deed for the lands, and such title as it acquired

erty, real or personal, of the corporation, of a *private nature*, unless restrained by charter or statute;¹ they cannot, of course, dispose

could, under the principles stated in the text, only be questioned by the State. It may be doubted, therefore, whether under the circumstances the conclusion of the court was correct.

¹ *Shannon v. O'Boyle*, 51 Ind. 565 (stock of railroad company owned by county); *Platter v. Elkhart County*, 103 Ind. 360; *Fort Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558, citing text; *Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411, 416, citing text; *Buffalo v. Balcom*, 134 N. Y. 532; *People v. Albany*, 4 Hun (N. Y.), 675, 679; *New York Mail & N. T. Co. v. Shea*, 30 N. Y. App. Div. 266, citing text; *Reynolds Heirs v. Stark County*, 5 Ohio, 204; *Carlisle Gas & W. Co. v. Carlisle*, 218 Pa. 554.

A municipal corporation may sell and dispose of property held for *general convenience, pleasure, or profit*, e. g., the interest of a town in a branch railroad connecting the town with the main line. *Searcy v. Yarnell*, 47 Ark. 269. In the absence of any statute prohibiting it, a city may sell property sold for unpaid taxes, and, in default of bidders, struck off to the city, and may take a mortgage from the purchaser to secure the purchase price. It may make such sale to the original owner of the property. *Buffalo v. Balcom*, 134 N. Y. 532. A county is not a municipal corporation proper, and it has been held that it cannot, without statutory authority, sell land belonging to it, although the land may not be applied to a public use. *West Carroll v. Gaddis*, 34 La. An. 928; *Jefferson County v. Grafton*, 74 Miss. 435. But *quare?*

By virtue of its incidental or implied power, a city may sell stock which it may own in corporations, e. g., in a waterworks company. *Terre Haute v. Terre Haute Water Works Co.*, 94 Ind. 305, citing text; *Carlisle Gas & Water Co. v. Carlisle*, 218 Pa. 554; 67 Atl. Rep. 844; or a plank road company; *Newark v. Elliott*, 5 Ohio St. 113; or in a railroad company; *Shannon v. O'Boyle*, 51 Ind. 565. It may sell stock in a water company by virtue of its implied or incidental power, although such water company was organized to supply it and its inhabitants with water; and the fact that it has by statute or ordinance the right to appoint certain managers or directors of the company,

does not prevent it from selling. *Carlisle Gas & Water Co. v. Carlisle*, 218 Pa. 554. As to power to sell water and gas works constructed and managed by municipalities, see next note.

A municipal corporation had authority to sell its real estate for cash. It sold for part cash, part notes. It was held that the municipality was estopped to dispute the validity of the sale by retaining the benefits. The contract was within the power of the municipality, and the only question at issue was as to the making of a deed before the price was paid. *Book v. Polk*, 81 Ark. 244. Even if a city has not authority to sell otherwise than for cash, a purchaser of property who has made a mortgage to the city for the purchase price cannot question the validity of the mortgage in a suit by the city to foreclose it. *Buffalo v. Balcom*, 134 N. Y. 532. Constitutional provisions prohibiting any city from giving property to or in aid of any individual, association, or corporation, preclude a city from granting a site to a charitable hospital for a nominal consideration, and this is so, although the constitution permits the city to make provision for the aid or support of its poor, and to provide for the support, maintenance, and education of inmates of orphan asylums, &c. *Mt. Sinai Hospital v. Hyman*, 92 N. Y. App. Div. 270. An exposition, though in form a private corporation, held to be a public purpose justifying a conveyance of real property belonging to the city by virtue of express legislative authority therefor. *Minneapolis v. Janney*, 86 Minn. 111. An improvident sale made by a municipal corporation in the exercise of its discretionary power may be set aside by the court. *Terre Haute v. Terre Haute Water Works Co.*, 94 Ind. 305.

A corporation may alien land held by it in fee simple, though purchased for the use of a common. *Beach v. Haynes*, 12 Vt. 15. But not if after its purchase it has dedicated it to the public. *State v. Woodward*, 23 Vt. 92. Board of supervisors of a county not entitled to extra pay for selling, in pursuance of a statute, the stock owned by a county in a railroad corporation. *Andrews v. Pratt*, 44 Cal. 309.

Mr. Grant, after an examination of

of property of a *public nature*, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons.¹ The distinction

the English authorities, observes that "no decision of the common-law courts, directly in point, can be found, laying down the law to be that to *alien* its real property at pleasure is incident to a corporation." Grant, 129, 134. But in this country there can be no doubt as to the general *implied authority* of corporations, unless restrained, to *dispose of property* of a private nature. *Newark v. Elliott*, 5 Ohio St. 113; 3 Washb. Real Prop. (4th ed.), 565, pl. 25a. The English Municipal Corporations Act of 1835 imposes certain specific restraints on the right of municipal corporations to alien, mortgage, or lease their real property. 5 and 6 Wm. IV, chap. lxxxi. § 94; *Grant Corp.* 140; *post*, chap. xxxi. Powers of *private* corporations to dispose of property. *Morawetz on Corp.* (2d ed.) § 335.

✓ *Meriwether v. Garrett*, 102 U. S. 472; *Hoadley's Admsrs. v. San Francisco*, 124 U. S. 639 (squares dedicated to public use cannot be conveyed to private persons); *Wright v. Morgan*, 191 U. S. 55; *Morgan v. Johnson*, 106 Fed. Rep. 52; *Murray v. Allegheny*, 136 Fed. Rep. 57; *District of Columbia v. Cropley*, 23 App. D. C. 232, 248; *Holladay v. Frisbie*, 15 Cal. 631; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160; *Warren County v. Patterson*, 56 Ill. 111; *Shannon v. O'Boyle*, 51 Ind. 565; *Lake County Water & Light Co. v. Walsh*, 160 Ind. 32; *Ransom v. Boal*, 29 Iowa, 68; *Augusta v. Perkins*, 3 B. Mon. (Ky.) 437; *Alves' Ex. v. Henderson*, 16 B. Mon. (Ky.) 131, 168; *Kennedy v. Covington*, 8 Dana (Ky.), 50; *Roberts v. Louisville*, 92 Ky. 95; *Dupuy v. Iberville Police Jury*, 116 La. 783; *Bowlin v. Furman*, 28 Mo. 427; *Matthews v. Alexandria*, 68 Mo. 115; *Still v. Lansingburgh* (conveyance of public square void), 16 Barb. (N. Y.) 107; *New York Mail & N. T. Co. v. Shea*, 30 N. Y. App. Div. 266, 268, citing text; *Mount Sinai Hospital v. Hyman*, 92 N. Y. App. Div. 270; *Southport v. Stanley*, 125 N. Car. 464; *Newark v. Elliott*, 5 Ohio St. 113; *Reynolds Heirs v. Stark County*, 5 Ohio, 204; *Knox County v. McComb*, 19 Ohio St. 320; *Cincinnati v. Dexter*, 55 Ohio St. 93; *Philadelphia v. Phila. & Reading R. Co.*, 58 Pa. St. 253; *Huron Waterworks Co. v. Huron*, 7 S. Dak. 9, 26,

citing text; *State v. Taylor*, 107 Tenn. 455; *Corpus Christi v. Central Wharf Co.*, 8 Tex. Civ. App. 94, 97; *Ogden City v. Bear Lake & Riv. W. & Irr. Co.*, 16 Utah, 440; *Roper v. McWhorter*, 77 Va. 214 (ferries); *Lord v. Oconto*, 47 Wis. 386; *Smith v. Barrett*, 1 Siderf. 162; *Colchester v. Lawton*, 1 Vesey & B. 226; *Kyd*, 108; 2 Kent Com. 281; *Angell & Ames Corp.* § 187; *ante*, § 818; *post*, chap. xxxi.

In *McGuire v. Atlantic City*, 63 N. J. L. 91, *Van Syckel, J.*, said: "Cases holding that municipal corporations may sell and convey any real estate to which they have title are cases where the property is of a private nature, or where by statute they are invested with a general power to sell all lands held by the municipality" (citing the text). See *supra*, § 977. There is no implied or incidental power in a city to exchange streets for other property. *Beebe v. Little Rock*, 68 Ark. 39. In *New York City* the general public have a right of passage over the places where land highways and navigable waters meet; and when a wharf or bulk head is built at the end of a land highway and to the adjacent water, the highway is by operation of law extended by the length of the added structure. Hence, as the pier extending a highway is subject to a public use, the conveyance of a pier by the city subject to the city's right to order it to be extended into the river at the grantee's expense, or to extend it at its own expense, or to grant the right to other parties to do so on the grantee's failure, was held not to give the absolute fee to the land covered by the pier, but merely the right to maintain a pier and collect wharfage, the city having no power to convey the land. *Knickerbocker Ice Co. v. Forty-second Street, &c. R. Co.*, 176 N. Y. 408. A statute authorizing any town to sell "any property real or personal belonging to such town and apply the proceeds as they may think best" construed to authorize only the sale of property which is not held in trust for a public purpose. *Southport v. Stanley*, 125 N. Car. 464. See also *Ogden City v. Bear Lake & Riv. W. & Irr. Co.*, 16 Utah, 440.

Water works are held for a public use, and can only be sold by a municipality

is between property which a corporation may own the same as a natural person and that which it holds in general or special trust. The rights of the corporation as a *property holder* are distinct from

by virtue of *express statutory authority*. Lake County W. & L. Co. v. Walsh, 160 Ind. 32; Huron Water Works Co. v. Huron, 7 S. Dak. 9; s. c. 8 S. Dak. 169. See also New Orleans v. Morris, 105 U. S. 600. In Ogden City v. Bear Lake & Riv. W. & Irr. Co., 16 Utah, 440, it was held that general power to lease, convey, and dispose of property real and personal *did not authorize the sale of water works* belonging to the city. But in Ohio it is held that *under a statute authorizing a city to acquire by purchase or otherwise and hold real estate "for the use of the corporation and to sell or lease the same" a city may sell a gas plant* established by it, and maintained for the use of the city and its inhabitants. Thompson v. Nemeier, 59 Ohio St. 486. The court said: "The city having acquired the property known as the gas plant and held the same for over twelve years, for some reason satisfactory to the officers of the city, concluded to sell and dispose of the same for a price agreed upon between the contracting parties. This was not in the nature of a speculation, but was disposing of property which the city did not desire to longer hold or use, and the statute just quoted clearly gives the city the power to make such sale, whenever in the judgment of the officers of the city it becomes for the best interests of such city. The petition does not claim that there was any fraud or improper motive in the proceedings to sell the plant, but everything was in good faith, and in the judgment of the officers of the city, for the best interests of the municipality. It is therefore clear that the city has the right and power to make such sale." To the same effect and under the same statute, Kerlin v. Toledo, 20 Ohio Cir. Ct. 603. In Pennsylvania, it was also held that a borough in undertaking to supply water to its inhabitants acts in a private and not in a public capacity; and in a case involving the right or power of a municipality to sell stock of a water company owned by it, the court seems to have been of the opinion, *arguendo*, that it might sell its water works under its incidental or implied right to alienate or dispose of property, real and personal, of a private nature held for the emolument and advantage

of the municipality, unless restricted by charter. Carlisle Gas & Water Co. v. Carlisle, 218 Pa. 554. And although the Supreme Court of *Indiana* denies the right of a city, by virtue of implied or incidental power, to sell its water works, it has held that under a general power to sell and convey property which has not been dedicated to a public use, a city *may sell* and transfer its *right to purchase a water works plant* reserved to it by an ordinance. De Motte v. Valparaiso, 161 Ind. 319. Dowling, J., said: "There is, in our opinion, an obvious legal distinction between a right of a city to purchase property for a public use, and the ownership of property actually dedicated to and employed for public purposes. It is not the fact that property may be devoted to public use by the city at some future day which constitutes the city a trustee for that use, but it is the circumstance that the property is actually so used. The city of Valparaiso is not the owner of the water works, and may never acquire title to them, either because it has not the means with which to purchase the works, or for the reason that such purchase may not be deemed expedient. The property is now held by a private corporation, and will continue to be so held, unless the city shall become financially able to buy it, and its acquisition shall be decided to be for the advantage of the city. If the city remains unable to purchase for lack of funds, or if it shall not be thought desirable to exercise the right to purchase, the service to the public rendered by the Valparaiso water works will continue to be of the same nature, extent, and efficacy, and upon the same terms, whether the city retains its right to purchase the works, or disposes of that right by a sale and transfer. . . . As the right to purchase has not been exercised, and the city has not impressed its possible interest in the property with a public use, it may sell and transfer such right under its general power to sell and convey property which has not been dedicated to a public use." The *lease or sale of gas works* is not an executive function, and the power to make a lease or sale does not belong to the director of public works of a city as the head of the de-

the *legislative rights* of the corporation: the corporation may alien its private property, but it cannot (as elsewhere shown) cede away the power of municipal control.¹

§ 992 (576). **Sale on Execution.** — In some of the States it is held that the private property of municipal corporations, that is, such as they own for *profit*, and charged with no public trusts or uses, may be sold on execution against them.² In other States, either by

partment, although, as a legislative act, it may be within the power of the city. *Baily v. Philadelphia*, 184 Pa. 594. As to the capacity, public or private, in which municipal corporations hold public utilities, see *post*, chapter on Public Utilities, § 1385.

Where a city, having a general power to hold and convey real property for the convenience of its inhabitants, purchased a lot to be used as a *site for a city hall*, and afterwards purchased another for the same purpose, it was held that the power was a continuing one, and that the city had the right to sell and convey the lot first purchased. *Konrad v. Rogers*, 70 Wis. 492. Land purchased by a city for the purpose of a *public park*, but which has never been dedicated to that use, may be sold by the city under its general power to sell and convey property, real or personal, owned by it as a municipal corporation, although it could not do so if the land had been applied to the purpose for which it was bought. *Ft. Wayne v. Lake Shore & M. R. S. Co.*, 132 Ind. 558. But in *New Jersey* it has been held that when a *special power* to purchase land is granted to a city for a specific purpose, *e. g.*, public buildings, — and no power is conferred to sell these lands, — the city cannot, after having purchased lands for the specific purpose, purchase for the same purpose other lands not adjacent thereto, and not available as an addition to the original purchase. The specific power cannot be construed, in the absence of power to sell, as authorizing the purchase of additional and unnecessary sites. *McGuire v. Atlantic City*, 63 N. J. L. 91; distinguishing *Konrad v. Rogers*, 70 Wis. 492, cited *supra*. The legislature may authorize a city to sell lands acquired for a public purpose, *e. g.* as a public park. *Driscoll v. New Haven*, 75 Conn. 92. Where an act of the legislature confers upon a corporation the power to sell certain property originally

donated by the State to the corporation and enumerates the objects for which such sale may be made, it is not competent for the corporation to dedicate such property to the public use of the citizens. *Wright v. Victoria*, 4 Tex. 375.

¹ Index, *Charter; Delegation of Power*.

² *Hart v. New Orleans*, 12 Fed. Rep. 292, approving text; *Kerr v. New Orleans*, 126 Fed. Rep. 920; *Birmingham v. Rumsey*, 63 Ala. 352; *Murphree v. Mobile*, 108 Ala. 663; *Equitable Loan Co. v. Edwardsville*, 143 Ala. 182, quoting text; *Ft. Smith School Dist. v. Board of Improvement*, 65 Ark. 343, quoting text; *Holladay v. Frisbie*, 15 Cal. 631; *Dunham v. Angus*, 145 Cal. 165; *State v. Buckles*, 8 Ind. App. 282; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276; *Louisville v. Commonwealth* (as to public and private property), 1 Duvall (Ky.) 295; *Beadles v. Fry*, 15 Okla. 428; *Beadles v. Smyser*, 17 Okla. 162; 87 Pac. Rep. 292; *St. Francis Levee Dist. v. Bodkin*, 108 Tenn. 700; *Brown v. Gates*, 15 W. Va. 131.

In *California*, where the private property of the city is subject to execution for the city's debt, it remains subject to execution therefor until the debt is paid, and this right the legislature cannot impair. *Dunham v. Angus*, 145 Cal. 165. It seems that a municipal corporation may sometimes own some descriptions of property, or have debts of a strictly private nature due it, which are subject to levy, and to the lien of such writ or garnishment. *Brown v. Gates*, 15 W. Va. 131. It has been held that a place of traffic called a *market bazaar*, owned by a municipal corporation, for the sale of merchandise from which the sale of fresh meats, fish, and vegetables was excluded, and which had been rented out by the corporation for a term of years, is not such a market as is protected from execution; and, no

statute or on general principles, it is declared that judgments against municipal corporations cannot be enforced by ordinary writs of execution, and that the remedy of the creditor is by *mandamus* to compel payment, or the levy of a tax for that purpose. Questions of this kind are influenced much by local legislation.¹ On principle, in the absence of statutable provision, or legislative policy in the particular State, it would seem to be a sound view to hold that the right to contract and the power to be sued give to the creditor a right to recover judgment; that judgments should be enforceable by execution against the strictly private property of the corporation, but not any against property owned or used by the corporation for public purposes, such as public buildings, hospitals, and cemeteries, fire-engines and apparatus, water works, and the like; and that judgments should not be deemed liens upon real property except when it may be taken in execution.² Outside of the New England

authority having been given by the legislature to establish such a bazaar, it is subject to levy and sale. *New Orleans v. Morris*, 3 Woods C. C. 103, *Billings*, J.; *ante*, § 248, and note; *New Orleans v. Home Mut. Ins. Co.*, 23 La. An. 61. *Water-works*, owned by a city, have been held to be of such public utility and necessity as to be practically held in trust for the use of the citizens, and not liable to sale under execution. *New Orleans v. Morris*, 105 U. S. 600; *ante*, § 4; *infra*, § 996. Further, see chapters on Dedication and *Mandamus*, *post*. And an act of the legislature of the State, granting to a city certain real property within its limits, with a proviso in the act that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent of all moneys arising from the sale or other disposition of the property, gives to the city an *absolute interest*, qualified by no conditions or trusts attaching to the property, and subject to no specific uses; and hence the property may be levied on and sold under execution. *Holladay v. Frisbie*, 15 Cal. 631.

In *Foster v. Fowler*, 60 Pa. St. 27, the corporation known as the Monongahela Water Company, empowered to introduce water into a city for the use of the inhabitants, was held to be a corporation for public purposes; and on principles recognized in *Pennsylvania* it was held that its buildings and property necessary to carry on its operations could not be seized and sold on execution, or be subjected to a mechanic's

lien. But the property of a storage and warehouse company may be sold on execution. *Girard Point Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 251. As to sale on execution of property of private corporations necessary to enable it to perform its public duties, see *Morawetz on Corp.* (2d ed.), § 1125, and cases cited. See also *Winslow v. Perquimans Co. Com'rs*, 64 N. Car. 218. Judgment against county which has no private property must be enforced by *mandamus*, and not by execution. *Gooch v. Gregory*, 65 N. Car. 142. More fully see *post*, chapter on *Mandamus*.

¹ *Crane v. Fond du Lac*, 16 Wis. 196; *Chicago v. Hasley*, 25 Ill. 595; *Olney v. Harvey*, 50 Ill. 453; *Elrod v. Bernadotte*, 53 Ill. 368; *Bloomington v. Brokaw*, 77 Ill. 194, 197; *Cairo v. Allen*, 3 Ill. App. 398; *Morrison v. Hinkson*, 87 Ill. 587; *Klein v. New Orleans*, 99 U. S. 149; *Curry v. Savannah*, 64 Ga. 290; *Commonwealth v. Allegheny County*, 37 Pa. St. 277, 290; *Commonwealth v. Perkins*, 43 Pa. St. 400; *State v. Milwaukee*, 20 Wis. 87; *State v. Beloit*, 20 Wis. 79; *infra*, § 1507.

² *Meriwether v. Garrett*, 102 U. S. 472; *Brickley v. Boston*, 20 Fed. Rep. 207; *Hart v. Burnett*, 15 Cal. 580; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 196; *Cole v. Green*, 25 Ill. 104; *Green v. Marks*, 25 Ill. 221; *Dolton v. Dolton*, 196 Ill. 154; *Geneva v. People*, 98 Ill. App. 315; *Princeville v. Hitchcock*, 101 Ill. App. 588; *Gibson v. Murray*, 120 Ill. App. 296, *aff'd* 216 Ill. 589; *Indianapolis & B. R. Co. v. Indian-*

States the creditors of a municipal corporation cannot resort, for the purpose of making their debts, to the private property of the inhabitants.¹ The indebtedness of a city is conclusively established by a judgment recovered against it in a court of competent jurisdiction; and in enforcing payment by *mandamus*, the plaintiff is not restricted to any particular property or revenues, or subject to any conditions, unless the judgment or the statute so provides.²

§ 993 (577). **Mechanics', Maritime, and Attorneys' Liens.**— It is clear that property owned by a municipal corporation and used for public purposes cannot be sold by virtue of an execution issued on a judgment rendered against the corporation.³ As one of the results of this general rule, there is no right to a *mechanic's lien* against such property. Thus, county bridges, school-houses, court-houses, and other public buildings which cannot be sold under an execution, cannot, without a plain statute to that effect, be sold on foreclosure of a mechanic's lien; it is only such property as can be sold under

apolis, 12 Ind. 620; *Lowe v. Howard County*, 94 Ind. 553; *Lamb v. Shays*, 14 Iowa, 567; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276; *Mariner v. Mackey*, 25 Kan. 669; *Darling v. Baltimore*, 51 Md. 1; *State v. Tiedeman*, 69 Mo. 306, approving text; *Wallace v. Sharon Trustees*, 84 N. Car. 164; *Lilly v. Taylor*, 88 N. Car. 489; *Vaughn v. Forsyth County*, 118 N. Car. 636, 639, citing text; *Schaffer v. Cadwallader*, 36 Pa. St. 126; *Foster v. Fowler*, 60 Pa. St. 27; *Huron Waterworks Co. v. Huron*, 7 S. Dak. 9, 23, quoting text; *Emery County v. Burresen*, 14 Utah, 328; *Brown v. Gates*, 15 W. Va. 131; *Buell v. Arnold*, 124 Wis. 65, citing text; *infra*, § 993, and note.

A school-house is not liable to levy and sale on execution, nor can the insurance money, if it burns down, be garnished by a creditor. *Fleishel v. Hightower*, 62 Ga. 324. A *public quay or levee* in New Orleans is public property which is not subject to sale on execution against the city. *New Orleans v. Louisiana Const. Co.*, 140 U. S. 654; *Kerr v. New Orleans*, 126 Fed. Rep. 920. The fact that the quays or levees are leased and the lessee has enclosed them, does not render them private property subject to sale on execution, when the lease provides that they shall be used for the ordinary wharf and other purposes to which they are naturally adapted. *New Orleans v. Louisiana Const. Co.*, 140 U. S. 654. *Water*

front lands held by a municipality in trust to lay out and construct streets, wharves, &c., are not subject to levy and sale under execution. *Oakland v. Oakland Water Front Co.*, 118 Cal. 160. Land containing a gravel bed and horses, mules, wagons, &c., *bought for and used in improving the streets*, are public property and not subject to execution. *Monroe v. Johnson*, 106 La. 350. *Stock of liquors* kept by a municipality of *Alabama* under the dispensary act of that State is held in a governmental capacity, and is exempt from levy and sale under execution against the municipality. *Equitable Loan Co. v. Edwardsville*, 143 Ala. 182. But see to contrary in *Georgia*, *Sheffield v. Blakely Dispensary*, 111 Ga. 1.

¹ *Horner v. Coffey*, 25 Miss. 434. The court refused to follow the doctrine laid down in *Beardsley v. Smith*, 16 Conn. 368; s. p. *Miller v. McWilliams*, 50 Ald. 427; *Meriwether v. Garrett*, 102 U. S. 472; *post*, chap. xxix. § 1506, note.

As to exemption of *municipal revenues* from judicial seizure, and as to *garnishment* of municipal corporations, see *ante*, §§ 248, 249.

² *United States v. New Orleans*, 98 U. S. 381. *Post*, chapter on *Mandamus*.

³ *Ante*, § 992; *Lyon v. Elizabeth*, 43 N. J. L. 158; *Amy v. Galena*, 7 Fed. Rep. 163; *Odell v. Schroeder*, 58 Ill. 353.

judicial process that is subject to such lien. Laws creating liens in favor of mechanics are enacted with reference to that class of property which may be so sold.¹ For the purpose of securing the payment of mechanics and materialmen performing labor or furnishing materials to contractors with municipalities, statutes have been enacted in many States giving them a lien upon moneys owing by the municipality to the principal contractor. We have already discussed these statutes and the rights and liabilities of the parties thereunder.² As a result also of the rule that property owned by a municipal corporation and held for public purposes cannot be sold by virtue of an execution or a judgment, a vessel which is the property of a municipality and devoted to public uses and necessary for carrying on some essential operation of the government, has been held not to be liable to seizure in a suit *in rem* in admiralty for a maritime tort, or for a maritime lien for wharfage, etc.³ And

¹ Klein v. New Orleans, 99 U. S. 149; New Orleans v. Morris, 3 Woods C. C. 103; Florman v. School Dist. No. 11, 6 Colo. App. 319; Emory v. Laurel, 3 Pennewill (Del.), 67; Curry v. Savannah, 64 Ga. 290; Albany v. Lynch, 119 Ga. 491, quoting text; Chicago v. Hasley, 25 Ill. 595; Olney v. Harvey, 50 Ill. 453; Elrod v. Bernadotte, 53 Ill. 368; Bloomington v. Brokaw, 77 Ill. 194; Board of Ed. of Dist. No. 3 v. Neidenberger, 78 Ill. 58; Bouton v. McDonough County, 84 Ill. 384; Morrison v. Hinkson, 87 Ill. 587; Cairo v. Allen, 3 Ill. App. 398; Pike County v. Norrington, 82 Ind. 190; Parke County v. O'Conner, 86 Ind. 531; Fatout v. Indianapolis School Board, 102 Ind. 223; Townsend v. Cleveland Fire Proofing Co., 18 Ind. App. 568; Loring v. Small, 50 Iowa, 271; Charnock v. Colfax, 51 Iowa, 70; Whiting v. Story County, 54 Iowa, 81; Breneman v. Harvey, 70 Iowa, 479; Plaquemines v. Foulhouze, 30 La. An. 64; McKnight v. Parish of Grant, 30 La. An. 361; Lesard v. Revere, 171 Mass. 294; Staples v. Somerville, 176 Mass. 237, 242; Young v. Falmouth, 183 Mass. 80; Knapp v. Swaney, 56 Mich. 345; Jordan v. Taylor's Falls Bd. of Education, 39 Minn. 298; Burlington Mfg. Co. v. Minneapolis Court House Com'rs, 67 Minn. 327; Whiteside v. School Dist. No. 5, 20 Mont. 214; Ripley v. Gage County, 3 Neb. 397; Perkins v. Butler County, 44 Neb. 110, 117; Winslow v. Perquiman's County, 64 N. Car. 218; Gooch v. Gregory, 65 N. Car. 142; Vaughn v. Forsyth County, 118 N. Car.

636, 640, citing text; Portland Lumbering, &c. Co. v. School Dist. No. 1, 13 Ore. 283; Bank of Idaho v. Malheur County, 30 Ore. 420, quoting text; Foster v. Fowler, 60 Pa. St. 27; Wilson v. Huntingdon County Com'rs, 7 W. & S. (Pa.) 195; Hovey v. East Providence, 17 R. I. 80; Atascosa County v. Angus, 83 Tex. 202, citing text; Dallas v. Loonie, 83 Tex. 291; Manly Mfg. Co. v. Broadus, 94 Va. 547; Hicks v. Roanoke Brick Co., 94 Va. 741; Wilkinson v. Hoffman, 61 Wis. 637; Platteville v. Bell, 66 Wis. 326, 334.

Unless the right be given by statute, a *mechanic's lien* cannot be enforced against the real estate of a municipal corporation held for public use. Leonard v. Brooklyn, 71 N. Y. 498; *post*, chapter on Mandamus. But in *Louisiana* a mechanic was permitted to file and foreclose a lien on a building erected for a jail; and it was held that the jail might be sold, but not the ground on which it stood. McKnight v. Parish of Grant, 30 La. An. 361.

² *Ante*, § 851.

³ The Seneca, 8 Ben. 509; Fed. Cas. No. 12,668; The Fidelity, 9 Ben. 333; Fed. Cas. No. 4757; s. c. on appeal, 16 Blatchf. 569, Fed. Cas. No. 4758; Long v. The Tampico, 16 Fed. Rep. 491; Brickley v. Boston, 20 Fed. Rep. 207; The F. C. Latrobe, 28 Fed. Rep. 377; The John McCracken, 145 Fed. Rep. 705. But see to the contrary: Oyster Steamers of Maryland, 31 Fed. Rep. 763; Henderson v. Cleveland, 93 Fed. Rep. 844.

A *police boat* is not subject to seizure

the principle has also been applied to a claim to an attorney's lien upon public moneys collected by judgment in a suit brought by an attorney-at-law on behalf of a county.¹

§ 994 (578). **Mode of Alienation; "City Slip Cases."** — If the charter or constituent act of the corporation prescribes a particular *mode* in which the *property* of the corporation shall be disposed of, that mode must be pursued.² This is well illustrated in an interesting and important series of adjudications in California known as the "City Slip Cases," in which, upon the most deliberate consideration, it was repeatedly held, where the officers of the city, under the authority of a *void* ordinance, made sales of real estate belong-

in admiralty under a lien for wharfage. The *Seneca*, 8 Ben. 509, Fed. Cas. No. 12,668. The following vessels have been held not to be seizable under a lien in admiralty for a maritime tort; viz., a tug boat used by a department of charities and correction of a city for transporting prisoners and sick persons; The *Fidelity*, 9 Ben. 333, Fed. Cas. No. 4757, aff'd 16 Blatchf. 569, Fed. Cas. No. 4758; a boat maintained by a city to free the harbor of ice; The *F. C. Latrobe*, 28 Fed. Rep. 377; a vessel owned by the Port of Portland, Oregon, a municipal corporation charged with the duty of improving the harbor, the vessel being used in such work as a tug or dredge; The *John McCracken*, 145 Fed. Rep. 705. Such vessel cannot be seized even at the suit of the United States. The *John McCracken*, 145 Fed. Rep. 705.

But in *Workman v. New York City*, 179 U. S. 552, the Supreme Court of the United States held that under the general maritime law the public nature of the service upon which a vessel is engaged at the time of the maritime tort affords no immunity from liability *in personam* to the municipal corporation in a court of admiralty when the court has jurisdiction; that a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of the vessel; that while the emergency of fire is to be considered in determining whether or not those in charge of a fire-boat were negligent, such emergency does not exempt the fire-boat from the exercise of such due care as the occasion requires. The court therefore sustained the jurisdiction of the court of

admiralty to award judgment *in personam* against the city of New York for damages for a maritime tort committed by a fire-boat owned and operated by the city. Mr. Justice White, in an elaborate opinion reviewing the authorities, held that the maritime law and not the local law of the State governed the liability of the city; that as a result of the general principles by which a municipal corporation has the capacity to sue and be sued, there is no limitation taking such corporations out of the reach of the process of a court of admiralty, and that the court of admiralty therefore has jurisdiction to render a judgment *in personam* against a city. No levy of a process upon the fire-boat was made or attempted to be made; and the court did not feel called upon to pass upon the question whether the fire-boat could be seized by virtue of liability for a maritime tort. The personal liability of a municipality for a maritime tort was also sustained in *Thompson Nav. Co. v. Chicago*, 79 Fed. Rep. 849, but *Grosscup, J.*, recognized the fact that the vessel in question, a fire-tug, was public property and not subject to a maritime lien. See also *The F. C. Latrobe*, 28 Fed. Rep. 377.

¹ In *Indiana*, an attorney who obtains judgment on behalf of a county for public money against a defaulting treasurer cannot acquire any lien on the judgment for statutory fees on the principle that public funds cannot be made liable to suits for debts to individuals. *Wood v. State*, 125 Ind. 219.

² *Platter v. Elkhart County*, 103 Ind. 360, 374; *Crow v. Warren County*, 118 Ind. 51, 54; *Shimer v. Phillipsburg*, 58 N. J. L. 506.

ing to the city, that no title passed, and that under the charter of the city (which required sales of its property to be made by an ordinance adopted for the purpose, after advertisement of the time, place, and terms of sale) the appropriation, for municipal purposes, of the proceeds of the sales, while it would or might impose on the city the liability to pay back to the purchasers the moneys received from them, would not have the effect to ratify the sales.¹ This is upon the principle that if the use of the proceeds obtained from sales made under a void ordinance would have the effect to validate the sales, the restraints imposed by the legislature upon the power of the city in this behalf would be defeated and be practically useless.

§ 995. **Sale or Lease of Property to the Highest Bidder.** — Where the charter or statute requires that any sale or lease of the real estate or property of the city *shall be made at public auction*, or on sealed bids, *to the highest bidder*, the provisions of the charter or statute are *mandatory*, and a compliance therewith is essential to the validity of the sale or lease.² If, however, property is leased without being

¹ *McCracken v. San Francisco*, 16 Cal. 591; *Grogan v. San Francisco*, 18 Cal. 590; *Pimental v. San Francisco*, 21 Cal. 351. In these cases the principles stated in the text are vindicated with characteristic clearness and striking logical force, in able and interesting opinions of Mr. Chief Justice Field, afterwards holding a seat on the Supreme Bench of the United States. His views and conclusions are clearly sound. See approving comment of Prof. John Norton Pomeroy on these cases in his *Legislative and Judicial Work of Judge Field*, p. 30. See also *Satterlee v. San Francisco*, 23 Cal. 314; *Herzo v. San Francisco*, 33 Cal. 134; *ante*, §§ 783, 784, 794; *post*, §§ 998, 1615.

See *ante*, chap. xiv., as to *mode of contracting*. *Mode of exercising corporate powers*. *Ante*, chap. vii.; *post*, chap. xxvii.; *infra*, § 1575 *et seq.*

² An ordinance of the city council making a lease of a portion of its real estate upon the payment of a rent reserved, is void where the charter requires any sale or lease of realty to be made at public auction to the highest bidder, and the provisions of the statute are not complied with. *San Francisco & O. R. Co. v. Oakland*, 53 Cal. 502. Under a statute authorizing the city authorities to lease a ferry franchise, along with the wharves of piers used or required for the purposes of the

ferry for the highest price or rental at public auction, or on sealed bids, the city has authority to include in one leasing or sale two ferry franchises with the wharves of piers used in connection therewith; it is a matter in the discretion of the city authorities, and, in the absence of evidence of an abuse of that discretion, the court will not interfere. *Starin v. Edson*, 112 N. Y. 206.

In *Newbold v. Glenn*, 67 Md. 489, a statute authorized the mayor and council of Baltimore to sell property belonging to the city, but required that notice of the proposed sale be published. Notwithstanding the provisions of the statute, the mayor and city council *sold property at private sale* and gave a deed therefor. It appeared that the property had been sold for its full value. The court held that, although the requirement of the statute was intended to invite the fullest competition, and to prevent collusive and fraudulent sales, and, therefore, ought in all cases to be strictly observed, yet where the property had been sold at private sale for its full market value, it was not prepared to hold, in the absence of fraud or collusion, that the mere failure on the part of the city authorities to observe the requirements of the statute would invalidate the sale; and it therefore held that the deed of the property was valid. But *quare?* The city authori-

put to public auction, the lessee cannot defend an action for the rent payable to the city by terms of the lease on the ground that the lease was made in violation of the statute. Having had the full benefit of the contract, the lessee is estopped from questioning its validity.¹ The *terms and conditions* upon which such sale or lease shall be made are within the *discretion* of the city authorities, provided always that they are such as to permit fair competition and do not defeat the object of the statute.²

§ 996 (579). **Power to Mortgage.** — Where property charged with no trusts or public uses is held by the corporation without restriction for sale or profit, it may, in the absence of restrictive legislation, *mortgage it to secure any debt or obligation that it has the power to create or enter into*. The power to mortgage, if not expressly given or denied, would in such case be an incident to the power to hold and dispose of property, and to make contracts.³ Power given to the

ties cannot, under a provision in an advertisement reserving the right to reject any bid not deemed satisfactory, refuse to accept the highest bid on the ground that a higher offer has been made for the property after the sale. *Kerr v. Philadelphia*, 8 Phila. (Pa.) 292; *quære?* See Index, *Highest Bidder*; *Lowest Bidder*. As to validity of sale made by a person acting on behalf of the municipality who is not regularly licensed as an auctioneer, see *Schwartz v. Flatboats*, 14 La. An. 243.

¹ *New York City v. Sonneborn*, 113 N. Y. 423; *Starin v. Edson*, 112 N. Y. 206.

² The city authorities advertised for sale for a term of years certain ferry franchises, together with the right to occupy and use certain wharves and piers for the purposes of the ferries. The terms of sale provided that the franchises should be offered at an upset price of five per cent on gross receipts of the ferriage of the ferries and a yearly fixed rental of \$10,000 for the wharf property. It was held that a sale made on the conditions and in the manner stated in the advertised terms of sale was proper and valid; and that a bid of \$15,000 for the wharves and a smaller percentage on the gross receipts than that offered by the successful bidder was properly rejected. *Starin v. Edson*, 112 N. Y. 206. The court pointed out that it was not possible to make a bid for the franchise of the ferry and for the wharves by indicating the rental to be

paid for the wharves and the percentage on the earnings of the ferry to be paid for its franchise, the statute contemplating that the lease or sale should be made to the same individual. If A. should bid \$10,000 for the wharf and ten per cent on the gross receipts of the ferry, and B. bids \$15,000 for the wharf and five per cent on the gross earnings for the ferry franchise, which is the highest bidder for the property? No one can tell. Hence, the only solution is to say that no mixing can be permitted of those modes of bidding, and whichever is adopted must be exclusively adhered to. A corporation, lessee of property, cannot defend an action for rent on the ground that it has no legal right to enter into the lease. Having entered into it as a matter of fact and being in possession, it is against justice and right to permit such lack of power to be set up, when asked to pay the consideration promised in return for the granting of the lease. *Starin v. Edson*, 112 N. Y. 206; *New York City v. Sonneborn*, 113 N. Y. 423.

³ As to power to mortgage real estate. *Middleton Sav. Bank v. Dubuque*, 15 Iowa, 394; *Branham v. San Jose*, 24 Cal. 585; *Gordon v. Preston*, 1 Watts (Pa.), 385; *Goodwin v. McGehee*, 15 Ala. 233. A county cannot without express authority mortgage a court-house site to secure an issue of bonds to raise money to build the court-house. Power to sell does not confer

city of Memphis, in its charter, "to hold real, personal, or mixed property," and "to sell, lease, or dispose of the same for the use and benefit of the city," was held by the Supreme Court of Tennessee to confer, without further legislative authority and by necessary implication, the power upon the common council of the city of Memphis to mortgage a large tract of land ceded to the city in fee by the United States, lying within the corporate limits, to secure the payment of a large number and amount of bonds, to be issued by a railroad company to aid in the construction of its railroad, the initial point of which was on the bank of the river opposite Memphis, the court regarding this as a proper corporation purpose and for the benefit of the city.¹ It will be seen that there was no special or express legislative authority to the city to aid it by pledging its property to secure bonds issued by the railroad company. Without express authority the city could not have guaranteed the bonds of the company; and upon the accepted canons of construction of municipal powers, the author cannot concur with the learned court in the doctrine that the ordinary clause in the charter, giving the municipality the authority to take, hold, sell, and dispose of property, empowered it to pledge it as a security for the bonds or debts of the railway company.² Under charter authority to make all contracts which they may deem necessary for the welfare of the city, a mayor and council were considered to have *power to mortgage the city water works* to secure payment of bonds lawfully issued for the construction of the same. The effect of various provisions of the charter was considered; and it was also held that a special act of the legislature, providing for a tax and sinking fund for the payment of such bonds, did not affect the power, under the charter to mortgage. Nor is a vote of the citizens made necessary to the exercise of the power to mortgage, by the mere fact that the special act required such a vote

power to mortgage; hence, county commissioners, having power only to sell real estate of the county, cannot encumber it with a mortgage. *Vaughn v. Forsyth County*, 118 N. Car. 636. Power to a *school district* "to borrow money and mortgage the real property of the district therefor" confers authority to mortgage all or such part of the real property of such district as the school board may deem advisable. *Schmutz v. Little Rock Special Sch. Dist.*, 78 Ark. 118. On the subject of the mortgaging of city property as incurring debt in excess of constitutional limitations, see *ante*, § 199.

¹ *Adams v. Memphis & M. R. Co.*, 2 Coldw. (Tenn.) 645.

² See *ante*, §§ 237-240, also chap. viii. § 313, *et seq.*; *ante*, § 814.

A municipal corporation has the power to receive, as payee, a note and mortgage for a debt lawfully due to such corporation, and it has the right to execute a note and mortgage for a debt lawfully due from such corporation. And it may assign the note and mortgage of another owned by it, instead of executing its own. *Floyd County v. Day*, 19 Ind. 450; *Sturgeon v. Daviess County*, 65 Ind. 302; *Vanarsdall v. State*, 65 Ind. 176.

as a preliminary to the issue of the bonds. The right to foreclosure, on breach of condition, is a necessary incident to the mortgage.¹

§ 997 (580). **Leases of Corporate Property.** — A municipal corporation, or a *quasi* corporation, such as a county, has the power to enter into a lease and *become the tenant of real estate*, when the use thereof is needed to carry out any of its acknowledged powers, and to attain the public purposes for which it was erected.² A city cannot, as landlord or lessor, make a lease of real estate owned by it which is held for public purposes, when the making of such lease is inconsistent with these purposes.³ But even in the case of lands held for public purposes, a city may lease the same for purposes which are not inconsistent with, but are germane to and in furtherance of the public uses for which the lands are held.⁴ But it would seem that

¹ *Adams v. Rome*, 59 Ga. 765. *Quære*, as to *implied* power to mortgage water works. See *supra*, §§ 992, and note, 993.

² *Rumford School Dist. v. Wood*, 13 Mass 193; *Davies v. New York City*, 83 N. Y. 207, rev'g 45 N. Y. Super. Ct. 373. See also *People v. Green*, 64 N. Y. 499, rev'g 6 Hun (N. Y.), 11; *Davies v. New York City*, 93 N. Y. 250. When the common council have authority to take leases of real estate they possess ample power, as that duty cannot be conveniently performed by that body as such, to authorize some person in office to supervise the taking of a lease and to see that such instrument contains the proper covenants and conditions, and the evidence of the obligations which the parties assume to perform, as well as to direct who shall execute the same, unless such duty by law devolves upon some other officer of the corporation. *People v. Green*, 64 N. Y. 499, rev'g 6 Hun (N. Y.), 11. The *renting* of premises for the use of a city is not "*work or supplies*" for which, pursuant to statute, there must be a letting by contract to the *lowest bidder* and certificate of necessity from the head of the department. *Davies v. New York City*, 83 N. Y. 207, rev'g 45 N. Y. Super. Ct. 373. City held liable, by acquiescence, for rent of premises by *holding over* after the expiration of the term of a lease. *Davies v. New York City*, 83 N. Y. 207, rev'g 45 N. Y. Super. Ct. 373. Statutory authority conferred upon a common council of a city "to purchase or lease such lands, and to erect such build-

ings as may be necessary for city purposes," applies to all city purposes, and the city may as lessee enter into a *lease of lands for use as a public park*. *Holder v. Yonkers*, 39 N. Y. App. Div. 1, rev'g 25 N. Y. Misc. 250. A *county* held liable on covenants of lease for the *destruction of leased building through the negligence* of its officers. The building was rented for county purposes, and it was held that the county was liable by virtue of its contract and the obligations assumed by it under its covenants, and was not exempt from liability on the principle that it was a mere agency of the State formed for governmental purposes and was not liable for the negligence of officers through whom its powers were exercised. *Williams v. Kearny County*, 61 Kan. 708, rev'g 8 Kan. App. 850. See Index, *Actions and Liability; Negligence; Quasi Corporations; Torts*.

³ A city cannot lease property held for public use for a long term of years, thereby putting it out of its power to apply it to the public use for which it is held. *Corpus Christi v. Central Wharf Co.*, 8 Tex. Civ. App. 94; *Weekes v. Galveston*, 21 Tex. Civ. App. 102. A lease by a city which grants the exclusive use of part of a highway for purposes which impair its use as a highway is *ultra vires*; and when the city has again repossessed itself of the lands, it is not estopped to assert the *ultra vires* of the lease in an action by the lessees asserting rights under the lease. *Lowery v. Pekin*, 20 Ill. 575.

⁴ A city may lease part of a *public*

a lease of lands held for public purposes *is subject always to the paramount obligation* of the municipality to devote it to these purposes; and if the use and occupation of the lands by the lessee at any time becomes inconsistent with and prevents the application of the lands to these purposes, the lessee cannot claim the right to hold them as against the obligation of the city to devote the lands to these purposes.¹ But when lands are held by a city in its private and corporate capacity and are not subject to any public use, it is within the power of the city to lease the same for the purpose of deriving a revenue therefrom.² In erecting or acquiring public buildings for corporate

park for hotel purposes; such use may be regarded as incidental to the proper application of the land and not a diversion from its use for park purposes. *Harter v. San Jose*, 141 Cal. 659. Similarly, it may lease a part of a public park for restaurant purposes. *Gushee v. New York City*, 42 N. Y. App. Div. 37, aff'g 26 N. Y. Misc. 287; *State v. Schweickardt*, 109 Mo. 496. A city may lease part of a public park for one year with the right to extend the lease to five years, to improve and use it for training horses and horse racing, reserving access to the public at times for riding and driving on the track. Such lease is not an unlawful diversion of the park from its legitimate uses, and is authorized by the power of the city to purchase, take and hold, and to sell, convey, and let lands, &c. *Bryant v. Logan*, 56 W. Va. 141.

¹ In *Gushee v. New York City*, 42 N. Y. App. Div. 37, aff'g 26 N. Y. Misc. 287, the department of parks leased or granted to the plaintiff the privilege of selling refreshments in a building in a park for a term of five years, unless the agreement should be sooner revoked or cancelled or annulled as therein provided. It was stipulated that the agreement and privilege granted were personal and not assignable, and that plaintiff and all persons in his employ should conform to all rules and regulations prescribed by the department of parks in relation to the conduct of the privileges granted. The court held that the licensee was entitled to the undisturbed enjoyment of his privilege so long as there was no regulation necessarily interfering with the conduct of the restaurant, and so long as the department of parks deemed it best that a restaurant should be maintained therein, but that if the department should at any future time

determine in good faith to discontinue the restaurant, the licensee's privilege would terminate. See also *McNamara v. Willcox*, 73 N. Y. App. Div. 451; *Simson v. Parker*, 190 N. Y. 19, rev'g 113 N. Y. App. Div. 888, cited *infra*.

Where a city leased its water works to an individual who agreed to keep them in good condition, to keep the reservoir supplied with water, and, in case of fire, to put the pumps at work, it was held, in a proceeding in chancery to rescind the contract for gross violation of the agreement, that, as no provision was made by charter how the works should be operated, the city had power to make the lease, but it could not convey its control of the works for a long time so as to lose its right to have the contract annulled if necessary for its safety. *Mahon v. Columbus*, 58 Miss. 310. See *ante*, § 245.

² *Robbins v. Ackerly*, 91 N. Y. 98, aff'g 24 Hun (N. Y.), 499; *Hand v. Newton*, 92 N. Y. 88 (leases by town of oyster beds). See also as to the power to lease, *Bush v. Whitney*, 1 Chip. (Vt.) 369; *Taylor v. Carondelet*, 22 Mo. 105; *Angell & Ames*, § 191; *Grant Corp.* 146. Lease valid though it does not use precise corporate name. *McDonald v. Schneider*, 27 Mo. 405. No particular language essential. *Poole v. Bentley*, 12 East, 168. *Estoppel of lessee* to deny title of corporation lessor. *Chicago v. English*, 80 Ill. App. 163; *St. Louis v. Merton*, 6 Mo. 476; *New York City v. Wylie*, 43 Hun (N. Y.), 547, aff'd 122 N. Y. 663; *New York City v. Sonneborn*, 113 N. Y. 423. A lease is a conveyance of real estate, and when the power to convey is vested in a municipality in its corporate name, the making of the lease is governed by a charter provision authorizing the council to make ordinances to regulate, control, and manage the real property of the

purposes a municipality is *not restricted to its present necessities*, but may anticipate and make provision for its *reasonable future necessities*. Although the building may be held for public use, the municipality may allow the entire building, or a part thereof, to be used incidentally for *private purposes for compensation*, and may make *leases of surplus space* for the purpose of deriving an income therefrom, provided, always, such private use or such leases do not interfere with the application of the building to the legitimate public needs of the municipality.¹ But although the municipality may

municipality, and must be *authorized by ordinance*. An ordinance being prescribed, the council cannot proceed by resolution. *Shimer v. Phillipsburg*, 58 N. J. L. 506. See Index, *Ordinances*. Statute construed to authorize the lease of water terminations of the streets of a city. *Hirsch v. Brunswick*, 114 Ga. 776.

¹ *The Maggie P.*, 25 Fed. Rep. 202; *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1 (lease of surplus water power to generate electricity); *Camden v. Camden*, 77 Me. 530, 537; *Mayo v. Dover & F. V. Fire Co.*, 96 Me. 539 (furnishing surplus water to persons outside municipal limits); *French v. Quincy*, 3 Allen (Mass.) 9 (letting hall for meetings, lectures, theatrical entertainments, &c. and rooms for business purposes); *Spaulding v. Lowell*, 23 Pick. (Mass.) 71 (upper story of market used for other purposes); *Worden v. New Bedford*, 131 Mass. 23 (letting hall for meeting); *Curtis v. Portsmouth*, 67 N. H. 506, 509; *New York Mail & N. T. Co. v. Shea*, 30 N. Y. App. Div. 266 (pneumatic mail tubes on Brooklyn Bridge); *Bolling v. Petersburg*, 8 Leigh (Va.) 224 (leasing portions of court-house site); *Attorney-General v. Eau Claire*, 37 Wis. 400; s. c. 40 Wis. 533 (lease of surplus water power). See also *Fox v. Cincinnati*, 104 U. S. 783; *Kaukauna W. P. Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 274, aff'g 70 Wis. 635; *Little Miami Elevator Co. v. Cincinnati*, 30 Ohio St. 629; *Green Bay & M. Canal Co. v. Kaukauna W. P. Co.*, 90 Wis. 370; s. c. 93 Wis. 283. As to similar power in private corporations to dispose of or make advantageous use of surplus property. *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 712; *Morawetz on Corp.* (2d ed.) § 367; *Green's Brice's Ultra Vires* (2d ed.), 66-69.

A municipal corporation charged by its charter with the "management of its financial, prudential, and municipal concerns," while it would have no power to erect buildings for business purposes, has the power to lease a hall owned by it — in this case in the municipal building — for concerts, theatres, and other entertainments. *Bell v. Platteville*, 71 Wis. 139; *Stone v. Oconomowoc*, 71 Wis. 155. Town may lawfully repair an old building owned by it, for rental purposes, as any other prudent owner might do. *Bates v. Bassett*, 60 Vt. 530. City may lease lands acquired to support abutments of bridge provided the use be not inconsistent with the support of the bridge. *Ricard Boiler & Engine Co. v. Toledo*, 25 Ohio Cir. Ct. 64. A statute authorizing a city to *dispose of any surplus water* to corporations or individuals for compensation, but prohibiting such sale if the supply of the city or its inhabitants is thereby rendered insufficient, does not violate constitutional prohibitions against giving property to or in aid of any individual, association, or corporation. But under such authority the city cannot contract to furnish a fixed quantity of water for a term of seven years with liability for damages in case of a breach. Any contract made must be limited to the surplus supply, and is contingent upon there being a surplus over the needs of a city and its inhabitants. *Simson v. Parker*, 190 N. Y. 19, rev'g 113 N. Y. App. Div. 888.

But it has been held that when the municipality or *quasi* municipality is formed for *specific and limited purposes*, and the building is entirely erected for a public purpose, it cannot, without statutory authority, lease any part thereof, whether required for public purposes or not. Thus, a county cannot lease rooms in a court-house to be

make reasonable provision for future wants in erecting a public building and may lease the surplus space resulting therefrom, it will not be permitted under cover of so doing to erect a building not in fact for public needs as they may arise, but for the *express purpose of devoting* the building to *private purposes*, wholly or in part.¹ It is undoubtedly competent for the legislature to authorize municipal corporations to pass an ordinance, providing, that *in all leases of corporate property*, if the rent remain unpaid the corporation may terminate the lease by a resolution to that effect; in which case equity could not, at least ordinarily, relieve against the forfeiture. So such a corporation may, by stipulation in the lease, provide for such a forfeiture; in which case the right to forfeit owes its existence to the convention of the parties, and not to the action of the corporation in its political or legislative capacity; and where the right to forfeit rests upon *contract*, equity may relieve against it the same as if the contract were made between private individuals.²

§ 998 (581). **Conveyances by Municipalities.**—Power conferred upon a municipality to sell real estate *imports power to sell and convey in the usual method*, unless a mode is prescribed by statute.³ When a city has power to contract and to grant and convey real property, it may make a deed containing a *covenant of general warranty*.⁴ *Conveyances of real estate* should, in general, be

used for private purposes. *State v. Hart*, 144 Ind. 107; *Franklin County v. Gills*, 96 Va. 330; *Franklin County v. Saunders*, 96 Va. 335. Nor can a county authorize the erection of a law office on the court-house lands upon payment of a ground rent. *Alleghany County v. Parrish*, 93 Va. 615. In *Pennsylvania*, it is held that school trustees may not permit or authorize the use of school buildings for religious meetings, or for the holding of public lyceums, or for any purposes other than school purposes directly relating to the instruction of the pupils of the schools, or lectures or debates which are made a part of the course of instruction. *Bender v. Streabich*, 182 Pa. 251. See also *Hysong v. Gallitzin School Dist.*, 164 Pa. 629.

¹ In *Kingman v. Brockton*, 153 Mass. 255, it was held that a town could not erect a building for the express purpose of devoting a portion of it to the use of a G. A. R. post, not temporarily, but as long as the organiza-

tion might exist. See also *Attorney-General v. Eau Claire*, 37 Wis. 400; s. c. 40 Wis. 533.

² *Taylor v. Carondelet*, 22 Mo. 105, where this subject is very ably discussed. The dissenting opinion of *Leonard, J.*, in the special case in judgment, probably rests upon the most tenable ground. See also *Woodson v. Skinner* (power to annul sale), 22 Mo. 13; *State v. Balt. & O. R. Co.*, 3 How. (U. S.) 534.

³ *Macon v. Dasher*, 90 Ga. 195; *Platter v. Elkhart County*, 103 Ind. 360, 374.

⁴ *Abbott v. Galveston*, 97 Tex. 474. Authority to the mayor to execute a deed implies authority to insert a covenant of general warranty. *Abbott v. Galveston*, 97 Tex. 474. In this case it appeared that there was a valuable consideration for the conveyance, but the court made no reference thereto, and simply construed the authority conferred upon the mayor as if it were a power of attorney to him. When the

*executed in the corporate name and under the corporate seal.*¹ If the constituent act or charter prescribes the conditions upon which the conveyance of its real estate shall be made, — as, for example, if it requires the previous consent of a majority of the legal voters, — a conveyance without such consent is void.² A conveyance of real estate, regular on its face, and under the corporate seal, executed by a municipal corporation having the power to dispose of its property, will be presumed to have been executed in pursuance of that power; and hence it is unnecessary for the grantee, or party claiming under it, to produce the special resolution or ordinance authorizing its execution.³

city council has, by statute, authority to direct the conveyance and sale of real property belonging to the city, and there is no requirement that its action shall be by ordinance, *it may authorize the sale and conveyance by a simple motion*, and need not adopt a formal resolution or ordinance. *Morgan v. Johnson*, 106 Fed. Rep. 452, *aff'd sub. nom.*; *Wright v. Morgan*, 191 U. S. 55. But when the charter authority to the council is to make ordinances to regulate, control, and manage the real property of a municipality, a conveyance of real estate must be *authorized by ordinance*. *Shimer v. Phillipsburg*, 58 N. J. L. 506. Index, *Ordinances*.

¹ As to necessity of *seal*, see Index, tit. *Seal*; *Pennington v. Taniere*, 12 Q. B. 1011; *Grant, Corp.* 148; *ante*, chaps. x. and xviii. 2 Kent, Com. 291. As to name and misnomer, see *ante*, chap. x.; also *De Zeng v. Beekman*, 2 Hill (N. Y.), 489; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Tiffin v. Shawhan*, 43 Ohio St. 178, where a deed, made under authority of an ordinance directing the city clerk to make a *proper* conveyance, sealed with his private scroll and his official seal, was held effectual to convey.

"In general, corporations must *take and convey their lands and other property in the same manner as individuals*, the laws relating to the transfer of property being equally applicable to both." Angell & Ames Corp. § 193. Deed by a city executed by the mayor, attested by the clerk, and sealed with the corporate seal, is the *deed of the corporation itself*, and not a deed executed by its agent or attorney in fact. *Macon v. Dasher*, 90 Ga. 195. The mayor, being chief executive officer of a city, is the proper officer, in the ab-

sence of any statutory provision to the contrary, to execute a lease to the city, having the corporate seal of the city affixed by the clerk. *Chicago v. English*, 80 Ill. App. 163, *aff'd* 180 Ill. 476.

² *Still v. Lansingburgh*, 16 Barb. (N. Y.) 107; *Middleton Sav. Bank v. Dubuque*, 15 Iowa, 394. Charter mode of conveyance must be pursued. 3 Washb. Real Prop. (4th ed.) p. 262, pl. 25. *Ante*, § 994. In *Vermont*, the selectmen of the several towns in which there are glebe lands were empowered by statute to *lease* them. This was held to be the extent of their authority, and an absolute conveyance was utterly void, neither conveying title to the grantee nor affecting the rights of the town. *Bush v. Whitney*, 1 Chip. (Vt.) 369. In *California*, it is held that where the legislature authorizes the corporate board of a city to convey its lands, a majority of the members of such board may make the conveyance. *San Diego v. S. D. & L. A. R. Co.*, 44 Cal. 106.

As to liability on *covenants of warranty* in conveyances of real estate, to which the municipality had no title or right to convey. *Findler v. San Francisco*, 13 Cal. 534.

³ *San Francisco & F. Land Co. v. Hartung*, 138 Cal. 223; *Macon v. Dasher*, 90 Ga. 195, citing text; *Jamison v. Fopiana*, 43 Mo. 565; *Swartz v. Page*, 13 Mo. 603; *Choquette v. Barada*, 33 Mo. 249; *Flint v. Clinton Company*, 12 N. H. 430. See *Hart v. Stone*, 30 Conn. 94. The deed of a city is itself at least *prima facie* evidence of all the facts essential to its validity. *Gordon v. San Diego*, 101 Cal. 522; *Galvin v. Palmer*, 113 Cal. 46, 53; *San Francisco & F. Land Co. v. Hartung*, 138 Cal. 223, 227; *Wells v. Pressy*, 105 Mo. 164, 179. When authorized by statute the conveyance need not recite the au-

§ 999 (582). **Same Subject.** — A town cannot, without express authority, *pass the legal title to lands by a vote*, and when conveyed by an agent under the authority of a vote, the deed should, regularly, be in the name of the principal.¹ A corporation in North Carolina was the owner of the land on which the town was laid out; and between Front Street and the water of the sound there was a small strip of land. After the town was laid out, the corporation passed this ordinance: "*Ordered, That for the future, whatever small strips of land are to be found between the outward lines of Front Street and the water shall be the property of the person owning the front lot on the opposite side of the street.*" In *ejectment* by the corporation, it was held that this ordinance did not operate as a deed to pass the title: *first*, for the want of the seal of the grantors; *second*, for the want of a consideration; and *third*, for the want of delivery. Not only so, but it was held to be so obviously defective as a conveyance as not to give the "color of title" to the defendant, necessary (under the statute and decisions of North Carolina) to support an adverse possession.²

thority by which it is made. *Henry v. Atkinson*, 50 Mo. 266.

Conveyances of real property by the officers of a municipal corporation must be made by virtue of a special authority for that purpose, *Merrill v. Burbank*, 23 Me. 538. *How given.* *Clark v. Pratt*, 47 Me. 55; *Hascard v. Somany, Freeman*, K. B. 504; *Grant, Corp.* 146. *Requisites and proof of corporate conveyances.* *Osborne v. Tunis*, 25 N. J. L. 633, 658; *Lovett v. Steam Saw Mill Assoc.*, 6 Paige (N. Y.), 54; *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359; *Middleton Sav. Bank v. Dubuque* (deed by mayor *pro tempore*), 19 Iowa, 467; *Gourley v. Hankins*, 2 Iowa, 75.

When the legislature authorized a board exercising the corporate authority of a city to convey its lands to a corporation, and vested such board with discretion in the matter, *a member of such board, who is a stockholder or director in the grantee corporation*, cannot act officially in the city board in relation to the matter, or in making the conveyance; and if he does, and his vote or signature to the deed was requisite to complete the conveyance, the deed will be set aside as a cloud on the title. *San Diego v. S. D. & L. A. R. Co.*, 44 Cal. 106. See *ante*, §§ 522, note, 772.

¹ *Cofran v. Cockran*, 5 N. H. 458; *Coburn v. Ellenwood*, 4 N. H. 99, 102,

and cases cited. As to title under a vote, where possession is taken, see *Popp v. Neal*, 7 N. H. 275, 278, and authorities cited. In *Ward v. Bartholomew*, 6 Pick. (Mass.) 409, it was held that a conveyance of land by an individual as an agent of the commonwealth, under a resolve authorizing him to convey, might be sufficient even if the deed was executed in the name of the agent. And in *Cofran v. Cochran*, *supra*, it was determined that, from long usage, and in view of the great public mischief which would be produced by a contrary holding, land might be conveyed by a deed in the name of a duly authorized agent of the town. This decision is expressly put upon the maxim "*Communis error facit jus.*" Special legislative authority to certain "*trustees*" (declared to be a body corporate) to sell a lot is well executed by a deed in which the grantors describe themselves properly as the "*trustees*," and then sign and seal the conveyance in their individual names. *De Zeng v. Beekman*, 2 Hill (N. Y.), 489.

² *Beaufort v. Duncan*, 1 Jones (N. Car.) Law, 239. But a release by a municipal corporation of a right in real property, by ordinance and not by deed, may be enforced in equity, when within the scope of the corporate power, and the releasee has paid the considera-

tion, or entered into possession and made valuable improvements on the faith of it. *Grant v. Davenport*, 18 Iowa, 179, *obiter*, per *Wright*, C. J.

Extent of *legislative authority* over the property and property rights of municipal corporations. *Ante*, chaps. iv., ix., and x. Remedy against abuses

by municipalities of *trust property* or property clothed with public duties, and against *collusive alienations* of property by municipal councils. *Post*, § 1575 *et seq.* *Liability* of municipal corporation as an *owner of property*. *Osborne v. Detroit*, 32 Fed. Rep. 36; *post*, chap. xxxii. § 1671 *et seq.*

CHAPTER XXII

EMINENT DOMAIN

	Section		Section
Mode of Treatment	1010	Public Use; Water Supply, &c.	1033
Nature and Scope of the Power	1011	Same Subject; Public Parks	1034
Constitutional Provisions	1012	Same Subject; Ornamental Pur- poses	1035
Federal Constitution; Fifth and Fourteenth Amendments	1013	Legislative and Judicial Domain distinguished	1036
General Effect of the Constitu- tional Limitation stated	1014	Municipal Exercise of Power	1037, 1038
Constitutional Amendments, or- daining Liability for Property "damaged"	1015	Construction of Power	1039
Same Subject; Meaning of the Word "Property"	1016	Power must be strictly pursued	1040
Same Subject; Meaning of the Word "taken"	1017	Conditions Precedent	1041
Same Subject; Scope and Pur- pose of the Amendment	1018	Notice	1042
Power as applicable to Private Corporations	1019	Procedure	1043
Extension of Streets across Rail- roads	1020	Discontinuance of Proceedings	1044
Same Subject; Measure of Com- pensation	1021	Remedy of Land-Owner	1045
Lands of Municipality devoted to Public Use	1022	When Municipality concluded	1046
What may be taken or con- demned	1023, 1024	Revisory Proceedings; Certio- rari	1047
Same Subject; Quantity; Es- tate	1025	Compensation to Owner; Reme- dies	1048-1050
Same Subject; Condemnation of Entire Lot	1026	When Payment to be made	1051
Quantity or Amount of Property taken	1027	Apportionment of Damages among Lots benefited	1052
Condemnation of Lands beyond Municipal Limits	1028	Same Subject; Benefits	1053
Mapping or Platting Streets and other Improvements	1029	Tribunal or Body to assess Dam- ages	1054
Effect of accepting Damages	1030	Measure of Value or Damages Commissioners to ascertain Damages; Constitutional Provisions construed	1055
Public Use; What constitutes such a Use	1031	Power of City Council construed	1056
Public Use; Individual Contri- butions to Expense	1032	Amount of Damages	1058
		Elements of Compensation; Adaptability for Particular Uses	1059
		Elements of Compensation for Lands taken	1060
		Rules to measure Damages. General and Special Benefits	1061, 1062

§ 1010 (583). **Mode of Treatment.** — Among the important powers usually conferred upon municipal corporations and deserving separate treatment, *is the authority to exercise, by grant from the legislature, the right of eminent domain;* that is, compulsorily to take private property, on making to the owner compensation in the

prescribed mode, for designated municipal or public purposes. In this chapter the general nature of the power, the constitutional restrictions upon it, the principles which govern the construction and application of the legislative authority necessary to its existence, and exercise by public agencies, the mode and measure of compensation to the property-owner, will be considered with special reference to the purposes for which it is commonly delegated to municipal corporations.¹

§ 1011 (584). **Nature and Scope of the Power.** — Social duties and obligations are paramount to individual rights and interests. Private rights not under the shield of the organic law must yield when they come in conflict with public necessity or the general good. The maxim, *Salus populi suprema lex*, has an important meaning in its application to private rights, and in limiting the absoluteness of any possible ownership of private property. The legislature, as the authoritative representative of the public, and the constituted judge of what is demanded by the general weal, has the right to say, under such restrictions as exist in the Federal Constitution and in the Constitution of the particular State, to every private proprietor, "The public needs of your property thus much;" and the individual must submit. This is a right inherent in every government. It is a tremendous power, and one which is without theoretical limits, and indeed, without any legal limitations except such as may exist in the organic restraints upon legislative action; it has, in addition, practical limitations in the sense of justice, which ever prevails in enlightened communities, and which legislators

¹ In the tenth chapter of the work of Judge Redfield on the Law of Railways, and particularly in the last edition, the right of eminent domain, *in connection with railways*, is exhaustively treated, and may be usefully consulted by whoever desires to have a view of the state of the English and the American law upon almost any branch of this interesting inquiry. The learned author does not confine his consideration of the subject to its bearings on railways; but the nature of the right, the limitations upon its exercise, the mode of procedure, the time when compensation is to be made, and the rules to measure its amount, are clearly stated and fully illustrated. In his excellent work on Constitutional Limitations, chap. xv., Judge Cooley has presented the subject, particularly in its constitutional as-

pects, in a manner extremely satisfactory. Mr. Sedgwick's view, although less practical, will be found to be of great interest and value. Sedgwick on Stat. and Const. Law, 498, 534. Mr. Mills of the St. Louis bar, and Mr. Lewis of the Chicago bar, have published treatises on the Law of Eminent Domain, in which they have collected with diligence and stated with care, under a methodical arrangement, the results of the cases, English and American, many thousands in number, upon this subject. They are both useful and convenient works, and they go, of course, into greater detail on many points than is practicable in the present chapter. Their treatment is general; ours is limited to the subject chiefly in its relations to municipalities.

cannot for any considerable period effectually or safely disregard; and experience has shown that there is a point beyond which no government can press its demands upon its subjects or citizens, and continue to exist. One branch of this governmental prerogative is known by the name *taxation*, which, in its application to municipalities, will be noticed in another chapter; and the other is now familiarly known as the *power of eminent domain*, by which is meant the right of every government to appropriate, otherwise than by taxation and its police authority (which are distinct powers from the right of eminent domain), private property for public use.¹

§ 1012 (585). **Constitutional Provisions.**— In the *Constitution of the United States*, and in the Constitutions of the several States, there is a *limitation upon the power* of eminent domain, usually expressed in substantially these words: "Private property shall not be taken for public use without just compensation." In some of the Constitutions there are, in addition, special provisions, of more recent origin, as to the mode of ascertaining the amount of the compensation and the time and manner of payment. Full treatment of this subject in all of its constitutional and other aspects would not be appropriate to the present work, and our consideration of it will accordingly be limited to a statement of the general principles relating to it, and a reference to the cases which illustrate *the power as exercised by municipal corporations* under delegated legislative authority.

§ 1013 (586). **Federal Constitution; Fifth and Fourteenth Amendments.**— The *fifth article* of the amendments of the Constitution of the United States was intended to prevent the *general government* from taking private property for public use without just compensation, and was *not* intended as a restraint upon the *State governments*.²

¹ As to the phrase "eminent domain," see Mr. Justice *Campbell's* article on the "Taking of Private Property for Purposes of Utility," vol. i. No. 2, Bench and Bar, page 112. Mr. Carman F. Randolph of New Jersey has a learned article on "The Eminent Domain" in the July, 1887, number of the *English Law Quarterly Review*, 314, and in the *New Jersey Law Journal*, May, 1889, p. 133, on "Eminent Domain over Streets," in respect of the rights of owners of lands adjacent thereto. Mr. Randolph is also the author of

a valuable work on the general subject of "Eminent Domain."

"All private property is held subject to the necessities of the Government. The *right of eminent domain* underlies all such rights of property. The Government may take personal or real property whenever its necessities or the exigencies of the occasion demand." *Per* Mr. Justice *Brewer* in *United States v. Lynah*, 188 U. S. 445, 465.

² *Hunter v. Pittsburgh*, 207 U. S. 161, 176; *Barron v. Baltimore*, 7 Pet. (U. S.) 248; *Withers v. Buckley*, 20

Under this article, if in the execution of any power, no matter what it is, the government of the United States finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner.¹ The right of eminent domain residing in a State, says the Supreme Court of the United States, is an independent power, and all property is held and all contracts are made subject to this right. Therefore, the exercise of this right by the State does not impair the obligation of contracts within the meaning of the prohibition of the Constitution of the United States. Hence, a toll bridge owned by a private corporation, chartered by the State for that purpose, may, under the

How. (U. S.) 84; Mills, Em. Dom. § 348 and cases.

¹ *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 659; *Monongahela Nav. Co. v. United States*, 148 U. S. 312; *Sweet v. Rechel*, 159 U. S. 380, 399, 402; *United States v. Lynah*, 188 U. S. 445; *Union Bridge Co. v. United States*, 204 U. S. 364, 397. "The contention that the Government had a paramount right to appropriate this property may be conceded. But the Constitution in the Fifth Amendment guarantees that when this Governmental right of appropriation, — this asserted paramount right, — is exercised, *it shall be attended by compensation*. The government may take real estate for a post-office, a courthouse, a fortification, or a highway; or, in time of war, it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor." *Per Mr. Justice Brewer in United States v. Lynah*, 188 U. S. 445, 465.

It is now well settled that, whenever in the execution of the powers granted to the United States by the Constitution, *lands in any State are needed by the United States* for a fort, magazine, dockyard, lighthouse, custom house, courthouse, post-office, or any other public purpose, and cannot be acquired by agreement with the owner, the *Congress of the United States*, exercising the right of eminent domain and making just compensation to the owners, may authorize such lands to be taken either by proceedings in the courts of the

State with its consent, or by proceedings in the courts of the United States with or without any consent or concurrent act of the State as Congress may direct or permit. *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Kohl v. United States*, 91 U. S. 367; *United States v. Jones*, 109 U. S. 513; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 531, 532; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 656; *Monongahela Nav. Co. v. United States*, 148 U. S. 312; *Luxton v. North River Bridge Co.*, 147 U. S. 337, s. c. 153 U. S. 525; *Chappell v. United States*, 160 U. S. 499, 510; *Burt v. Merchants' Ins. Co.*, 106 Mass. 356; *United States, Petitioner*, 96 N. Y. 227.

Although *municipal corporations* organized under the laws of the respective States derive their power almost exclusively from the State, yet circumstances may exist where the power of eminent domain may be derived from an act of Congress. Thus *Congress, under the power to regulate commerce* among the States, may authorize the construction of a bridge across navigable waters between two States and the taking of private lands for that purpose upon making just compensation. *Luxton v. North River Bridge Co.*, 153 U. S. 525. And it has been held that a city may, by virtue of authority conferred upon it by the State where it is located, and also by virtue of power conferred upon it by act of Congress, be authorized to erect such a bridge over a navigable river between two States and to acquire land therefor not only beyond the city limits, but outside the State. *Haeussler v. St. Louis*, 205 Mo. 656. But compare *Becker v. La Crosse*, 99 Wis. 414; *Schneider v. Menasha*, 118 Wis. 298. Index, *Bridge; Property*.

right of eminent domain, and under a general law of the State authorizing the act, be condemned and taken as part of a public road, compensation being made to the corporation in the same manner as to natural persons. Such an exercise of the right of eminent domain does not impair the obligation of the contract between the bridge corporation and the State.¹

The *Fourteenth Amendment* of the Constitution of the United States, however, adopted in 1868, ordains that "No State shall make or enforce any law which shall deprive any person of life, liberty, or property without due process of law." This is a direct limitation upon the powers of the State governments, and puts these fundamental and immutable rights under the protection of the general government, as against invasion by the States. It is settled that corporations as well as natural persons are included in the amendment.²

¹ *West River Br. Co. v. Dix*, 6 How. (U. S.) 507, affirming judgment of the Supreme Court of Vermont; *Richmond, F. & P. R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 71. The same principle has been frequently declared by the State courts. *Ala. & Fla. R. Co. v. Kenney*, 39 Ala. 307; *Enfield Toll Br. Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40; *Ib.* 454; *Boston & L. R. R. Co. v. Salem & L. R. R. Co.*, 2 Gray (Mass.), 1; *Central Br. Co. v. Lowell*, 15 Gray (Mass.), 106; *Red River Br. Co. v. Clarksville*, 1 Sneed (Tenn.), 176; *Armington v. Barnet*, 15 Vt. 745; *Redfield on Railways*, § 70; *Mills Em. Dom.* §§ 37, 41, 42; *Lewis Em. Dom.* § 11; *infra*, § 1019.

Where a condemnation proceeding assumes the nature of a suit in which the question to be tried is the value of the land, the case is one which, under the several acts of Congress, may, if it is otherwise within those acts, be transferred from the State to the Federal courts for trial. *Patterson v. Miss. & R. R. Boom Co.*, 3 Dillon C. C. 465, affirmed by the Supreme Court, 98 U. S. 403; *Warren v. Wisconsin, &c. R. R. Co.*, 6 Biss. C. C. 425. A proceeding by a municipal corporation to condemn land for the purpose of opening a street, brought against the lessor and the lessee of the land (one of the parties being a foreign corporation), is not removable from the State court to the United States court on the ground that there is a separable controversy. "The cause of action alleged, and conse-

quently the subject matter of the controversy, was whether the whole lot should be condemned, and that controversy was not the less a single and entire one, because the two defendants owned distinct interests in the land, and might be entitled to separate awards of damages." *Bellaire v. Baltimore & O. R. Co.*, 146 U. S. 117.

² See *Davidson v. New Orleans*, 96 U. S. 97, 105. In this case there is a dictum of Mr. Justice Miller to the effect that the provisions of the Fourteenth Amendment as to due process of law do not refer to eminent domain. Mr. Justice Bradley expresses his dissent from this view. See *Mugler v. Kansas*, 123 U. S. 623, and cases cited *infra* in notes to this section. When there is no contention that statutes conferring the right of eminent domain, passed by the legislature of the State and which the courts of the State have decided authorize the appropriation of lands, do not make ample provision for assessment of damages to the land owner by due process of law, the question whether a given corporation comes within the law of the State and is entitled to exercise its power of eminent domain presents only a question of State law and does not raise any question of Federal law under the Fourteenth Amendment to the Federal Constitution. *Stone v. Southern Ill. & M. Bridge Co.*, 206 U. S. 267, 273.

In *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 251, Mr. Justice Harlan, delivering the opinion of the court, said: "It is funda-

§ 1014 (587). **General Effect of the Constitutional Limitation stated.** — Mr. Sedgwick sums up his examination of the then existing usual *limitation upon the power of the legislature* over the appropriation of private property to public uses; and his statement of the result will serve as an appropriate introduction to our consideration of the subject in its application to municipal corporations. He says: "If the brief and sweeping clause, 'Private property *shall not be taken* for public use without just compensation,' be made to express the modifications and qualifications which construction has inserted in it and added to it, it will stand nearly as follows: Private property shall in no case be taken for *private use*. Private property may be taken for *public use* in the exercise of the general police powers of the State, or of taxation, without making compensation therefor. And the power of taxation includes the power of charging the expense of local improvements exclusively upon those immediately benefited thereby. Private property may also be taken for public use in the exercise of the power of eminent domain, but not without just compensation being made or provided for before the taking is absolutely consummated. The right to compensation, [under the above quoted limitation], however, does not attach in cases where the value of property is merely impaired, and title to it not divested; nor does it exist in cases where the right to the property taken is not absolutely vested at the time of the legislative act affecting it.¹ This is substantially the form that the constitutional provision has assumed in the hands of the courts; and upon a careful examination of the process by which this result has been arrived at, it must be admitted that in practice our constitutional guarantees are very flexible things, and that the judicial power exerts an influence in our system which makes the subject of interpretation one of the first magnitude."²

mental in American jurisprudence that private property cannot be taken by the Government, national or State, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments. *Loan Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *Cole v. LaGrange*, 113 U. S. 1, 6. If the purpose be public, the taking may be outright, provided reasonable, certain, and adequate provision is made, at the time of the appropriation, to ascertain and secure the compensation to be made to the owner. *Cherokee Nation v. South-*

ern Kan. R. Co., 135 U. S. 641, 651; *Sweet v. Rechel*, 159 U. S. 380, 399; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540. Any State enactment in violation of these principles is inconsistent with the due process of the law prescribed by the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226; *San Diego Land, & C. Co. v. National City*, 174 U. S. 739, 754; *Smyth v. Ames*, 169 U. S. 466, 525."

¹ *Bush v. McKeesport*, 166 Pa. St. 57, quoting text.

² Sedgwick, *Stat. and Const. Law*, 533, 534.

It is not competent for the legisla-

§ 1015 (587 a). **Constitutional Amendments, ordaining Liability for Property "damaged."** — The *limited meaning of the word "property" and of the word "taken,"* referred to in the preceding section, by which the protective scope of the usual eminent domain clause of the Constitutions was by many tribunals confined to an actual trespass upon, or physical invasion or appropriation of, the property of the owner, and did not include many other injuries to the owner's use and enjoyment of his property when such injuries were the result of acts done under express legislative sanction, was not in its practical workings satisfactory to the public mind and conscience, or to the professional judgment. Accordingly, many of the later Constitutions have added the words "damaged," "injured," or "destroyed," so that the clause therein now reads, in substance, that private property shall not be taken or *damaged* for public use without compensation.¹ This important change in the law is considered more at large in a subsequent chapter. It may be here remarked that the exact meaning and effect of the change is yet, in many respects, to be delimited by future adjudications. In the light of such decisions as have been already made,² and with a view of aiding in the proper construction of the clause as amended, the following views are offered for the reader's consideration.³

§ 1016 (587 b). **Same Subject; Meaning of the Word "Property."** — As above suggested, the remedial provisions in question had their origin in two main but related causes. One was the narrow meaning which judicial decisions had placed upon the word "property." The word "property" conveys no precise and invariably certain meaning,⁴

ture to provide if a person shall make *improvements upon ground which will be embraced in a street*, if subsequently laid out and extended, that he shall not, if such street is thus laid out, be entitled to damages for such improvement. Such a provision is unconstitutional, because it deprives the owner of the use of his land, without compensation. *Mosle v. Baltimore*, 5 Md. 314; *post*, § 1029. See also *Houston v. Bartels*, 36 Tex. Civ. App. 498.

¹ Illinois first in 1870; since then, Alabama, Arkansas, California, Colorado, Georgia, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia, and Wyoming. *Post*, §§ 1684-1686, where the language of the consti-

tutional provisions of amendments, referred to in the text, is given, and the principal decisions thereon are cited.

² *Post*, § 1686, and notes.

³ Under the *Pennsylvania* constitutional provision, compensation for *damage* to property is *not limited to abutting property only*, but must be paid when any municipal or public works are sufficiently near to make the injury to the property proximate, immediate, and substantial. *Mellor v. Philadelphia*, 160 Pa. St. 614; *Robbins v. Scranton*, 217 Pa. 577.

⁴ "The word 'property' is used in so many senses as to be nearly useless for juristic purposes." Digby *Hist. Real Property* (2d ed.), p. 266. Austin enumerates the principal of these. 2 *Austin Jurisp.* (5th ed.) 789, 805-820. Its substantial meaning, as used in the

and its meaning was not defined in the eminent domain clause of the Constitutions. A large class of decisions, construing the word "property" as there used, limited the owner's rights to the *corpus* of the soil within the exterior limits of his lot. In cases where the fee of the street or highway was in the public, and not in the abutter, such decisions were very numerous. These decisions overlooked the fact that, in legal conception, land or the soil is not property but the subject of property. They overlooked the fact that an easement or an incorporeal right annexed to land is as much property as the right to the land itself. In either case, the lawyer is concerned with the nature of the *rights*, and not of the property or thing which is the subject of those rights. Property is that congeries of rights secured by law in and over land or other thing, which in the aggregate constitute the owner's title thereto, his ownership, his right of user and enjoyment, and his right of disposition, as against competing claims on the part of others.¹ For example, an *abutting owner's*

amended eminent domain clauses of the recent Constitutions, is, however, not difficult of ascertainment.

¹ Mr. Digby (History of the Law of Real Property, 2d edition, p. 270, note, puts this matter in a very clear light: —

"The division of hereditaments into corporeal and incorporeal, though deeply rooted in our legal phraseology, is most unfortunate and misleading. The confusion is inherited from the Roman lawyers (see Justinian, Inst. ii. tit. 2), but has been made worse confounded by our own authorities. Following the Romans, our lawyers distinguished between hereditaments as meaning the actual corporeal land itself, and another kind of hereditaments as not being the land itself but 'the rights annexed to or issuing out of the land.' A moment's reflection is sufficient to show that the distinction is untenable. The lawyer has nothing whatever to do with the material corporeal land, except so far as it is the subject of rights. It is the distinction between different classes of rights, and not between land on the one side and rights on the other, that he is concerned with. In such phrases as 'the land descends to the heir,' what is meant is, not that something happens to the land itself, but that a particular class of the ancestor's rights in relation to the land descends to the heir. The names 'corporeal and incorporeal' are most unfortunate, because if by 'corporeal' is meant 'relating to land,' then a large class of incorporeal heredita-

ments are also entitled to the name; if by 'incorporeal' is meant that they are mere rights, then all hereditaments are incorporeal, because the lawyer is only concerned with different classes of rights. In reality, however, it appears that the names point to different classes of rights; and in fact, Stephen, in his edition of Blackstone (5th ed., vol. i. p. 656), almost confines incorporeal hereditaments to *jura in alieno solo*. Austin Jurisp. ii. 707, 708." See also Rigney v. Chicago, 102 Ill. 64, 77, *per Mulkey, J.*, and Pause v. Atlanta, 98 Ga. 92, where the subject is discussed. 2 Austin Jurisp. Lectures, 48, 49, 50, 51; 3 Bentham Works (Edinburgh) (1843), p. 22; Eaton v. B. C. & M. R. R. Co., 51 N. H. 504; Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82.

"One holding an easement in a strip of land as a right of way, merely, sustains no damage in consequence of the taking of the fee for a street. When the fee is taken and maintained as a street by the public authorities, the owner's easement of a way is not impaired, but still exists, as he has all the right of way before enjoyed. No property of his is therefore taken from him and he is deprived of no interest." Allen v. Chicago, 176 Ill. 113; Buffalo v. Pratt, 131 N. Y. 293, 299; *In re 116th Street*, 1 N. Y. App. Div. 436. One having no title to land who has erected buildings thereon as a trespasser held not entitled to recover for the taking of the buildings in condemnation proceedings.

right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. The same may be predicated of other easements or rights annexed to the ownership of the lot itself. When he is deprived of such right of access or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property. When such a right is directly, specially and injuriously, affected by a public improvement, his property is damaged.¹

§ 1017 (587 c). **Same Subject; Meaning of the Word "taken."** — Directly connected with the foregoing consideration is the restricted meaning which a large class of decisions puts upon the word "taken," nothing being considered as a "taking" except a trespass upon or an actual appropriation of the *corpus* of the owner's lot; and hence all other rights connected therewith were subject to unlimited legislative control. Therefore, the legislature might, for example, authorize a railroad company to build and operate its railroad on the streets and highways in front of the abutting owner's lot or land, and even injuriously to change the level or grade of the street or highway, without liability for the damage thereby occasioned.² If the judicial judgments had established that the abutting owner had property rights in streets whether the fee was in him or in the public, such as the right to access and to light and air, or other rights annexed to the lot or land, and that any direct and special injury to such rights was as much a "taking" of "property" as a trespass upon or an appropriation of the lot itself, the necessity for an extension of the constitutional provision would not have existed, and the change under consideration would probably not have been ordained. If the Constitutional Amendments had defined property so as to make the definition embrace, for the purposes of compensation to the

Norris v. Pueblo, 12 Colo. App. 290. *Riparian rights* are property of which the owner cannot be deprived without just compensation. Matter of New York City, 168 N. Y. 134; Mansfield v. Balliett, 65 Ohio St. 451. A contract may be taken under condemnation proceedings. Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685. A clause in a city charter providing for damages in condemnation proceedings to the owner or occupant of "any right or interest claimed in any ground or

improvements" protects a mortgagee. Hagerstown v. Groh, 101 Md. 560.

¹ Owners of lots abutting on and adjacent to a public street of a city, even if not owners of a fee in the street, have the right of access and the right of quiet enjoyment, and such rights are property which may be protected by injunction when invaded without legal authority. Hart v. Buckner, 2 U. S. App. 488, citing text.

² McCullough v. Campbellsport, 123 Wis. 334.

owner, not only the taking of the *corpus*, but injuries to easements or to rights in, or over, or annexed to property, this would have effectuated, and would have been the logical method of effectuating, the end in view, instead of reaching it, not by defining rights, but by ordaining a provision which presupposes the existence of such rights.¹

¹ In *Martin v. Dist. of Columbia*, 205 U. S. 135, it is said that the question whether property is "taken" within the meaning of the constitution is one of degree, Mr. Justice *Holmes* remarking, "Constitutional rights, like others, are *matters of degree*. To illustrate: Under the police power in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make the limit five feet would require compensation and a taking by eminent domain."

The meaning of the word "taken" has recently undergone discussion by the Supreme Court of the United States in the case of *United States v. Lynah*, 188 U. S. 445. In this case, the result of erection of certain dams, training walls, and other obstacles in the bed of the Savannah River was to cause the waters of the river to be kept back and to flow back upon the plaintiff's lands. It appeared that both by seepage and percolation through the embankment, and an actual flowing upon the plaintiff's plantation above the obstruction, the water had been raised in the plantation about eighteen inches. It was impossible to remove this overflow of water, and as a consequence the property had become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture and deprived of all value. The court held that the property of the plaintiff was taken on the authority of *Pumpelly v. Green Bay & Miss. Canal Co.*, 13 Wall. (U. S.) 166. After referring to that and other cases, Mr. Justice *Brewer* said: "It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done, it is of little consequence in whom the fee may be vested. Of course it results from this that the proceeding must be re-

garded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title and fee with whatever rights may attach thereto, — in this case those at least which belong to a riparian proprietor, — pass to the government and it becomes henceforth the sole owner." The overflow of land to a minor extent was held *not to constitute a taking* of property within the meaning of the law, when damage could be prevented by raising the banks. *Manigault v. Springs*, 199 U. S. 473. In *Bedford v. United States*, 192 U. S. 217, it was held that damages to land by flooding as the result of revetments erected by the United States along the banks of the Mississippi River to prevent erosion of the banks from natural causes were consequential and *did not constitute a taking* of the lands flooded within the meaning of the Fifth Amendment to the Federal Constitution. See further as to the meaning of the word "taken," *Union Bridge Co. v. United States*, 204 U. S. 364; *Scranton v. Wheeler*, 179 U. S. 141, 153, 162; *Gibson v. United States*, 166 U. S. 269, 271.

In *Massachusetts*, it has been held that when the legislature authorizes something to be done in the neighborhood of a person's lands which diminishes its value, but which would not be actionable if done by a neighboring owner, if the statute provides no compensation, the owner of the land cannot claim any under the Constitution, because what is done does not amount to a taking; and even if the thing authorized would be actionable at common law and a nuisance but for the statute, still it is not necessarily a taking. *Lincoln v. Commonwealth*, 164 Mass. 368. See also *Rand v. Boston*, 164 Mass. 354; *McSweeney v. Commonwealth*, 185 Mass. 371. A statute authorizing a city to take land and construct works for treating sewage and freeing the same from noxious and offensive matters and providing compensation for land so taken, does not authorize the city to

§ 1018 (587 d). **Same Subject; Scope and Purpose of the Amendment.** — The words "*injured or damaged*," found as they are in the eminent domain clause relating to the taking or appropriation of property for public use, as well as the history of the origin and cause of this provision, and a consideration of the mischief intended to be remedied, show that it was *not* the intention of the Constitutional Amendment to create a right and to *give a remedy in all cases of consequential damage* which may result from the exercise of legislative power in making public improvements, or even from the appropriation of private property or for injuries to private property for public use. A city, for example, under legislative authority, might condemn land for the purpose of establishing a hospital thereon or a prison, which, if established, would have the consequential effect to injure or depreciate the market or actual value of property in the neighborhood. Such injuries, however, would not, in our judgment, be within the Constitutional Amendment. This amendment must, as it seems to us, be limited to cases where the *corpus* of the owner's property itself, or some appurtenant right or easement connected therewith or by the law annexed thereto, is directly (that is, in general, if not always, physically) affected, and is also specially affected (that is, in a manner not common to the property owner and to the public at large); and such direct and special injury must be such as to depreciate the value of the owner's property. These elements concurring, his property is "damaged" within the meaning of the Constitutional Amendment, and to the extent of such diminished value beyond the damages sustained by the public at large from the improvement, the property owner is, we think, under the Constitutional Amendment, entitled to compensation. It may, perhaps, be premature to affirm that the meaning of the word "damaged," as used in the recent Constitutional Amendments, is absolutely confined to cases where the common law would have given a remedy for injuries to property or property rights, if the legislative authority to do the act which caused the damage had not, aside from such Constitutional Amendment, deprived, or been previously construed to deprive, the owner of his right to compensation therefor; and yet such is, in our judgment, its main, if not exclusive, purpose and effect.¹

create a serious nuisance to the neighboring estate of a private owner by offensive odors and filthy percolations into and through the soil; and such a nuisance, if created, does not constitute a taking of such neighboring estate, compensation for which must be sought

under the statute, but recovery therefor may be had in an action of tort for damages. *Bacon v. Boston*, 154 Mass. 100.

¹ The views expressed in the text are substantially coincident with those of the Supreme Court of Illinois in *Rigney*

§ 1019 (588). **Power as applicable to Private Corporations.**—The following propositions more immediately applicable to private corporations, are well supported by adjudged cases and seem to be founded on sound principles:—

1. That the legislature may, in the exercise of the right of eminent domain, deprive corporations of their property and franchises upon making compensation; but this can be done only under power to that end specially or expressly granted.¹

v. Chicago, 102 Ill. 64, which were approved by the Supreme Court of the United States in *Chicago v. Taylor*, 125 U. S. 161, and in *Frazer v. Chicago*, 186 Ill. 480. In the latter case it was held that the establishment of a *smallpox hospital*, rightly located and well conducted, did not constitute a *taking or damaging* of private property for public use, within the meaning of the Constitution. See also *Pause v. Atlanta*, 98 Ga. 92 (which follows *Rigney v. Chicago*, 102 Ill. 81, and where the subject is discussed), and *Mansfield v. Balliett*, 65 Ohio St. 451, holding that any actual and material interference by a city with riparian rights, as by a *discharge of sewage into a natural water course*, causing a special and substantial injury to the owner, is a taking of his property. *Post*, §§ 1684–1686.

"The English courts," says *Mulkey, J.*, in *Rigney v. Chicago* (102 Ill. 64, 81), "in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language [property injuriously affected] is substantially the same as that in our present Constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. *Chamberlain v. West End L. & C. P. R. Co.*, 2 Best & Smith, 605; 110 E. C. L. R. 604; *Ib.* 617; *Beckett v. Midland R. Co.*, L. R. 3 C. P. 82; *s. c.* L. R. 1 C. P. 241; on appeal 3 C. P. C. 82; *McCarthy v. Metropolitan Board of Works*, L. R. 7 C. P. C. 508. These statutes required compensation to be made where property was 'injuriously affected,' which words the English courts construe as synonymous with the word 'damaged.' *Hall v. Bristol*, L. R. 2 C. P. C. 322; *East & West India Docks Co. v. Gattke*, 3 MacN. & G. 155." See also *New River Co. v. Johnson*, 2 E. & E. 435; 105 E. C. L. R. 434; *Rickett's Case*, 2 Eng. & Ir. App. 175; *Queen v. Eastern Counties Ry. Co.*, 2 Q. B. 347; 42 E. C.

L. R. 706; *Queen v. Great Northern Ry. Co.*, 14 Q. B. 25; 68 E. C. L. R. 24; *Glover v. No. Staffordshire Ry. Co.*, 16 Q. B. 912; *Wood v. Stourbridge Ry. Co.*, 16 C. B. n. s. 222; *Eagle v. Charing Cross Ry. Co.*, L. R. 2 C. P. C. 638; *Queen v. Vestry of St. Luke's*, L. R. 6 Q. B. C. 572. *Columbia Del. Bridge Co. v. Geisse* (construing words "may be injured"), 35 N. J. L. 558; *Ashby v. White*, 1 Smith's L. Cas. 264.

As to what is a "taking," and the construction of recent constitutional provisions giving a right to compensation for property "injured" or "damaged," as well as for property "taken," see *post*, §§ 1151, 1677, 1680, and notes, 1684–1686, and notes. See also *Wulzen v. San Francisco*, 101 Cal. 15. The word "damaged" in *Nebraska Constitution* construed and rule for recovery therefor laid down, see *Mason City & F. D. R. Co. v. Wolf*, 148 Fed. Rep. 961; *Stehr v. Mason City & F. D. R. Co.*, 77 Neb. 641; 110 N. W. Rep. 701; *Gillespie v. South Omaha*, 79 Neb. 441; 112 N. W. Rep. 582.

¹ *West River Br. Co. v. Dix*, 6 How. (U. S.) 507; *Leeds v. Richmond*, 102 Ind. 372; *Backus v. Lebanon*, 11 N. H. 19; *New York Central & H. R. R. Co. v. Met. Gaslight Co.*, 63 N. Y. 326, 334; *Rochester Water Com'rs, In re*, 66 N. Y. 413, 418, *per Allen, J.*; *Buffalo, In re*, 68 N. Y. 167; *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552; *N. Y., L. E. & W. R. Co., In re*, 99 N. Y. 388; *South Western State Normal School*, 26 Pa. Super. Ct. 99; *Mills, Em. Dom.* §§ 41, 42, 46; *Lewis Em. Dom.* § 274. Instances of *express statutory authority* depriving railroad corporations of their property will be found in the following cases: *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586; *Chicago & N. W. R. Co. v. Chicago*, 151 Ill. 348; *Chicago, & N. W. R. Co. v. Morrison*, 195 Ill. 271; *Powell v. Greensburg*, 150 Ind. 148.

2. If a corporation holds lands or property as a private proprietor and not for public uses, this may be taken under the power of eminent domain the same as if owned by an individual.¹

3. But lands held by a corporation upon a special trust for public use, and thus used, cannot be compulsorily appropriated to another public use without special or clear authority from the legislature.²

4. And hence a corporation cannot, under a *general power* to condemn property for public use, take from another corporation having like power property held by it, under legislative authority, for public purposes, although it may, it seems, under such general power, acquire an *easement in invitum* in such property, when this can be done without doing injury to the public, or essentially interfering with the uses for which it was acquired and is held by the corporation which owns it.³

¹ New York Cent. & H. R. R. Co. v. Met. Gaslight Co., 63 N. Y. 326, 334; Mills Em. Dom. § 41, and cases; Lewis Em. Dom. § 267. Land held by a corporation, whether acquired by purchase or by eminent domain, may be condemned for another public use when it is not employed in or needed for the proper exercise of the corporate powers of the corporation which owns it. Cincinnati, S. & C. R. Co. v. Belle Centre, 48 Ohio St. 273. To constitute a prior appropriation of lands to a public use there must be an actual intent to use presently, or in the near future, and that intent must have been manifested and carried out by apt and suitable actions. New Haven Water Co. v. Wallingford, 72 Conn. 293. In Diamond Jo Line Steamers v. Davenport, 114 Iowa, 432, it was held that a steamboat dock and landing owned jointly by an individual and a corporation engaged in the transportation of passengers and property were not invested with a public use, and might be condemned by a city for a public landing place under a general power to condemn for that purpose.

² Boston & A. R. R. Co., *In re*, 53 N. Y. 574; Rochester Water Com'rs, *In re*, 66 N. Y. 413, 418; Matter of Utica, 73 Hun (N. Y.), 256; C. & A. R. R. Co. v. Pontiac, 169 Ill. 155; Augusta v. Georgia R. R. & Banking Co., 98 Ga. 161. A street is a public franchise which cannot be violated except by direct legislative grant. Pennsylvania Ry. Co.'s Appeal, 93 Pa. St. 150; Portland & W. V. R. R. Co. v. Portland, 14 Ore. 188. In this case land which had been *dedicated for a levee or public land-*

ing was taken by a railroad company, under authority of an act of the legislature, for a depot, freight house. &c., and it was held that the grant to the railroad company was not inconsistent with the use to which the land had been dedicated, but was in aid of it, and that the easement of a city in its streets or public places is not private property for which compensation must be given when taken for public use, but is public property, the use whereof may be regulated by the legislature. See post, chapters on Dedication and Streets.

Power to a municipality to *take and use water for water supply* conferred upon it in *general terms* does not authorize it to take waters already appropriated to public use under legislative authority. New Haven Water Co. v. Wallingford, 72 Conn. 293, 302. Thus, under a general grant to condemn land, water, water rights or property for the purpose of a water supply, a city cannot take the water rights of a canal. Van Reipen v. Jersey City, 58 N. J. L. 262. A cemetery, although owned by a private association, is devoted to a public use, and a city cannot, under *general authority* to extend its streets, take a part of the cemetery for street purposes, and this is so although the part sought to be taken is only used for ornamental purposes in connection with the part used for burial purposes. Evergreen Cemetery Assoc. v. New Haven, 43 Conn. 234.

³ Rochester Water Com'rs, *In re*, 66 N. Y. 413, 418. The right of a street railroad company to the use of a street for the purposes of its business is a

§ 1020. **Extension of Streets across Railroads.** — An exception to the general rule that express power to condemn property already devoted to public use is essential, is to be found where *streets are extended across railroad tracks*. Such crossings are a matter of necessity, and the legislature did not contemplate that a city should be divided by a strip of land devoted to use for railroad tracks. The appropriation made by a city in extending a street across a railroad track is subject to the prior use for railroad purposes, and the two uses are not regarded as necessarily inconsistent, but in all ordinary cases may stand together. Hence, it is held that *general authority* conferred upon a city by charter or by statute *to lay out and extend streets* authorizes the extension of streets across the right of way and tracks of a railroad *without an express legislative provision* authorizing the appropriation of railroad property.¹ But general authority to lay out and extend the city streets will not permit the appropriation of railroad property *under circumstances* which are *inconsistent* with the continued use of the property for railroad purposes. Hence, such a general authority will not authorize a city to lay out a street *longitudinally* along the right of way of a railroad,² or through a

property right, subject to condemnation for public use; and the legislature may authorize other persons, either natural or artificial, to do a similar business in the same street, or to use the tracks of the company, by making compensation to it whenever, in their judgment, the public good requires. The State, in the exercise of the right of eminent domain, or a corporation to which it has delegated the right, *is not bound to take the entire estate*, and strictly should take only such an interest as is necessary to be acquired to accomplish the public purpose in view. Sixth Av. R. Co. v. Kerr, 72 N. Y. 330; Lewis Em. Dom. § 267 *et seq.*, and cases.

¹ St. Louis & S. F. R. Co. v. Fayetteville, 75 Ark. 534; Bridgeport v. New York & N. H. R. Co., 36 Conn. 255; Poulan v. Atlantic C. L. R. Co., 123 Ga. 605; Chicago & N. W. R. Co. v. Chicago 148 Ill. 141; Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 457; Chicago & N. W. R. Co. v. Cicero, 154 Ill. 656; Chicago, & N. W. R. Co. v. Cicero, 155 Ill. 51; Lake Erie & W. R. Co. v. Kokomo, 130 Ind. 224; Ft. Wayne v. Lake Shore & M. S. R. Co., Ind. 132 558, 565; Chicago, M. & St. P. R. Co. v. Starkweather, 97 Iowa, 159; Albia v. Chicago, B. & Q. R. Co., 102 Iowa, 624; Boston & A. R. Co. v. Boston, 140 Mass. 87; East-

hampton v. Hampshire, 154 Mass. 424, 425; Detroit Park Com'rs v. Michigan Cent. R. Co., 90 Mich. 385; Detroit Park Com'rs v. Detroit, G. H. & M. R. Co., 93 Mich. 58; St. Paul, M. & M. R. Co. v. Minneapolis, 35 Minn. 141; Fohl v. Sleepy Eye Lake, 80 Minn. 67; Minneapolis & St. L. R. Co. v. Hartland, 85 Minn. 76; Hannibal v. Hannibal & St. J. R. Co., 49 Mo. 480; New York & L. B. R. Co. v. Drummond, 46 N. J. L. 644; Little Miami, C. & X. R. Co. v. Dayton, 23 Ohio St. 510.

Under general authority to lay out and extend streets a *diagonal crossing* may be effected. Chicago, B. & Q. R. Co. v. Chicago, 149 Ill. 464. But it has been said that the rule permitting the extension of streets across railroad tracks under a general authority to lay out and extend streets, &c., has its limitations, and that a crossing cannot be effected under such a power, when the *street will prevent the railroad* from using its tracks at the crossing. Ft. Wayne v. Lake Shore & M. S. R. Co., 132 Ind. 558. Under a general authority to construct sewers, &c., a city may lay a *sewer* under railroad tracks. Matter of Gloversville, 42 N. Y. Misc. 559. See also Steele v. Empsom, 142 Ind. 397, 406.

² Bridgeport v. New York & N. H.

depot or station building,¹ or through grounds used for depot or station purposes or for freight yards.²

§ 1021. **Same Subject; Measure of Compensation.** — Although there are decisions to the effect that streets or highways may be

R. Co., 36 Conn. 255; Athens Terminal Co. v. Athens Foundry & Mach. Works, 129 Ga. 393; Seymour v. Jeffersonville, M. & I. R. Co., 126 Ind. 466; Ft. Wayne v. Lake Shore & M. S. R. Co., 132 Ind. 558; Union Pac. R. Co. v. Kindred, 43 Kan. 134; Easthampton v. Hampshire, 154 Mass. 424, 425; New Jersey & S. R. Co. v. Long Branch, 39 N. J. L. 28.

The commissioners of highways cannot, under general power to lay out highways, lay out a *highway longitudinally* over a turnpike road. West Boston Bridge v. Middlesex County, 10 Pick. (Mass.) 269. But in Northern Ohio R. Co. v. Hancock County, 63 Ohio St. 32, it was held that a *county ditch* may be located longitudinally on the right of way of the railroad unless it appears that the proper use of the right of way is thereby defeated.

¹ Milwaukee & St. P. R. Co. v. Fairbault, 23 Minn. 167; St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359. Express authority to extend a highway across railroad tracks does not authorize the laying out of the highway through an engine house; Albany Northern R. Co. v. Brownell, 24 N. Y. 345; or across property used for storage yard or for depot purposes, People v. N. Y. Cent. & H. R. R. Co., 156 N. Y. 570; Prospect Park & C. I. R. Co. v. Williamson, 91 N. Y. 552; Rochester & H. V. R. Co. v. Rochester, 17 N. Y. App. Div. 257. In Atlanta v. Central R. & B. Co., 53 Ga. 120, where land had been granted by the State to the railroad for use for the erection of carshops and other buildings, but the title remained in the State, it was held that a street could not be extended through the shops. The fact that the land was owned by the State was considered in conjunction with its use for railroad purposes.

² Chicago, R. I. & P. R. Co. v. Williams, 148 Fed. Rep. 442; Augusta v. Georgia R. & B. Co., 98 Ga. 161; Valparaiso v. Chicago & G. T. R. Co., 123 Ind. 467; Lake Erie & W. R. Co. v. Kokoma, 130 Ind. 224; Ft. Wayne v. Lake Shore & M. S. R. Co., 132 Ind.

558; Cincinnati, W. & N. R. Co. v. Anderson, 139 Ind. 490; Terre Haute v. Evansville & T. H. R. Co., 149 Ind. 174; Boston & A. R. Co. v. Cambridge, 166 Mass. 224; Paterson & R. R. Co. v. Paterson, 72 N. J. L. 112; New York, S. & W. R. Co. v. Paterson, 61 N. J. L. 408; Winona & St. P. R. Co. v. Watertown, 4 S. Dak. 323. See also Boston & A. R. Co. v. Greenbush, 52 N. Y. 510.

But the right to do so has been sustained when it appears that the taking of the railroad property for street purposes does not deprive the company of the right to operate its trains, although it may interfere therewith. Chicago, M. & St. P. R. Co. v. Starkweather, 97 Iowa, 159; Battle Creek & S. R. Co. v. Tiffany, 99 Mich. 471. See also Winona & St. P. R. Co. v. Watertown, 4 S. Dak. 323. In Illinois it has been held that power, by condemnation or otherwise, to extend any street over or across "any railroad track, right of way, or land of any railroad company, within the corporate limits," authorizes the extension of a street across the tracks and yard of a railroad. Illinois Central R. Co. v. Chicago, 141 Ill. 586; Chicago & N. W. R. Co. v. Chicago, 151 Ill. 348; Chicago & A. R. Co. v. Pontiac, 169 Ill. 155, 163. See to the same effect, Terre Haute v. Evansville & T. H. Co., 149 Ind. 174; Grafton v. St. Paul, M. & M. R. Co., 16 N. Dak. 313; 113 N. W. Rep. 598. The fact that the extension of a street will deprive a railroad company of the use of its track for storing cars does not prevent the city from acquiring the necessary right to cross by condemnation, nor does the fact that the extension will necessitate the removal of an oil house and the construction of additional platform space. Chicago & N. W. R. Co. v. Morrison, 195 Ill. 271; Chicago & N. W. R. Co. v. Chicago, 151 Ill. 348; Chicago & A. R. Co. v. Pontiac, 169 Ill. 155. But a way may be located over the lands of a railroad company *outside of its track or right of way*, e. g., lands acquired for use as a gravel pit. Eldridge v. Norfolk County, 185 Mass. 186.

opened across railroad tracks without compensation to the railroad company,¹ the general and perhaps better view, where not controlled by statute, would seem to be and the statutes often expressly require that *compensation be made to the railroad company* for the property taken thereby.² In a proceeding to acquire by condemnation the right to lay a street or highway across a railroad track, the *measure of damages or compensation* to the railroad company, if a liability therefor exists, is in the *decrease in value* of its exclusive right to the use of the land for railroad purposes, caused by its being used as a street, the uses being exercised jointly.³ A diversity of opinion has arisen in the courts as to the right to compensation for the *expense of erecting gates, cattle guards, and other structures and appliances* for the protection of the public in using a grade crossing. In some jurisdictions it is held that a railroad company takes its right of way subject to the right of the public to extend public streets and highways across the right of way. If railroads, so far as they are public highways, are like other highways subject to legislative supervision, then railroad companies in their relations to highways and streets which intersect their rights of way are subject to the control of the police power of the State. Therefore, the requirement that railroad companies shall construct and maintain the highways and

¹ In *New York* it has been held that a statute which authorizes the construction of highways across railroad tracks without compensation to the railroad company does not violate the constitutional provisions against the taking of private property for public use without compensation or impair the obligation of contracts. *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Boston & A. R. Co. v. Greenbush*, 5 Lans. (N. Y.). 461, aff'd 52 N. Y. 510; *Delaware & H. Canal Co. v. Whitehall*, 90 N. Y. 21. See also *People v. Boston & A. R. Co.*, 70 N. Y. 569.

² *Savannah v. Vernon Shell Road Co.*, 88 Ga. 342; *Vernon Shell Road Co. v. Savannah*, 95 Ga. 387; *Poulan v. Atlantic C. L. R. Co.*, 123 Ga. 605, 608. A statutory provision requiring a railroad company to construct crossings where the railroad crosses "public roads or town streets now or hereafter to be opened for public use" does not confer authority upon municipalities by ordinance to open a street across a railroad right of way without condemnation proceedings unless there has previously been a legal dedication of the street across the right of way. *St.*

Louis & S. F. R. Co. v. Gordon, 157 Mo. 71.

³ *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, aff'd 166 U. S. 226; *Chicago, B. & Q. R. Co. v. Naperville*, 166 Ill. 87; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155; *Grafton v. St. Paul, M. & M. R. Co.*, 16 N. Dak. 313; 113 N. W. Rep. 598; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418.

In determining the damages, where there is a liability therefor, the following elements, it has been held, may be considered: any increase in the cost of transacting the railroad company's business, and loss through interruption of the same, occasioned by the opening of a street, *Chicago, B. & Q. R. Co. v. Naperville*, 166 Ill. 87; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155; that the opening of the street will render the railroad premises unavailable for use as a freight depot, to which use they were peculiarly adapted, and that there is no other property available for the purpose, *Chicago & N. W. R. Co. v. Cicero*, 154 Ill. 656; that the opening of the street will prevent storing cars on the tracks, *Chicago & N. W. R. Co. v. Morrison*, 195 Ill. 271.

street crossings and the approaches thereto within their respective rights of way is *nothing more than a police regulation*, and items of expense for constructing and maintaining the crossings, such as erecting gates, planking the crossing, and maintaining flagmen, in order that the road may be safely operated are to be regarded as incidental to the exercise of the police power of the State and are to be borne by the company by virtue thereof, without compensation from the city.¹ But in other jurisdictions it would seem that for such matters the railroad company is entitled to compensation;²

¹ *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, aff'g 149 Ill. 457; *New York & N. E. R. Co. v. Waterbury*, 60 Conn. 1; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309; *Lake Shore & M. S. R. Co. v. Chicago*, 148 Ill. 509, 519; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155; *Chicago & N. W. R. Co. v. Morrison*, 195 Ill. 271; *Chicago, B. & Q. R. Co. v. People*, 212 Ill. 103, 115; *Albia v. Chicago, B. & Q. R. Co.*, 102 Iowa, 624, 629; *Portland & R. R. Co. v. Deering*, 78 Me. 61; *Boston & M. R. Co. v. York County*, 79 Me. 386; *Grafton v. St. Paul, M. & M. R. Co.*, 16 N. Dak. 313; 113 N. W. Rep. 598; *Lake Shore & M. S. R. Co. v. Sharpe*, 38 Ohio St. 150. See also *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527, aff'd *sub. nom.* *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556; *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412.

Nebraska. When a highway is opened across a railroad track, the company is entitled to receive compensatory and not merely nominal damages for the interference with its right of way; but cannot recover for the cost of cattle guards, sign posts, wing fences, planking the track, and constructing the necessary approaches. *Missouri Pac. R. Co. v. Cass County*, 76 Neb. 396.

When a city has at the time of condemnation no power to compel the railroad company to construct the crossing and keep it in repair as a *police regulation*, the fact that the legislature can confer this authority at any time and can compel the company without compensation to construct and keep in repair either an overhead or a grade crossing, is not to be considered as an element of damage. *St. Louis & S. F. R. Co. v. Fayetteville*, 75 Ark. 534.

² *Massachusetts.* In *Old Colony & F. R. R. Co. v. Plymouth County*, 14 Gray (Mass.), 155, it was held that

on the opening of a highway across a railroad, the railroad corporation is entitled to compensation not only for the land taken, but also for the expense of erecting and maintaining gates and cattle guards and of flooring the crossing and keeping it in repair, but not for increased liability to accident, or for increased expense of ringing the bell, or for its liability in the future to be ordered to bridge the track. In *Boston & A. R. Co. v. Cambridge*, 159 Mass. 283, where a statute provided that when a way is laid across an existing railroad, "all expenses of and incident to constructing and maintaining the way at such crossing shall be borne by the county, city," or town, it was held that the railroad company was entitled to the expense of making and maintaining planking, paving, cattle guards, fences, sign boards, posts, gates, and gate house, but not for the cost of operating the gates. It is to be observed that the statute under which the crossing was constructed in this case was enacted after the decision of *Old Colony & F. R. R. Co. v. Plymouth County*, 14 Gray (Mass.), 155, referred to *supra*. See also *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124, 126.

Kansas. In this State it is held that the railroad company is entitled to compensation for the expense of constructing cattle guards and such other things as the statute requires to be constructed in making the crossing. *Kansas Cent. R. Co. v. Jackson County*, 45 Kan. 716; *Greenwood County v. Kansas City, E. & S. K. R. Co.*, 46 Kan. 104; *Atchison, T. & S. F. R. Co. v. Osage County*, 48 Kan. 576; *Chicago, K. & W. R. Co. v. Chautauqua County*, 49 Kan. 763; *Southern Kan. R. Co. v. Johnson County*, 52 Kan. 138.

Michigan. When a new highway is laid out the rule is adopted that it

whilst in still other jurisdictions the courts appear to have attempted to *adopt a modified view* which entitles the railroad company to *compensation for structural changes*, but *not* for safety appliances such as cattle guards, crossing gates, flagmen, bells, and other things required for the safety of the public. It is to be noted, however, that the courts are not in accord as to what are to be regarded as structural changes and what are to be treated as safety appliances.¹

belongs to those who lay it out to bear the expense of making the crossing in such condition as is necessary to meet all the danger which it occasions. *Per Campbell, C. J.*, in *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507. See also *People v. Lake Shore & M. S. R. Co.*, 52 Mich. 277; *Grand Rapids v. Grand Rapids, & I. R. Co.*, 58 Mich. 641; s. c. 66 Mich. 42; *People v. Detroit, G. H. & M. R. Co.*, 79 Mich. 471, 475; *Detroit v. Detroit, G. H. & M. R. Co.*, 112 Mich. 304. Hence, compensation must be made to the railroad company for the expense of erecting safety crossing gates, *Detroit Park Com's v. Michigan Cent. R. Co.*, 90 Mich. 385; *Detroit Park Com's v. Detroit, G. H. & M. R. Co.*, 93 Mich. 58; *Detroit Park Com's v. Chicago, D. & C. G. T. R. Co.*, 91 Mich. 291; also for the expense of constructing, maintaining, and operating a gate or tower, if necessary, *Grand Rapids v. Bennett*, 106 Mich. 528; and for all structural changes, and flagman or gates or cattle guards, but not for cutting trains to avoid obstructing the crossing. *Plymouth v. Pere Marquette R. Co.*, 139 Mich. 347, 349. See also *Gage v. Pittsfield*, 120 Mich. 436. Under the Michigan drainage statutes, the drainage authorities cannot impose upon the railroad company the expense of building and maintaining a culvert for a drain crossing the right of way. *Chicago & G. T. R. Co. v. Chappell*, 124 Mich. 72.

Missouri. In this State it has been held that the damages to the railroad company should include the diminution in the value of the land and the expense of building cattle guards, fences, &c. *Kansas City v. Kansas City B. R. Co.*, 102 Mo. 633. See also *St. Louis & S. F. R. Co. v. Gordon*, 157 Mo. 71, 80. But compare *Kansas City v. Kansas City B. R. Co.*, 187 Mo. 146, where it was held that by accepting an ordinance whereby it agreed to pave between the tracks at any street

crossing then existing or thereafter laid out, the railroad company had agreed to assume this obligation and could not recover compensation therefor. See to the same effect, *Southern Kan. R. Co. v. Oklahoma City*, 12 Okla. 82, 95.

¹ *Maryland.* In this State it is held that the railroad company is to be compensated for *structural changes*, but *not* for cattle guards, crossing gates, flagmen, bells, and other things required for the safety of the public. The latter are duties imposed by the police power of the State. *Northern Cent. R. Co. v. Baltimore*, 46 Md. 425; *Eyler v. Alleghany County*, 49 Md. 257; *Baltimore v. Cowen*, 88 Md. 447; *Central R. Co. v. Philadelphia*, 95 Md. 428, 438. The compensation for structural changes should be sufficient to pay for the permanent maintenance and renewing of the crossing. *Baltimore & O. R. Co. v. Baltimore*, 98 Md. 535.

Minnesota. In this State the railroad company is to be compensated for grading and planking the crossing, but not for cattle guards and crossing signs. *State v. Shardlow*, 43 Minn. 524; *State v. Hennepin County Dist. Ct.*, 42 Minn. 247.

New Jersey. It has been held that an ordinary crossing is not inconsistent with the use of the railroad tracks and for the crossing itself nominal damages may be sufficient, but *changes in buildings and structural changes* must be compensated for. But under this rule the railroad company is not entitled to compensation for the expense of planking between the tracks and maintaining the same, or for the expense of erecting gates, sign boards, cattle guards, and the like. *Morris & E. R. Co. v. Orange*, 63 N. J. L. 252 (overruling *Central R. Co. v. Bayonne*, 51 N. J. L. 428). See also *Paterson, N. & N. Y. R. Co. v. Nutley*, 72 N. J. L. 123.

Wisconsin. The railroad company is entitled to compensation for the

§ 1022. **Lands of Municipality devoted to Public Use.** — The same principle above stated which excepts the property of railroads and other corporations from condemnation under a power of eminent domain conferred in *general* terms, and not expressly made applicable to property already devoted to public use, *applies to and protects the property of the municipality* which is held by it for public purposes from condemnation by other corporations. The general rule may be laid down that if the taking of these lands will substantially affect the use to which they are applied, they cannot be condemned by virtue of a *general* authority to acquire property by eminent domain.¹ But even under general authority to acquire property by eminent domain, it has been held that certain public property of a municipality may, under circumstances, be taken for another public use *when the necessities of the second and later use* and the due protection of the public interests require that the prior use yield to some extent.²

diminished value of its easement and to the cost of structural changes, *i. e.*, for *planking the track and maintaining the same*, but not for the construction and maintenance of crossing gates. *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418.

¹ A railroad company under a mere general authority cannot locate its track through a thirty acre lot *acquired by a city for a reservoir*. *Jersey City v. Montclair R. Co.*, 35 N. J. L. 328. In *Easthampton v. Hampshire*, 154 Mass. 424, 425, *Holmes, J.*, said: "It would be a strong thing to say that, without special circumstances, county commissioners or other like officers, acting under *general* powers, could lay out a public highway through a public reservoir, so as to ruin it." Power conferred upon drainage commissioners to take riparian rights, rights of flowage and water powers, construed to have reference to *private* lands, and not to the rights of the public in navigable streams. Hence, drainage commissioners may not by virtue of this power impair the use of navigable rivers. *In re Horicon Drainage Dist.*, 136 Wis. 227; 116 N. W. Rep. 12. See also *In re Dancy Drainage Dist.*, 129 Wis. 129.

It is a general principle that *lands belonging to the State* are not affected by a statutory provision unless expressly included therein. "The taking of *private* property only is authorized by statutes providing for the

exercise of the power of eminent domain, unless there is express or clearly implied authority to extend them to the *public* property." *State v. Boone County*, 78 Neb. 271; 110 N. W. Rep. 629; *State v. Chelan County Superior Ct.*, 36 Wash. 381. Hence *tide lands belonging to the State* cannot be appropriated under a general power. *Seattle & M. R. Co. v. State*, 7 Wash. 150. See also *North River Boom Co. v. Smith*, 15 Wash. 138; *Samish Boom Co. v. Callvert*, 27 Wash. 611, 614; *State v. King County Super. Ct.*, 31 Wash. 445, 452.

² In *Easthampton v. Hampshire*, 154 Mass. 424, it was held that county commissioners might, under general authority, take a strip of land from a school-house lot for a town way, where the use of the lot for school purposes, though considerably impaired, would not be wholly prevented. *Holmes, J.*, said: "We must consider the relative importance and the necessities of the two uses generically, the extent of the harm to be done, accept any light that history may throw, and make up our minds under all the circumstances of the particular case as best we can. . . . When it is considered that very large tracts of land often are appropriated to school purposes, it is impossible to accept an unqualified rule that no part of such land can be taken for a way under any circumstances without an express enactment." See also *Rominger v. Simmons*, 88 Ind. 453, where

§ 1023 (589). **What may be taken or condemned.** — As the *legislature is the sole judge of the public necessity* which requires or renders expedient the exercise of the power of eminent domain without the owner's consent, so it is the exclusive judge of the *amount of land* and of the *estate in land* which the public end to be subserved requires shall be taken. But as the right originates in necessity, so it is limited by it. The principle and its limitations have found interesting illustrations in cases which we shall notice, arising under powers conferred upon municipalities to enable them to execute certain public purposes. The legislature has the constitutional power expressly to authorize a municipal corporation *compulsorily* to acquire *the absolute fee simple* to lands of private persons, required for public use, upon the payment of a just compensation.¹ Ac-

it appears to be held that real estate and buildings held by a school township for school purposes may be subject to appropriation for highways in the same manner as other private property. In *Boston v. Brookline*, 156 Mass. 172, it was held that land devoted to one public use may, by general authority given to cities and towns, or county commissioners, be taken for another public use, provided that such taking does not impair or interfere with, and is not inconsistent with, the public use already existing. Hence, a town may lay out a way over lands taken by a city for its water pipes, the two uses not being inconsistent and not interfering with each other.

In *California* there is an express statutory provision authorizing the condemnation of lands of the State, or of a city, county, village, or town, and of property appropriated to public use, "but such property shall not be taken unless for a *more necessary public use* than that to which it has already been appropriated." Under this statute, a water company supplying water to the inhabitants of a county may, when it has the title to lands subject to the easement of a public road therein, condemn part of such road for the construction and maintenance of a dam and reservoir where it appears that such use thereof is a more necessary public use than that to which the road is already appropriated. *Marin County Water Co. v. Marin County*, 145 Cal. 586. So also a railroad company may condemn a right of way over lands which are already subject to public use for levee

purposes. *Reclamation Dist. v. Sacramento Super. Ct.*, 151 Cal. 263.

When the public works of a municipality are taken for another public use, the situation may be such as to call for the application of special rules in assessing compensation. Thus where a part of the sewer system of a town was taken by the United States, it was held proper to permit the town to show the cost of restoring its sewer system to the state of its original efficiency of circulation. *United States v. Nahant*, 153 Fed. Rep. 520. Where a city has acquired real estate for any of its public purposes, and thereafter it proceeds to lay out a street, and for that purpose takes a portion of the real estate which it has so acquired, the legislature may provide that the city shall be entitled to damages or compensation for the loss which the city may sustain thereby, to the end that such loss, instead of being borne by the general taxpayers of the city, shall be paid by an assessment upon the property benefited by the street. *Matter of New York City (Van Cortlandt Ave.)*, 186 N. Y. 237.

¹ *Heyward v. New York*, 7 N. Y. 314, aff'g 8 Barb. (N. Y.) 486; distinguished from *Embury v. Conner*, 3 N. Y. 511, where an *unnecessary amount* was sought to be taken; s. p. *Dingley v. Boston*, 100 Mass. 544; *Tyler v. Hudson*, 147 Mass. 609; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *Matter of New York City*, 190 N. Y. 350; *Fairchild v. St. Paul*, 46 Minn. 540, citing text; so in *North Carolina* it is held that the legislature may authorize not simply the use, but the *entire interest* of the owner

cordingly a statute "to enable" a city "to abate a nuisance and for the preservation of the public health," which authorized the city to "purchase or otherwise take lands" within a large district, on payment of damages to the owners, and which directed the city to raise and drain the same, so as "to abate the present nuisance thereon," and declaring, further, that the "title to all land so taken shall vest in the city," was held to *vest the fee* of such lands in the city, and was not unconstitutional because it authorized the taking of a greater interest in the land than was necessary, nor as an attempt to exercise judicial power.¹ To land, the fee simple of which is thus acquired by a municipal corporation, the title is perfect, and it does not revert when sold by the corporation, or when the public good, in the opinion of the corporate authorities, requires the land to be used for other purposes than those for which it was originally obtained.² Thus property was appropriated in fee by the State, through its canal commissioners, for the purposes of a canal. Subsequent statutes gave to a city corporation power to enter upon a portion of the appropriated premises, and occupy the same "as a

to be taken for public use, if it deems the public exigency to require it. *Raleigh & G. R. Co. v. Davis*, 2 Dev. & B. (N. Car.) Law, 451; *De Varaigne v. Fox*, 2 Blatchf. C. C. 95; *Kane v. Baltimore*, 15 Md. 240, *arguendo*; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *Washington Cemetery v. Prospect Park & C. I. R.*, 68 N. Y. 591; *Cooley Const. Lim.* 558; *Patterson v. Miss. & R. Boom Co.*, 3 Dillon C. C. 465; *City of Buffalo, In re*, 64 N. Y. 547; *Bachler's Appeal*, 90 Pa. St. 207; *Challiss v. Atchison, T. & S. F. R. Co.*, 16 Kan. 117; see also *Moore v. New York*, 4 Sandf. (N. Y.) 456 (power over washing interest); *John and Cherry Streets, In re*, 19 Wend. (N. Y.) 659 (as to reverter of discontinued streets to adjacent owners); *Kimball v. Kenosha*, 4 Wis. 321. An enactment that on payment for land for a public park it shall "vest forever in the city," gives to the city a fee simple title to land thus acquired. *Brooklyn Park Com'rs v. Armstrong*, 3 Lans. (N. Y.) 429; s. c. 45 N. Y. 234; *Mills, Em. Dom.* §§ 49, 50, and cases; *Lewis, Em. Dom.* §§ 277 *et seq.* *Infra*, § 1039.

The legislature may require the condemnation of the whole interest or estate of the owner, *i. e.*, the land itself in fee or such lesser estate as he may own. *Roanoke City v. Berkowitz*, 80

Va. 616. Under a statute which requires the condemnation of the whole estate or interest of the owner, the city cannot condemn a riparian right against the owner's objection without condemning any of the abutting lands. *Charlottesville v. Maury*, 96 Va. 383. See also *Clear Creek Water Co. v. Gladeville Imp. Co.*, 107 Va. 278.

¹ *Dingley v. Boston*, 100 Mass. 544; *Page v. O'Toole*, 144 Mass. 303; *St. Louis County Court v. Griswold*, 58 Mo. 175, establishing Forest Park in St. Louis County.

² *Heyward v. New York*, 7 N. Y. 314; *Heard v. Brooklyn*, 60 N. Y. 242; *Heath v. Barmore*, 50 N. Y. 302; *De Varaigne v. Fox*, 2 Blatchf. C. C. 95; *Reynolds Heirs v. Stark County*, 5 Ohio, 204; *Le Clerq v. Gallipolis, Trs.*, 7 Ohio, Part I. 218. See also chapter on Corporate Property, *ante*, and on Dedication, *post*. City corporation, owning land in fee, held entitled to compensation when taken for public use. *Ninth Avenue, &c., In re*, 45 N. Y. 729; *ante*, chap. iv.; *post*, §§ 1222 *et seq.* A municipal authority may exercise the right of eminent domain in securing an outlet for its sewage, but no such authority exists as will permit it to seize upon a stream and its margins so as to relieve it from consequential damages. *Valparaiso v. Hazen*, 153 Ind. 337.

public highway, and for the use of water-pipes and for sewerage purposes," and also released to the city all of the right of the State in the premises in question. Under such legislation, one who claims to own a portion of the canal bed cannot contest the right of the city, on the ground that the change of use authorized by the legislature has terminated the public interest in the property.¹ But where the fee is not expressly authorized to be taken and an easement will fully satisfy the language and the object of the statute, the authority will be construed and limited accordingly.²

§ 1024 (590). **Same Subject.** — *The right of eminent domain is inherent in the government; it is not conferred, but limited by the Constitution. No property can be taken without legislative authority,³ and it must be taken in the manner and for the purposes authorized. Courts cannot extend or limit these: the necessity for such condemnation must be determined by the legislature, and cannot be questioned by the judicial tribunals.⁴ If the legislature attempts under this power to take property plainly not for public use, the courts may prevent it. Where the State has taken a fee simple, or authorized the taking thereof, and compensated the owner therefor,*

¹ *Malone v. Toledo*, 28 Ohio St. 643.

² See cases in last note but one. *In-fra*, § 1039; *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591; *Holt v. Somerville*, 127 Mass. 408; *Matter of New York City*, 74 N. Y. App. Div. 197; *Newton v. Newton*, 188 Mass. 226, 228. The right to take land does not involve the obligation to take the whole interest in the land. No more land and no greater interest in it need be taken than the public use requires. *Hepburn v. Jersey City*, 67 N. J. L. 114.

³ See *Cavanagh v. Boston*, 139 Mass. 426; *Van Reipen v. Jersey City*, 58 N. J. L. 262; *Brunswick R. R. Co. v. Waycross*, 94 Ga. 102; *State v. Ramsey County District Court*, 87 Minn. 146; *Butler v. Thomasville*, 74 Ga. 570; *Warner v. Gunnison*, 2 Colo. App. 430; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458.

Freeholders' charters, framed under constitutional provisions permitting cities to frame their own charters, may properly make provision of the exercise by the city of the power of eminent domain, in laying out, opening and improving streets. *State v. Ramsey County Dist. Court*, 87 Minn. 146. See also *State v. Field*, 99 Mo. 352; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458; *Kan-*

sas City v. Bacon, 147 Mo. 259; *Byrne v. Drain*, 127 Cal. 663. But in *Washington*, it has been held that the power is purely legislative in its origin, and that a freeholder's charter adopted under the provisions of the Constitution of that State, cannot provide for the exercise of the power of eminent domain for street or other purposes in the absence of an act of the legislature authorizing cities to exercise that right. *Tacoma v. State*, 4 Wash. 64. Index, *Freeholders' Charter*.

The mode of exercising the power of eminent domain, the conditions upon which it may be invoked, and the assessment of damages or compensation upon an exercise of the power, all relate to the civil rights of citizens as such and are not a *municipal matter*, within the meaning of a constitutional provision prohibiting *special legislation* with reference to municipal matters, although the entry may be by a city under a power of eminent domain conferred upon it for a public purpose and the city may be a party to the proceedings. *Pasadena v. Stimson*, 91 Cal. 238; *Ruan Street*, 132 Pa. 257; *Wyoming Street*, 137 Pa. 494; *Pittsburgh's Petition*, 138 Pa. 401.

⁴ *Mills*, Em. Dom. § 11.

the subsequent abandonment of the use will not reinvest the former owner with the title; if simply an easement is taken, the rule is otherwise. The right of determining the necessity of the work may be delegated, and the judicial tribunals may then be called upon to determine as to its necessity.¹

§ 1025 (591). **Same Subject; Quantity; Estate.** — The cases which have established that the legislature may, if it sees proper, authorize the compulsory appropriation of the fee, are to be distinguished from those in which it has been held that *no more in amount of private property* can be taken than the legislature has declared to be necessary to the accomplishment of the public purpose in view, even although compensation be made. It was accordingly decided in South Carolina, on sound principles, as we think, that the State cannot authorize part of a lot to be taken for a street, and in addition compel the owner, against his will, to part with the balance for the benefit, emolument, or private purposes of the corporation, since, in the opinion of the court, such an act “disseizes or deprives” the owner of his property “without the judgment of his peers” and contrary “to the law of the land.”²

§ 1026 (592). **Same Subject; Condemnation of Entire Lot.** — The *same principle, limiting the amount of land* that may be condemned,

¹ *Indianapolis Water Works Co. v. Burkhardt*, 41 Ind. 364. The legislature authorized its public agents to appropriate a fee simple in the lands taken for the construction of its canals. The former owner had no right afterwards to take ice from the canal. *Ib.* Overruling *Edgerton v. Huff*, 26 Ind. 35. A city having acquired the fee of land for park purposes by condemnation the legislature possesses the power to give the city authority to terminate the trust impressed upon it by alienation of the land subject to the intervention of the courts. *Driscoll v. New Haven*, 75 Conn. 92, citing text.

² *Dunn v. Charleston*, Harper L. (S. Car.) 189. This decision is right. Other cases in *South Carolina* holding that private property may be taken or streets, roads, &c., against the owner's consent and *without compensation* (*State v. Dawson*, 3 Hill (S. Car.), 100, and cases cited), are not elsewhere regarded as law. *Sedgwick on Stat. and Const. Law*, 494. In *Patrick v. Cross Roads Com'rs*, 4 McCord (S. Car.), 540, it

was held that the legislature might authorize a street to be laid out on private property without making compensation. And in *Massachusetts*, where a city appropriated land for a street forty-one feet wide, to be built as a grade above the adjoining land, it was held that an owner could maintain an action for damages caused by the placing of part of the embankment necessary to support the street upon his land. *Mayo v. Springfield*, 136 Mass. 10.

The taking by virtue of the power of eminent domain may be *temporary* only. *Matter of Thompson*, 57 Hun (N. Y.), 419. Thus, in *Doremus v. Paterson*, 73 N. J. Eq. 474; 69 Atl. Rep. 225, condemnation of the right of sewage flowage for five years was sustained; and in *Hepburn v. Jersey City*, 67 N. J. L. 114, s. c. 67 N. J. L. 686, the taking of the temporary use of a strip of land twenty feet wide for a conduit and pipe lines in connection with the water supply for a limited period only was sustained.

was subsequently declared by the Supreme Court and by the Court of Appeals of the State of New York and of the States of Maryland and Kentucky.¹ The Constitution of the State of New York contained the provision that "no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The legislature enacted, with reference to the city of New York, that whenever *part only of a lot* should be required for a street, the commissioners for assessing compensation might, if they deemed it expedient, *include the whole lot*, and that the part not required for the street should, upon confirmation of their report, be vested in fee in the city, with authority to appropriate it to public uses, or, if not thus appropriated, to sell it. The court inclined to the opinion that the legislature did not intend by this provision to authorize the compulsory taking of more land than the public needed, and that the statute should be construed so as to require the *owner's consent* to the appropriation of the part not required for the public use. But the court expressly decided that if the statute did intend to authorize the compulsory taking of the whole, when part only was required for the use of a street, it would be in conflict with the above provision of the Constitution of the State, guaranteeing protection to private property. It was, however, further adjudged that the owner's consent to the appropriation would remove all objections on the ground of the unconstitutionality of the statute; that such consent need not be in writing; and that the receipt by the owner of damages allowed by the commissioners is evidence of his consent.²

¹ Albany Street, *In re*, 11 Wend. (N. Y.) 148; Embury v. Conner, 3 N. Y. 511, rev'g 2 Sandf. (N. Y.) 98; Baltimore v. Clunet, 23 Md. 449; Dennis Long & Co. v. Louisville, 98 Ky. 67; Mills, Em. Dom. § 23; Lewis, Em. Dom. § 269.

² Referring to this statute, in Embury v. Conner, 3 N. Y. 511, Jewett, J., delivering the opinion of the Court of Appeals, says: "It needs no argument to show that the end and design of this section was not to take private property for the use of the public. It manifestly goes upon the ground that the property so authorized to be taken is not wanted for the purpose of forming or improving a street, the object in view for which the proceedings are instituted. In Matter of Albany Street, 11 Wend. (N. Y.) 148, the constitutionality of this enactment came directly under the consideration of the

Supreme Court, on application to confirm the report of the commissioners in that matter. The court then held that if that provision was intended merely to give to the corporation *capacity* to take property under such circumstances, with the *consent* of the owner, and then to dispose of it, there could be no objection to it. But if it was to be taken literally, that the commissioners might, against the consent of the owner, take the whole lot, when only a part was required for public use, and the residue to be applied to private use, it assumed a power which the legislature did not possess.

"This decision went mainly upon the application contained in the last member of the clause of § 7 of art. 7 of the Constitution of 1821, — that 'no person shall be deprived of life, liberty, or property, *without due process of law*; nor shall private property be taken for

§ 1027. **Quantity or Amount of Property taken.**—When the public improvement for which property is taken has clearly defined limits, as in the case of a street or public park, the principles set forth in the preceding sections can be definitely and justly applied, but in the case of other classes of property situations may arise in which *a greater amount or quantity* of property may be taken *than is required for present public use*. We have seen ¹ that in erecting or acquiring public buildings for corporate purposes a municipality is not restricted to its present necessities, but may make provision for its reasonable future requirements and may grant or lease surplus space, &c., to private individuals for the purpose of deriving a revenue therefrom. In some classes of public improvements it is a practical impossibility to accurately gauge the exact measure of the needs of the municipality, but if the improvement is in its nature of such a

public use without just compensation.' Chief Justice *Savage* said, 'The Constitution, by authorizing the appropriation of private property to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another.' In *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. (N. Y.) 9, Mr. Senator *Tracy* said that words should be construed 'as equivalent to a constitutional declaration that private property, without the consent of the owner, shall be taken *only* for the public use, and then only upon a just compensation.' *Bronson*, J., in *Taylor v. Porter*, 4 Hill (N. Y.), 140, 147, in reference to this question, said that although he felt no disposition to question the soundness of these views, yet it seemed to him that the case stood stronger upon the first member of the clause, — 'No person shall be deprived of life, liberty, or property, *without due process of law*;' that the words 'due process of law,' in that place, could not mean less than a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. The same doctrine was held in *John and Cherry Streets*, *In re*, 19 Wend. (N. Y.) 659, and by the chancellor in *Varick v. Smith*, 5 Paige (N. Y.), 137, and was admitted by all the members of the Court for the Correction of Errors, whose opinions have been reported in the case referred to, of *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. (N. Y.). I think these decisions should be regarded as having

settled the point, that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation is made. The late Chancellor *Kent*, in reference to the decision in *Taylor v. Porter*, says: 'I apprehend that the decision of the court was founded on just principles, and that taking private property for *private* uses without the consent of the owner is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine in the English and American law.' (2 Kent Com. (5th ed.) note c, 340.) But it is insisted that as the enactment is only held to be void on the ground that it takes private property for private uses against the owner's consent, if the consent be given, all objection on the ground of unconstitutionality is removed. The decisions to which I have referred proceed upon this principle, and Mr. Justice *Bronson*, in *Taylor v. Porter*, in terms concedes that the objection has no application when the owner consents. If we read the statute in question with the proviso that the owner consent, and I think we should, that consent removes all obstacles, and lets the statute in to operate the same as if it had in terms contained the condition."

That such is the effect of consent. *Sedgw.* on Stat. and Const. Law, 111, and Mr. Justice *Cooley's* opinion, Const. Lim. 541, note; *Baltimore v. Clunet*, 23 Md. 449.

¹ *Ante*, § 997.

character as to be for a public purpose, the fact that the acquisition of property by the municipality under the power of eminent domain results in the acquisition of property in excess of its needs and that such excess is devoted for purposes of revenue to private purposes, neither detracts from the public character of the use for which the property is taken nor affects the *quantum* of the estate or property which may be taken by virtue of the power. This is aptly illustrated in the condemnation of the right to appropriate water for the purpose of a public water supply. The fact that, as a natural incident to securing a public supply of water for a city, more water is obtained than is needed for public purposes, and that the city disposes of the surplus for an outside or private use, does not deprive the condemnation of land or water rights of its public character.¹ But this principle cannot be made the excuse for unnecessarily and oppressively depriving a person of his property for the express purpose of devoting it to private purposes. It has been pointed out that the true distinction in this respect seems to be between cases where the improvement is made for the express or implied purpose of obtaining property to lease or dispose of to private individuals, or where in the making of an improvement a wholly unnecessary excess of property is taken, and cases where the surplus or excess of property taken is a mere incident to the public improvement and a reasonable provision for securing adequate property in connection therewith at all times for such improvement. So long as the im-

¹ *Slingerland v. Newark*, 54 N. J. L. 62. See also *Fox v. Cincinnati*, 104 U. S. 783; *Kaukauna W. P. Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254; *Cooper v. Williams*, 4 Ohio, 253; s. c. 5 Ohio, 391; *Buckingham v. Smith*, 10 Ohio, 288; *Little Miami El. Co. v. Cincinnati*, 30 Ohio St. 629, 643; *Attorney-General v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533. In discussing this subject, Mr. Justice *Brown* said in *Kaukauna W. P. Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 273, *supra*, "The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose, is doubtless a proper exercise of the authority of the State under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing pur-

poses. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands in order to preserve at all times a sufficient supply for the purpose of navigation. . . . As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement." See also *Green Bay & M. Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 77.

provement is erected for the *bona fide* purpose of meeting a public use and is not a colorable device for taking property for private purposes, the municipality and its agents are entitled to latitude of discretion in regard to the amount of property to be taken. The courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact *quantum* of property required for the purposes of the public improvement.¹

§ 1028. **Condemnation of Lands beyond Municipal Limits.**—The power of the legislature to authorize a municipal corporation to acquire *lands beyond the municipal limits* and for that purpose to exercise the power of eminent domain cannot be disputed. It has long been recognized to exist where the use for which the property is taken is a proper and reasonable public use.² It has been said that power to condemn lands beyond the municipal limits must be *expressly conferred* upon the municipality.³ But what is express power is largely a matter of construction. In construing the authority conferred upon municipalities it has been held that if a city is authorized to engage in a public improvement beyond its limits and to acquire land therefor, a general power of eminent domain conferred upon it

¹ Per Mr. Justice Brown in *Kaukauna W. P. Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 276. In this case the court said that while the surplus of water power taken might be unnecessarily large, there did not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement, and it sustained the taking as a proper exercise of the power of eminent domain.

² See *New York City v. Bailey*, 2 Denio (N. Y.), 433, 446; *Matter of New York City*, 99 N. Y. 569. See *ante*, chaps. viii, x; Index, *Boundaries; Bridge; Water and Water Works*. When power is conferred upon a city to appropriate lands within or without its corporate limits "for its corporate uses," the city may condemn lands, *outside its limits for an electric light plant*. *State v. King County Super. Ct.*, 35 Wash. 303. By statute, power was conferred upon cities to acquire by purchase, lease, or gift, and to maintain *ferries* outside the municipal limits, but no mention was made of the power of

eminent domain. Another general statute authorized the condemnation of lands for ferry purposes, &c. This statute was not expressly confined to ferry corporations. It was held that the city might exercise the power of eminent domain under the second statute for the purpose of carrying into effect the authority granted by the first. *Helm v. Grayville*, 224 Ill. 274. Authority was conferred by statute upon a city "to improve rivers and streams flowing through the city or adjoining the same; to widen, straighten, and deepen the channels thereof, &c." Authority was also conferred to acquire lands therefor by condemnation. It was held that this authority authorized the city to condemn lands outside its limits to straighten the channel of a river forming one of its boundaries. *Puyallup v. Lacey*, 43 Wash. 110. Index, *Boundaries; Bridge; Ferries*.

³ *Robertson v. Baxter*, 57 Mich. 127; *Houghton v. Huron Copper Min. Co.*, 57 Mich. 547; *Puyallup v. Lacey*, 43 Wash. 110.

to acquire land for its corporate purposes may be exercised to effectuate the improvement beyond the city limits.¹

§ 1029. **Mapping or Platting Streets and other Improvements.** — The mere fact that a *street* or other improvement is platted and *laid out upon a map* prepared pursuant to statutory authority does not in itself constitute a *taking* of the property included within the lines of the projected street.² But if the statute pursuant to which the map is made and filed declares that no compensation shall be made to the owner of land taken for the street, &c., in respect of any building erected or placed thereon, *after* the making and filing of the map, the owner of the land is deprived of the beneficial use and enjoyment of his property and a restraint is imposed thereon which materially affects its value. Hence, such a provision deprives the

¹ Warner v. Gunnison, 2 Colo. App. 430; Helm v. Grayville, 224 Ill. 274.

The general doctrine that a municipal corporation can only exercise its powers within its corporate limits is founded on the fact that generally no authority is given by charter to act beyond such limits, and hence the corporate authorities are restricted in that regard by the general rule that they can exercise only such powers as are granted by express words. The general rule is however subject to the qualification that a municipal corporation may also do those things which are fairly or necessarily implied in or incident to the powers expressly granted. Hence, a municipality having *power to make sewers* may, when necessary, extend them beyond the corporate limits for the purpose of securing a suitable outlet. Having power to extend the sewers beyond the city limits, the city may exercise beyond the limits a general power to condemn lands conferred upon it by the legislature. Maywood Co. v. Maywood, 140 Ill. 216; see also Minnesota & M. Land & Imp. Co. v. Billings, 111 Fed. Rep. 972; McBean v. Fresno, 112 Cal. 159; Shreve v. Cicero, 129 Ill. 226, 230; Cochran v. Park Ridge, 138 Ill. 295; Coldwater v. Tucker, 36 Mich. 474. When property outside of a city is sought to be condemned for municipal purposes, the legislature has no power to delegate the determination of the question of compensation to a local court possessing under the statutes and constitution

no extra-territorial jurisdiction. Matter of Buffalo, 139 N. Y. 422.

² Bauman v. Ross, 167 U. S. 548, 597; Dist. of Columbia v. Arnes, 8 App. D. C. 393; Hudson County Land Imp. Co. v. Seymour, 35 N. J. L. 47, 53; Jones v. Carragan, 36 N. J. L. 52; Dist. of Pittsburgh, 2 W. & S. (Pa.) 320; Bush v. McKeesport, 166 Pa. 57.

In Jones v. Carragan, 36 N. J. L. 52, an assessment for the opening of a city street was set aside on *certiorari* because the landowner had not been allowed any compensation for his buildings within the line of the street erected before the ordinance opening the street was passed, the street having been laid out on a map or plan before their erection. The Court did not make reference to any statute declaring that no compensation should be awarded under such circumstances, merely saying, that while the opening of the street was in abeyance, the owner was not deprived of the right to improve his property in any lawful manner. See also Whittingham v. Hopkins, 70 N. J. L. 322, 328. The mere plotting or laying out of a street by the municipal authorities on an official map or plan, does not impose any duty on the city to proceed to open by condemnation or otherwise, and an action will not lie at the instance of a property owner to compel the opening or to recover damages for failure to open the street. Collins v. Savannah, 77 Ga. 745; Terrill v. Bloomfield, 14 Ky. Law Rep. 614; 20 S. W. Rep. 289; s. c. 21 S. W. Rep. 1041.

owner of his property, something which can only be done upon the payment of just compensation, and in the absence of such compensation such a statutory provision is unconstitutional as depriving the owner of his property without due process of law, and without compensation.¹ Notwithstanding such an unconstitutional provision,

¹ *Moale v. Baltimore*, 5 Md. 314; *Stewart v. Baltimore*, 7 Md. 500, 510; *Baltimore v. Hook*, 62 Md. 371, 374; *Forster v. Scott*, 136 N. Y. 577; *German American Real Estate v. Meyers*, 32 N. Y. App. Div. 41; *Singer v. New York City*, 47 N. Y. App. Div. 42.

In *Matter of Furman Street*, 17 Wend. (N. Y.) 649, the question before the court was the confirmation of the report of commissioners of estimate and assessment for opening the street. By statute, the trustees of Brooklyn were required to cause a survey of the village to be made, exhibiting the streets, &c., to be opened and laid out "in order that no resident may plead ignorance of the permanent plan to be adopted for opening, laying out, levelling and regulating the streets of the said village of Brooklyn." The survey and map were made in 1818, but no steps were taken to open the street and acquire lands therefor by condemnation until seventeen years after. There was no provision in the statute declaring that persons erecting buildings within the street lines after the making and filing of the map should not be entitled to compensation therefor. But the court held that the purpose of making the map, according to the evident intent of the legislature, was that the streets should be opened at a future period without paying for improvements made upon them in the meantime, and that for such improvements, the property owners were not entitled to compensation. In answer to the objection that the act was unconstitutional in that it did not provide compensation for buildings erected on the sites of the streets, since the map was filed, *Bronson, J.*, said that the provision of the Constitution, upon which this contention was based that private property should not be taken for public use without just compensation, was not contained in the Constitution at the time the act was passed and the map filed. But he also held, that, waiving this consideration, the right to take private property for public use was not conferred by the Constitution; that the Constitution only regulated its ex-

ercise by requiring just compensation to be made to the owner; that at what time and in what particular manner the owner should receive his compensation rested in the discretion of the legislature; that there was nothing in the Constitution of New York, or in equity or justice, which forbade the recompense to the owner being made in property instead of money; and that the benefits resulting from the permanent and uniform plan, which was adopted, over-balanced the damage from the loss of the privilege of building on the streets, if it could properly be called an injury.

But this decision, so far as it holds that the legislature may, either expressly or by necessary implication, deny compensation to the owner, for buildings erected within the lines of a projected street, is overruled by the case of *Forster v. Scott*, 136 N. Y. 577. In that case, the plaintiff contracted to sell certain vacant land in New York City to the defendant and covenanted to deliver a warranty deed sufficient to vest title in the defendant free from any lien or encumbrance except a mortgage. He tendered a deed, but the tender was rejected by the defendant on the ground that the premises were within the lines of a projected street as laid down on a map made and filed pursuant to law, and that, by statute, the owner of lands so situated could not recover compensation for any building erected within the lines of any street exhibited upon such map, subsequent to the filing of the map. The property was vacant, but derived almost its entire value from its availability for building purposes. The court held that the statute, if valid, imposed a restriction upon the use of the property which constituted an encumbrance, but that the statute was unconstitutional, because its provisions deprived the owner of the beneficial use and free enjoyment of his property, or imposed a restraint upon such use or enjoyment that materially affected its value, without legal process or compensation, and hence deprived him of his property within the meaning of the Con-

the owner of the land taken for the street is entitled to compensation for buildings erected thereon *after* the making and filing of the map, but before the actual opening of the street.¹ But in Pennsylvania, these views have not been accepted by the courts, and it has been held that when it is provided by statute that a municipal corporation shall adopt a general plan of streets and alleys opened and to be opened, and that no person shall thereafter be entitled to recover any damages for any buildings or improvements of any kind which may be placed or constructed within the lines of any street laid down upon the map, such a provision is only declaratory of the common law as laid down by the courts of that State, and does not violate the constitutional provision against the taking or damaging of property without just compensation.²

stitution; and that therefore there was no encumbrance upon the property and the plaintiff was entitled to specific performance of the contract of sale.

¹ Matter of New York City, 24 N. Y. App. Div. 7; Matter of New York City (Briggs Ave.), 118 N. Y. App. Div. 224; Matter of New York City (Baychester Ave.), 120 N. Y. App. Div. 393. The owner is entitled to compensation for the building though it has been moved upon or erected on the lot for the express purpose of making the city pay for it. Matter of New York City (Briggs Ave.), 118 N. Y. App. Div. 224. But in computing the damages, the commissioners may consider whether the building can be moved further back on the lot. Matter of New York City (Baychester Ave.), 120 N. Y. App. Div. 393.

² The rule adopted in *Pennsylvania* is the result of the decisions in that State to the effect that the making of a plan of a city, pursuant to statute, precludes the recovery of compensation for improvements made within the lines of streets laid out thereon, irrespective of any statutory provision that no compensation shall be made therefor. In *Dist. of Pittsburgh*, 2 W. & S. (Pa.) 320, the court held that the mere laying out or plotting of streets is not in itself a taking of the property of the individuals, upon which they are laid out for public use at some future time, but rather a designation of what may be required for that purpose thereafter, so that the owners of the property may in due time be fully apprised of what is anticipated and regulate the subsequent improvements which they shall make thereon

accordingly, and that it was within the power of the legislature to authorize and direct the plan to be made. It is only when the streets, lanes, alleys, and public squares shall come to be admitted to the city as a part thereof, and to be opened under the authority of the same, in the manner prescribed by the statute, that the lands so appropriated can be said to be regarded as *taken* for public use. This decision was made upon the authority of *Matter of Furman Street*, 17 Wend. (N. Y.) 649, *supra*.

This decision was followed and applied in *Forbes Street*, 70 Pa. 125, a proceeding by *certiorari* to review an assessment for the opening of a street according to a plan previously made and filed pursuant to the statute. The statute provided for the filing of a map or plan and for the hearing of objections thereto, but contained no provision declaring that compensation should not be paid for buildings thereafter erected within the projected street lines. The assessment which was before the court included compensation for buildings erected within the line of a street laid out on a map or plan made pursuant to the statute. The court held that this was erroneous, and that the owner of the buildings so erected could not recover compensation for their removal or destruction. *Read, J.*, said, "The leading object of laying out the city district, which was finally to become a part of Pittsburgh, was that the owners of ground within it should know what portion of their property would be taken for streets and other public purposes. The portions laid out for streets were to be

In Pennsylvania, also, it has been held that a statute which widens a street by laying down a new building line therefor and which declares that the owners of property on the street *in rebuilding shall be required to recede from the old building line* and to build within the new line, is a valid exercise of the power of eminent domain, and that the owner of land affected thereby has a cause of action for the compensation or damages sustained by the taking as soon as he removes his building and proceeds to rebuild.¹

deemed taken and adjudged as public highways. If buildings were erected on ground to be taken for streets of the first class previously to the plan and survey, then they were to be paid for as well as the ground taken when the streets were opened; but if built *after* the survey and plan, of which map or plan all the freeholders owning property in the said district had notice under the provisions of the sixth section of the Act of June 16th, 1836, then it is clear that such buildings were not to be paid for, for otherwise the map or plan would be entirely nugatory. The case of *Furman Street*, 17 Wend. (N. Y.) 649, cited by Judge *Kennedy*, 2 W. & S. (Pa.) 325, is good authority on this point. . . . When therefore an individual erects a building or improvement on *Forbes Street* and the street is ordered to be opened, he cannot claim damages for its removal, or for any injury caused to the remaining works by such necessary removal or destruction. His damages will be limited to the value of the ground taken for the street, and this is strictly equitable, the amount of the benefits to be assessed upon other owners of property."

In *Bush v. McKeesport*, 166 Pa. 57, the property owner petitioned for the appointment of viewers to assess damages for lands included within the lines of a plotted street, but which had not yet been opened. The claim was advanced that by the plotting or laying out of the street on the map, and by virtue of a statute which declared that no compensation should be paid for buildings erected within the street lines *after* the same have been located, the petitioner's property had been taken, as the use and enjoyment thereof were impaired. But the court held that the petition must be dismissed, because the mere plotting of the street on the map did not *take* any property. It also held that the

statute did not violate the provision of the Constitution requiring just compensation to be made for property taken, injured, or destroyed for public use. To the effect that there is no right of action against the city until some act is done, or notice or demand made, affecting or relating to the possession or appropriation of the land to the actual opening of the street, see *Volkmar Street*, 124 Pa. 320; *South Twelfth Street*, 217 Pa. 362, 363. The compensation is to be assessed as of the time of the taking, and not as of the time of the making or filing the map or plan. *Whitaker v. Phoenixville*, 141 Pa. 327; *Fitzell v. Philadelphia*, 211 Pa. 1, 3; *South Twelfth Street*, 217 Pa. 362. No recovery can be had for buildings erected *after* the making of the map. *Plan 166*, 143 Pa. 414, 423; *Shaaber v. Reading City*, 150 Pa. 402, 407; *Grugan v. Philadelphia*, 158 Pa. 337, 347; *Western Ave.*, 7 Pa. County Ct. R. 233. But the compensation, when assessed, is to include the full market value of the land, and the fact that no compensation can be recovered for *buildings* erected after the plotting is not to be considered as affecting the market value of the land. *South Twelfth Street*, 217 Pa. 362. The statute, being expressly directed against "buildings" subsequently erected only, does not preclude recovery of the value of *trees* planted after the making of the map. *Dobson v. Philadelphia*, 9 Pa. Dist. R. 139. A sale of land by deed describing it as on a street which has been plotted pursuant to statute, but has not been opened, does not effect a dedication of the land within the street lines to public use. *Brooklyn Street*, 118 Pa. 640; *Fitzell v. Philadelphia*, 211 Pa. 1; *Bellefield Ave.*, 2 Pa. Super. Ct. 148; *Venango Street*, 9 Pa. Dist. R. 651. Index, *Dedication*.

¹ *Philadelphia v. Linard*, 97 Pa. 242; *In re Chestnut Street*, 118 Pa.

§ 1030 (593). **Effect of accepting Damages.** — The *voluntary acceptance of damages* by the owner, in the absence of fraud or mistake in fact, operates as a waiver of whatever errors may have existed in the proceeding, and estops the party from disputing their legality.¹ So the *actual receipt of damages* by the party entitled thereto is a waiver of delay in depositing and paying the money, and is a ratification of the proceedings.²

§ 1031 (595). **Public Use; what constitutes such a Use.** — It is agreed that individual property can be compulsorily appropriated by the public *only for public use*.³ What is a *public use* has, in some aspects of the subject, given rise to much controversy, particularly in reference to the delegated exercise of the power by, or for the benefit of private corporations, companies, and individuals. Since municipal corporations are instituted for public purposes, authority

593; *Brower v. Philadelphia*, 142 Pa. 350; *Bornot v. Bonschur*, 202 Pa. 463. ¹ *Hartshorn v. Potroff*, 89 Ill. 509; *Rees v. Chicago*, 38 Ill. 322; *Town v. Blackberry*, 29 Ill. 137; *Pursley v. Hays*, 17 Iowa, 310; *Deford v. Mercer*, 24 Iowa, 118; 2 *Smith Lead. Cas.* (5 Am. ed.) 662; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *Commonwealth v. Shuman's Adm.*, 18 Pa. St. 343; *Burns v. Milwaukee & Miss. R. R. Co.*, 9 Wis. 450; *Smith v. Warden*, 19 Pa. St. 426; *State v. Stanley*, 14 Ind. 409; *Magrath v. Brook Tp.*, 13 Up. Can. Q. B. 629; *Kile v. Yellowhead*, 80 Ill. 208; *Mills, Em. Dom.* § 329, and cases. *Winslow v. Baltimore & O. R. Co.*, 208 U. S. 59; *Petaluma v. White*, 152 Cal. 190; 92 *Pac. Rep.* 177; *Pool v. Breese*, 114 Ill. 594; *Matter of Woolsey*, 95 N. Y. 135.

Where a turnpike company accepted compensation for a portion of its road, taken by a city under its right of eminent domain, it was held that it was estopped from objecting to the exercise by the city of control over the road. *Albany v. Watervliet T. & R. Co.*, 108 N. Y. 14.

² *Howley v. Harrall*, 19 Conn. 142, 151.

Confirmation of *defective proceedings* by legislative authority. *Yost's Report*, 17 Pa. St. 524; *Bennett v. Fisher*, 26 Iowa, 497. Compare *Baltimore v. Horn*, 26 Md. 194; *Lennon v. New York*, 55 N. Y. 361, 365; *Indianapolis v. Kingsbury*, 101 Ind. 200; *ante*, §§ 127, 129, 645, 948. Index, *Curative Acts*.

³ *Cole v. La Grange*, 113 U. S. 1; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239; *Adams v. Ohio Falls Car Co.*, 131 Ind. 375; *Nalle v. Austin* (Tex. Civ. App.), 21 S. W. 375. One of the most acute and able American jurists maintains, in an interesting article, that the right to take private property for purposes of utility rests not in public uses, but on public *policy*, or the law of *necessity*. *Mr. Justice Campbell*, Vol. I. No. 2, p. 97, Bench and Bar. See, in same publication, Vol. I. No. 1, p. 1, Prof. Washburn's article on "Taxation to Build Railroads," and an able article in *Am. Law Rev.*, Oct., 1870. What are "public uses," discussed by Judge *Redfield* in *Allen v. Jay*, 60 Me. 124; *post*, § 1351. Power to condemn land for cemetery purposes. *Re Deansville Cemetery Assoc.*, 66 N. Y. 569; *Underwood v. Bailey*, 59 N. H. 480; *Varner v. Martin*, 21 W. Va. 534; *Phillips v. Scales Mound*, 195 Ill. 353; *Mills, Em. Dom.* § 19; *Lewis, Em. Dom.* § 176; *ante*, § 683.

Private property cannot be taken for other than a public use under the guise of taking it for public use. The *establishment of a harbor line* is not a public use where the only reason for its establishment is to prevent a new bridge from being affected by the building of structures not connected with it which would obscure the view of the bridge, and it is not established in the interests of navigation or for any other public use. *Farist Steel Co. v. Bridgeport*, 60 Conn. 278.

to take property in order to carry out their chartered powers is not often open to the objection that the use is private and not public. Municipal uses proper are public uses. Highways are conceded to be, and manifestly are, matters of public concern; and hence the condemnation of property for streets, alleys, and public ways is, undeniably, for a public use.¹

§ 1032 (596). **Same Subject; Individual Contributions to Expense.**

— The mere fact that *individuals have subscribed money*, or given a bond to a city or town, to contribute towards the expense of laying out or altering a street, will not vitiate the proceedings, nor will it prove that the land was taken for the accommodation of private individuals, and not for public uses.² But if such a bond was made the basis of the proceedings,³ or if the street was laid out or widened,

¹ *Per Woodbury, J.*, in *West River Br. Co. v. Dix*, 6 How. (U. S.) 507, 545; *Angell on Highways*, § 86; *Arnold v. Covington & C. B. Co.*, 1 Duvall (Ky.), 372; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Redfield on Railways*, § 63. The private property of a citizen cannot, by the exercise of legislative power in any form, be taken from him and given to another, or to a corporation. Such act would deprive the citizen of his property without due process of law. *Turner v. Althaus*, 6 Neb. 54. So a city, having condemned land for a *public wharf*, has no power to lease it to a grain elevator company for a term of years. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121; *Mills, Em. Dom.* § 23.

The declarations of the legislature or courts of a state are not conclusive and binding upon the Federal courts upon the question as to what is due process of law within the meaning of the Federal Constitution, and as incident thereto, what is a public use. These are questions which also arise under the Federal Constitution, and the Federal courts can decide them in accordance with their views of constitutional law. But what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned, and the Federal courts must give great weight to the decisions of the courts of the State defining what is a public use under the laws and customs thereof. *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112,

159, holding that the acquisition of lands for *irrigation purposes* is for a public use. In *Clark v. Nash*, 198 U. S. 361, these principles were followed and applied by the Supreme Court of the United States, and it was held that in *Utah*, under the circumstances of the particular case, the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he had an interest, to *irrigate his land* which otherwise would remain absolutely useless, was a taking for a public use. In so holding the court attached great weight to the fact that the land taken was in the arid part of the United States, where irrigation is a necessity if the land is to have any value. The existence of a *swamp lands* affects the public health, and the reclamation of such lands is a proper exercise of the police power, and also of the power of eminent domain. *Manigault v. Springs*, 199 U. S. 473.

² *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359; *Santa Ana v. Harlin*, 99 Cal. 538; *Kramer v. Los Angeles*, 147 Cal. 668; *Edgerton v. Green Cove Springs*, 19 Fla. 140; *Chicago, B. & Q. R. Co. v. Naperville*, 169 Ill. 25, quoting text; *Summerfield v. Chicago*, 197 Ill. 270; *Stilson v. Lawrence County*, 52 Ind. 213; *Parks v. Boston*, 8 Pick. (Mass.) 218; *Copeland v. Packard*, 16 Pick. (Mass.) 217; *Atkinson v. Newton*, 169 Mass. 240; *Stratford v. Greensboro*, 124 N. Car. 127; *Ford v. North Des Moines*, 80 Iowa, 626; *ante*, § 792.

³ *Commonwealth v. Sawin*, 2 Pick.

"colorably," to use the expression of Parsons, C. J., "for the use of the city, but really for the benefit of the individual" giving or procuring the bond, the proceedings would be set aside.¹

§ 1033 (597). **Same Subject; Water Supply, &c.** — We have seen above that lands can be condemned only for public uses. Let us consider *what are public uses* so far as respects municipalities. It is a competent and frequently a wise and just exercise of the right of eminent domain, to empower towns and cities, upon compensation being made, to appropriate private property for the purpose of *supplying the inhabitants with pure water*. This is clearly a public use.² Water plants and works owned and operated by municipalities

(Mass.) 547; *Freeport v. Bristol*, 9 Pick. (Mass.) 46; *Parks v. Boston*, 8 Pick. (Mass.) 217. Such contributions are not against public policy. *State v. Orange*, 54 N. J. L. 111.

¹ *Commonwealth v. Cambridge*, 7 Mass. 158, 167; *Parks v. Boston*, 8 Pick. (Mass.) 218; *Crockett v. Boston*, 5 Cush. (Mass.) 182, 190, where the above cases are commented on; *ante*, § 792.

² *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Wayland v. Middlesex Co. Com'rs*, 4 Gray (Mass.), 500, *per Thomas, J.*; *Burden v. Stein*, 27 Ala. 104. See *Same v. Same*, 25 Ala. 455; *Warner v. Gunnison*, 2 Colo. App. 430, citing text; *Reddall v. Bryan*, 14 Md. 444; *Gardner v. Newburgh Trs.*, 2 Johns. (N. Y.) Ch. 162; *Ham v. Salem*, 10 Mass. 350; *Bailey v. Woburn*, 126 Mass. 416; *Martin v. Gleason*, 139 Mass. 183; *Tyler v. Hudson*, 147 Mass. 609; *Mills, Em. Dom.* § 18, and cases; *Lewis, Em. Dom.* § 173; *Rochester Water Com'rs, In re*, 66 N. Y. 413; *Middletown Village, In re*, 82 N. Y. 196; *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123; *Lake Pleasanton Water Co. v. Contra Costa W. Co.*, 67 Cal. 659. See Index, *Water and Water Works*, and chapter on Public Utilities, *post*.

"Public" and "local" improvements as the words are used in a municipal charter construed. *Kinsella v. Auburn*, 26 N. Y. St. Rep. 884. In the act to supply the city of New York with pure and wholesome water, the city, under right of eminent domain, was authorized to take private property many miles distant from the corporate limits. Although regarded

as going very far, it was not contended that the legislature had exceeded its power. *New York v. Bailey*, 2 Denio (N. Y.), 433, 446, *per Hand, Senator; post*, § 1668. In the case of *Kane v. Baltimore, infra*, it is held that when property is compulsorily taken by the exercise of the right of eminent domain for a *specific public use*, as, for example, supplying the city with water, the city is limited to such use, all other rights not interfering therewith being left with the owner. It was not denied, however, that the power to condemn, in *fee simple*, might, if necessary to carry out the public end designed, be conferred by the legislature. *Kane v. Baltimore*, 15 Md. 240, *Tuck, J.*, dissenting.

In *Massachusetts* the statute authorized the city of B. to take, hold, and convey to said city all the water of S. river at any point in or above the town of F., and provided for payment to any one injured in his property by the taking of or injury to any land, real estate, water or water rights, or by flowage, or by the interference with or injury to any use or enjoyment of the water of said river to which any person at the time of such taking is legally entitled, subject to all the duties, liabilities, and regulations of the statutes. Under a petition to assess damages to plaintiff's rights, the only injury alleged to have been suffered (omitting an alleged right of fouling the water by its dye-works), was that the filing of the order or certificate, required by the statute to be recorded in the registry of deeds, was an appropriation of all the waters above the dam, and was equivalent to a warranty deed conveying those to the city by an

are very common in this country, and for the purpose of procuring such plants the debt-limit prescribed by the Constitution of the State is frequently enlarged. Other illustrations of what is a *public use* are given in the note.¹

absolute title. *Held*, that the statute did not make the city the owner of the water for any other purpose than that of supplying it with pure water; that the riparian proprietors higher up still retained all their common-law rights in the river so far as they were not inconsistent with the use defined in the statute; and that the defendant was at least entitled to say that it had not only done nothing as yet to practically diminish the petitioner's water-power, but that there was at most only a remote possibility that it would ever do so. *Ipswich Mills v. Essex Co. Com'rs*, 108 Mass. 363, and *Wamesit Power Co. v. Allen*, 108 Mass. 352, distinguished. A riparian proprietor, although it be a chartered municipality, has, in the absence of an express grant or prescription, no right to *foul or corrupt the water* of a running stream. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and invasion of private right in like manner as a permanent obstruction or diversion of the water. *Dwight Printing Co. v. Boston*, 122 Mass. 583.

Where a city, in order to obtain a supply of water for its water-works, dug a well upon its own land on the bank of a mill-pond, which had been dammed up at great expense by its owner, and so near to the pond that the water precolated from it into the well, and also placed a pipe directly into the pond to be used whenever extra water was needed in case of fire, all of which was done without condemnation proceedings and without compensation to the owner of the pond, an injunction was issued restraining the city from taking the water either by means of the pipe or through the well. *Emporia v. Soden*, 25 Kan. 588.

¹ It is not within the corporate powers of a city to open streets on lands within the corporate limits, *belonging to the United States*, and which have never been sold to private persons. *United States v. Chicago*, 7 How. (U. S.) 185. But the United States may *lay out and dedicate* lands for streets and public places the same as any other

proprietor. *State v. Ill. Cent. R. R.* (Chicago Lake Front Case), 33 Fed. Rep. 730, before *Harlan* and *Blodgett*, JJ.; *United States v. Illinois Central Railroad Co.*, 154 U. S. 225. Where the State of *Georgia* purchased a tract of land for the purpose of the erection of car-shops, and other buildings necessary to the successful operation of the Western and Atlantic Railroad, the mayor and council of the city of Atlanta, under the general authority of their charter to *lay out streets, &c.*, and § 965 of the Code, sought to appropriate a portion of said land for a street. *Held*, that such contemplated action was properly enjoined. *Atlanta v. Central R. & B. Co.*, 53 Ga. 120.

In *Indiana*, where, by statute, municipal corporations have express power to *make streets narrower*, it is held that the easement of owners of abutting property in the street, being a valuable property right recognized by law, cannot be appropriated against the consent of the owner without due compensation, and that when the legislature has authorized, by necessary implication, the abandoning of a part of a street to the adjoining owners, the improvement is thus declared by the legislature to be for a public use, and the courts cannot interfere with such declaration, "unless it is apparent at first blush that the proposed use is not public." *Rensselaer v. Leopold*, 106 Ind. 29; see *post*, chap. xxiv.

The availability of land for a *reservoir site* may be considered in determining its value in a proceeding to condemn it therefor. *San Diego Land Co. v. Neale*, 88 Cal. 50; s. c. 78 Cal. 63; *Alloway v. Nashville*, 88 Tenn. 510. For *land taken for water supply purposes* the owner is entitled to receive the fair value of the land as it was at the time of the taking. This means the value of the land apart from its special adaptability for water supply purposes, *plus* such sum as a purchaser would have added to that value, because of the chance that the land in question might be some day used for water supply purposes. *Sargent v. Merrimac*, 196 Mass. 171; *Moulton v.*

§ 1034 (598). **Same Subject; Public Parks.** — On the ground that the public health, convenience, and welfare will be thereby promoted, the legislature may authorize the condemnation of private property for the purpose of using the same for a *public park*¹ or *pub-*

Newburyport Water Co., 137 Mass. 163.

The common law does not recognize any right in the *riparian owner* as *such to divert water from a stream in order to make merchandise of it*; and no person has any inherent right to use the stream for a water supply. Hence, the State may by statute prohibit any person or corporation from transporting out of the State for purposes of sale by means of pipes, conduits, etc., the waters of any stream or lake. Such prohibition does not affect interstate commerce. Water abstracted contrary to such a statutory provision cannot legitimately enter into interstate commerce. *Attorney-General v. Hudson County Water Co.*, 70 N. J. Eq. 695. Whether this principle would apply to prevent a private water company from transporting its surplus waters out of the State, *quære?*

As to the *jurisdiction of the United States Supreme Court* to entertain a suit by one State to enjoin another State from *diverting* the waters of rivers within its boundaries, see *Kansas v. Colorado*, 185 U. S. 125; s. c. 206 U. S. 46; and from *discharging sewage matter* into a navigable river, see *Missouri v. Illinois*, 202 U. S. 598; s. c. 180 U. S. 208.

The constitutional provision prescribes the *minimum compensation* which can be awarded for a taking, but the State may by statute require the payment of compensation *in excess thereof*. An instance of this is to be found in the Massachusetts Metropolitan Water Supply statutes, which gave compensation to "any resident of the town of West Boylston employed by any corporation, partnership, or individual at the time when the plant of such corporation, partnership, or individual is taken and work therein stopped on account of a reservoir for the Metropolitan Water Supply, and who is obliged by reason of such taking to seek employment elsewhere." The compensation under this statute was limited to the sum of the wages for six months at the rate paid the injured employee for the last six months prior to suspension of the plant.

As to construction of this statute see *Whiting v. Commonwealth*, 196 Mass. 468. When a city has power to light its streets and to maintain works therefor, charter authority to appropriate private property for its corporate purposes upon making compensation authorizes the city to acquire by eminent domain lands necessary for the erection of an *electric light plant*. *State v. King County Super. Ct.*, 35 Wash. 303.

¹ *Wilson v. Lambert*, 168 U. S. 611, 616; *South Park Com'rs v. Williams*, 51 Ill. 57; *Kansas City v. Bacon*, 147 Mo. 259; *St. Louis County Court v. Griswold*, 58 Mo. 175; *Kansas City v. Ward*, 134 Mo. 172; *Central Park Extension, In re*, 16 Abb. Pr. (N. Y.) 56; *People v. Adirondack R. Co.*, 160 N. Y. 225, aff'd 176 U. S. 335; *Matter of Rochester*, 102 N. Y. App. Div. 181; *Loble v. Philadelphia*, 174 Pa. 111. *Index, Park.* Congress possesses such powers with respect to the District of Columbia. *Shoemaker v. United States*, 147 U. S. 232.

The legislature may authorize the *condemnation of the fee for a public park* (*Mills, Em. Domain*, §§ 49, 50, and cases; *Lewis, Em. Dom.* § 175), and the title of a city corporation to lands thus acquired is clothed with a trust to hold them for this specific purpose, but the legislature may (where there is no contract with creditors which will be thereby impaired) relieve the city from the trust and authorize a sale of the lands discharged therefrom. There is no contract in such cases with the owners of adjacent property. *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *infra*, § 1035, note; *post*, § 1103. A *board of park commissioners* held to have power to use the name of the city in any proceeding at law or in equity that may be necessary to carry into effect the objects in the act creating the commission. *Philadelphia v. Germantown Pass. R. Co.*, 10 Pa. 165. In *Ohio* it is held that where the statute does not undertake to authorize the appropriation of the fee the estate is limited to an easement for the purposes intended where land is appropriated by a city for park purposes.

lic square,¹ for the construction of *drains and sewers*,² or for the establishment of a *public city market*.³ So, for the same reasons, a

Newton v. Manufacturers' R. Co., 115 Fed. Rep. 781.

For a learned discussion of the constitutionality of an act authorizing a city to *lay out parks outside of its corporate limits*, and to acquire land therefor, see *Matter of Mayor of New York*, 99 N. Y. 569. Nature of a city's ownership of a park situate outside of the city limits. *Detroit v. Park Com'rs*, 44 Mich. 602; *ante*, § 980, note. Index, *Boundaries; Property*. As to the uses of a *public park*, see opinion of *Folger, J.*, 45 N. Y. 240; *post*, §1100, note. For a collection of authorities upon the rights and liabilities of municipal corporations, and of abutting owners, in parks dedicated to public use, see valuable note, by the Reporter, to *Morris v. Sea Girt Imp. Co.*, 38 N. J. Eq. 304.

In *State v. Leffingwell*, 54 Mo. 458, the Supreme Court of *Missouri* held the act of March 25, 1872, establishing for the city of *St. Louis*, and outside of the city, what is known as the *Forest Park*, to be unconstitutional. The park commissioners were created a body corporate, with power to purchase and to condemn lands for the park, and to issue \$1,200,000 of bonds

to be secured on the lands purchased and condemned. A park district was laid off, comprising lands surrounding the park within a designated district, and provision was made for the levy and collection for twenty years of a special tax on all lands within this district to pay the principal and interest of the park bonds. The act was held invalid on two grounds. 1. It infringed the constitutional provision, "Corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes; no municipal corporations, except cities, shall be created by special act." The Park Act was decided to be a special act and to create a corporation other than municipal. 2. It was invalid because it levied a special tax or local assessment exclusively upon certain designated lands outside of the city, for an object general in its nature, and which the act declared to be of great importance to the city of *St. Louis*, conducive to its dignity and character and to the health and recreation of its inhabitants. The remarks of *Wagner, J.*, on the abuses of local assessments, are emphatic,

Owners, &c., *In re Pine St. v. Albany*, 15 Wend. (N. Y.) 374. In this case, the legislature authorized the condemnation of property for a *public square* in the city of *Albany*, and required the damages to the landowners whose property was taken to be apportioned amongst the owners of the ground to be benefited. The court sustained the validity of the enactment, and held that the taking of ground for such a purpose was as much a public use as if taken for a street, and that the mode of compensation (by an assessment of benefits instead of a general tax) was unimportant, and no evidence that the use is not a public one. As to *dedication of land for "parks," "public squares," &c.*, see *post*, §§1094-1098.

² *Hildreth v. Lowell*, 11 Gray (Mass.), 345. *Pasadena v. Simpson*, 91 Cal. 238; *Ham v. Salem*, 10 Mass. 350; *Chaplin v. Wheatland*, 129 Ill. 651. The power to condemn land for sewers must be plainly given, and is not implied in the grant of power to en-

force ordinances "to construct and regulate sewers, and to provide for the payment of the cost of constructing the same." *Allen v. Jones*, 47 Ind. 438. In this case *Downey, J.*, says: "The right of eminent domain, or that right by which the sovereign power, for public uses, takes and appropriates the property of the citizen, is one which should be watched with great vigilance. It should never be exercised except when the public interest clearly demands it, and then cautiously and in accordance with law. The right is one which lies dormant in the State until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise" (citing *Dyckman v. New York*, 5 N. Y. 434; *Cooley, Const. Lim.* 527). *Allen v. Jones*, 47 Ind. 438; *post*, § 806. In *California an alley* in a city or town is by statute declared to be a public use. *Santa Ana v. Brunner*, 132 Cal. 234.

³ *Matter of Cooper*, 28 Hun (N. Y.), 515.

municipal corporation may be designated as the public agency to "purchase or otherwise take lands" within a large district, on compensation being made, in order to *raise and drain* them so as to abate an existing nuisance thereon.¹

and, in view of the case before the court, just. He concludes by saying, "The Constitution has wisely erected a barrier against this exorbitant power, and there is a time in the tide of this special taxation when it must be said, 'Thus far shalt thou go, and no farther.'" A subsequent act, passed in consequence of the above decision, authorizing the appropriation of land for a public park for the benefit of the inhabitants of St. Louis County (which embraces the city of St. Louis), the park being located near to but outside of the limits of the city, and also authorizing the issue of bonds of the county to pay for the lands purchased and condemned, and for the improvement of the park, the bonds to be paid by taxation of all the property in the county, including the city, and the park to be laid out, improved, and managed by a board, one-half of which was to be appointed by the county court and one-half by the mayor of the city, was sustained as not in conflict with any provision of the Constitution of the State. The court distinctly held that such an appropriation of land was for a "public use," and that it was competent for the legislature to authorize a county to create a debt for the purpose of establishing a park for the benefit of its inhabitants, including the inhabitants of the city, who, in this instance, comprised the greater part of the population of the county. *St. Louis Co. Court v. Griswold*, 58 Mo. 175. See *ante*, chap. x. Index, *Boundaries; Park*.

In *Flatbush, &c., In re*, 60 N. Y. 398, relating to Prospect Park in the city of Brooklyn, it was held that the legislature had not attempted to authorize the assessment of lands in the adjoining town of Flatbush to aid in paying for lands acquired for the park, and that it was beyond the competency of the legislature to assess lands in Flatbush to pay debts previously incurred by Brooklyn under prior acts. *Ante*, § 115. *As to local assessments*, see *post*, chap. xxviii.

¹ *Dingley v. Boston*, 100 Mass. 544; *supra*, § 1023; *New Orleans Draining Co., In re*, 11 La. An. 338; *Mills, Em.*

Dom. §§ 16, 354, and cases; *Lewis, Em. Dom.* §§ 185-197. In *Reeves v. Wood County Treasurer*, 8 Ohio St. 333, 345, a law authorizing an entry upon private property, and the *construction of drains* when demanded by private and not by public interest, was adjudged void. *Approving Albany Street, In re*, 11 Wend. (N. Y.) 148; *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. (N. Y.) 9, 59; *Varick v. Smith*, 5 Paige (N. Y.), 137; *Sedgw. on Const. Law*, 514, 515; *Rutherford's Case*, 72 Pa. St. 82. See also *Cooley, Const. Lim.* 533; *People v. Nearing*, 27 N. Y. 306; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Talbot v. Hudson*, 16 Gray (Mass.), 417. The *drainage act of North Carolina of 1795* is not unconstitutional as taking land for a mere *private purpose*; for although the canal may be private property, all persons may acquire the right to drain into it on just terms, and their reciprocal duties are subject to judicial regulation. *Norfleet v. Cromwell*, 70 N. Car. 634. The New York law of 1871, chap. 566, authorizing the draining of private lots in the city of New York by the department of public works, on the certificate of the board of health that the same is necessary, &c., and providing for collecting the expense by an assessment on the property benefited, is unconstitutional, in making no provision for compensation to the land-owners. *Cheesbrough, In re*, 17 Hun (N. Y.), 561.

Under the laws of *Illinois*, the *draining of bodies of land* so as to make them fit for human habitation and cultivation is a public purpose to accomplish which the State may, by appropriate agencies, exercise the general powers it possesses for the common good. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561; *Chicago, B. & Q. R. Co. v. People*, 212 Ill. 103, 119. Pursuant to statute authorizing the *construction of sewers*, a city may condemn not only a route necessary to connect its sewers with a river, but also the right to discharge sewage into the river, the contamination being an injury to a lower riparian proprietor and to his land. *Long v. Emporia*, 59 Kan. 46. The

§ 1035 (599). **Same Subject; Ornamental Purposes.** — It has been said that since public necessity is the basis of the right of eminent domain, the right cannot be exercised except where the *purpose is useful*, and therefore that property cannot be compulsorily acquired against the owner's consent when wanted merely for *ornamental purposes*.¹ Chancellor Kent,² referring to the opinions of

depreciation to the remainder of the lands by the construction of a *sewer outlet* and noxious gases and vapors

coming therefrom, held to be only consequential, the sewer outlet being at a distance from the land obtained.

¹ Angell on Highways, § 85; Smith, Commentaries on Stat. and Const. Law, § 335. By the Supreme Court of Vermont it is said that highways and streets cannot be laid out for the mere purpose, or mainly for the purpose, of *embellishing and ornamenting* the grounds about a public building, but that these results may be taken into consideration in connection with the public convenience and necessity; if the latter exist, the resulting incidental embellishment will not render the establishment of the highway or street illegal. *Woodstock v. Gallup*, 28 Vt. 587; s. c. 29 Vt. 347. See, on the general subject, the opinion of *Woodbury, J.*, in *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 545, where the subject of eminent domain is ably examined. In the case last referred to, this learned judge, in the course of his opinion, observes: "When we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without the power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or State prison? So a custom-house is a public use for the general government, and a court-house or jail for a State. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. [*Quare?*] No necessity seems to exist which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence, while as to light-house, or fort, or wharf, or highway between certain termini, it may be very important and imperative. I am aware of no precedents abroad for such seiz-

ures of private property, for objects like the former, though some such doctrines appear to have been advanced in this country." See *Kohl v. United States*, 91 U. S. 367; *Boston Mill Corp. v. Newman*, 12 Pick. (Mass.) 476; *Cooley*, Const. Lim. 531, 533; *Dunn v. Charleston*, Harper (S. Car.) Law, 189; *Bankhead v. Brown*, 25 Iowa, 540; *Eldridge v. Smith*, 34 Vt. 484; *Wild v. Deig* (private road), 43 Ind. 455. See as to ornamental and aesthetic purposes, *ante*, § 695. Index, *Ornamental Purposes*.

The legislature incorporated the "Memphis Freight Co.," giving to it "the privilege of loading and unloading freight, goods, and other property on boats that may touch at the port of Memphis; of erecting on the bank of the Mississippi River, in the city of Memphis, such sheds, railroad tracks, engines, and their equipments, as may be necessary for hauling freight." No right was given to the public to use the property or privileges given to the company, and no right of legislative regulation of tolls was reserved. It was held that this company, organized for private advantage and profit, could not be invested with the right to condemn property, against the owner's consent, to lay down a railroad track from the streets of the city to the margin of the river, for the reason that the use was not a public use, within the meaning of the Constitution. It will be noticed that "The Promenade," over which the right of way was sought, is treated by the case as the private property of the city of Memphis. There is, however, no discussion of the question as to the legislative power over property thus dedicated. *Memphis Freight Co. v. Memphis*, 4 Coldw. (Tenn.) 419.

² Bynkershoeck, *Quæst. Jur. Pub.* book ii. chap. xv.

continental jurists on the subject of eminent domain, observes that Bynkershoeck¹ "insists that private property cannot be taken, *on any terms*, without the consent of the owner, for purposes of *public ornament or pleasure*; and he mentions an instance in which the Roman Senate refused to allow the prætors to carry an aqueduct through the farm of an individual, against his consent, when intended merely for ornament." If it be admitted or shown in any given case that the ornamental purpose is not associated with any useful purpose, it would seem to be true that it is inconsistent with the respect in which all enlightened governments hold private property to say that it can be compulsorily taken from the owner. Such a use is not, within the meaning of the American Constitutions, a legitimate "*public use*." But if land for public squares and parks, which are largely, though not exclusively, for ornament, may be assumed by the State, upon payment to the owner, it would be difficult to hold an act unconstitutional which authorized the condemnation of land for a public fountain or as a site for a monument. The Roman Law, as we have seen, authorized legacies *ad ornatum civitatis* and *ad honorem civitatis*, which became frequent: and in respect of cities, it would perhaps be difficult to hold that the legislature could not authorize land to be taken for purposes which would fall within the description of ornamental rather than useful. It would be an extreme case where a purpose was wholly ornamental, and not at all useful. These questions, however, lie upon the boundary of legislative power, and have not been very fully illustrated by actual adjudications.²

Seufferle v. Macfarland, 28 App. D. C. 94. See also Bacon v. Boston, 154 Mass. 100. Jurisdiction of the Supreme Court of the United States of a suit by one State to enjoin another State from *discharging sewage matter into a navigable river*, see Missouri v. Illinois, 202 U. S. 598; s. c. 180 U. S. 208; *supra*, § 1033, note.

¹ Gardner v. Newburgh Trs., 2 Johns. (N. Y.) Ch. 162, 166.

² An interesting illustration of the subject discussed in the text is afforded by the somewhat singular case of Higginson v. Nahant, 11 Allen (Mass.), 530. In *Massachusetts* the usual constitutional provision exists that the property of individuals can be appropriated to public uses only when the public exigencies require it; and the doctrine has been asserted therein that public ways are for travel and not for places of amusement. Blodgett v.

Boston, 8 Allen (Mass.), 237. See Balch v. Essex Co. Com'rs, 103 Mass. 106; *Re Mt. Washington Road Co.*, 35 N. H. 134; *post*, § 1691. The proper authorities of the town in due form laid out a town way, and the above-mentioned case of Higginson v. Nahant presented the question whether the proceedings to establish it could be impeached by showing that the way was wholly upon the land of the plaintiffs; that it entered their land from a highway and returned to it near the place at which it entered; that it led to no other way or landing place, and could be used for no purposes of business or duty, or of access to the lands of any other person; but that it was laid out by the selectmen of the town with the design to provide access, not for the town merely, but for the public, to points or places in the lands of the plaintiffs which presented pleasing

§ 1036 (600). **Legislative and Judicial Domain distinguished.**—Of the *necessity or expediency* of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature and not judicial.¹ But the question *whether the specified*

natural scenery. The court sustained the validity of the proceedings to establish the road. The substance of its reasoning is that the only true test is whether the road is wanted for public travel; that whether wanted for this purpose is a question not committed by the legislature to the determination of the courts, but to the local authorities; and that where there is a sufficient amount of travel to warrant the construction of a particular road the courts cannot enter upon an inquiry as to the reasons which may induce people to travel upon it. It is sufficient if they wish to travel upon it for any innocent and lawful purpose, whether for business, or duty, or pleasure. "The passing from place to place," says Mr. Justice Hoar, who gave the opinion of the court, "is a rightful object of public provision in itself; and the occasions for it are as extensive as the pursuits of life. *Pleasure travel may be accommodated as well as business travel.* If the doctrine for which the plaintiffs contend were supported, it would also follow that the legislature would not have the constitutional right to take private property for a public park or pleasure ground, making full compensation to the owner, — a conclusion which we should hesitate to arrive at without much farther consideration, in view of the important relations which air, exercise, and recreation bear to the general health and welfare of the community." Since the making of provision for opening public ways is confessedly a legislative duty, and such an object a public one (*ante*, §§ 318, 1031), this case, it is evident, does not hold that it would be lawful compulsorily to acquire private property for mere purposes of pleasure wholly dissociated from purposes of utility. Mills, Em. Dom. § 18, cites the cases bearing upon the subject discussed in the text.

There is deep philosophy and wisdom in the saying "Take care of the beauti-

ful; the useful will take care of itself." Looking to the fact that what may be called ornaments, such as squares, fountains, monuments, &c., have always existed in cities, the suggestion of the text is probably sound that it would be an extreme case where the use, though chiefly for ornament, was not at the same time useful in the degree that would support a legislative act authorizing the taking. If the use is public, the degree of usefulness is a legislative, not a judicial question. Mills, Em. Dom. § 11 and cases; Lewis, Em. Dom. chap. vii. The addition of a twenty-foot strip to each side of an avenue, the statute providing that the strips "shall not be added to its travelled portion," but shall be preserved as *ornamental* courtyards, is held to be a public purpose which may be accomplished under the power of eminent domain. Matter of Clinton Avenue, 57 N. Y. App. Div. 166.

It is now settled that for the purpose of preserving the *ornamental features and aesthetic qualities* of a public park it is within the power of the legislature to place a *restriction upon the height of adjoining buildings* upon making just compensation to the owners therefor. See Attorney-General v. Williams, 174 Mass. 476; s. c. 178 Mass. 330, 336; *aff'd sub. nom.* Williams v. Parker, 188 U. S. 491. The purport and effect of this case are stated *ante*, § 695.

¹ Pasadena v. Stimson, 91 Cal. 238; Santa Ana v. Harlin, 99 Cal. 538; Warner v. Gunnison, 2 Colo. App. 430; Chicago v. Wright, 69 Ill. 318, 327, citing text; Illinois Cent. R. Co. v. Chicago, 141 Ill. 586; Chicago & A. R. Co. v. Pontiac, 169 Ill. 155; Chicago & N. W. R. Co. v. Morrison, 195 Ill. 271; Richland Sch. Township v. Overmeyer, 164 Ind. 382; Speck v. Kenoyer, 164 Ind. 431; Coburn v. Bossert, 13 Ind. App. 359; Barrett v. Kemp, 91 Iowa, 296; Bennett v. Marion, 106 Iowa, 628, 630; Hayford v. Bangor, 102 Me.

use is a public use or purpose, or such use or purpose as will justify or sustain the compulsory taking of private property, is, perhaps, ultimately a judicial one, and, if so, the courts cannot be absolutely concluded by the action or opinion of the legislative department. But if the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably private, or the necessity for the taking plainly without reasonable foundation.¹ But if the use be public, or if it be so doubt-

340, 344, quoting text; *Lynch v. Forbes*, 161 Mass. 302; *Knoblauch v. Minneapolis*, 56 Minn. 321; *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129; *Cape Girardeau v. Houck*, 129 Mo. 607; *State v. Engelmann*, 106 Mo. 628; *Simpson v. Kansas City*, 111 Mo. 237; *Philadelphia Trust, S. D. & Ins. Co. v. Merchantville*, 75 N. J. L. 451; 68 Atl. Rep. 170; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475, 491, quoting text; *Varick v. Smith*, 5 Paige (N. Y.), 137; *People v. Smith*, 21 N. Y. 595; *Brooklyn Park Com'r's v. Armstrong*, 45 N. Y. 234; *Fowler, In re*, 53 N. Y. 60; *Matter of Brooklyn*, 143 N. Y. 596; *People v. McClellan*, 107 N. Y. App. Div. 272; *Matter of New York City*, 116 N. Y. App. Div. 801; *Stratford v. Greensboro*, 124 N. Car. 127; *Grafton v. St. Paul, M. & M. R. Co.*, 16 N. Dak. 313; 113 N. W. Rep. 598, citing text; *Giesy v. Cincinnati, W. & C. E. R. Co.*, 4 Ohio St. 308; *Roanoke City v. Berkowitz*, 80 Va. 616, 623. The reader will find a very full discussion of the subject in *Scudder v. Trenton Del. Falls Co.*, Saxt. (N. J.) 694; *St. Louis Co. Court v. Griswold*, 58 Mo. 175 (*Forest Park Case*); *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; *Mills, Em. Dom.* § 11, and cases. But it has been held that the court may review the legislative determination in case of abuse. *Smith v. Claussen Park Drainage Dist.*, 229 Ill. 155.

In *Michigan*, by constitutional provision the jury is required to determine the necessity of the taking. In determining the necessity of the taking of a single parcel of land, the jury must first determine whether the public necessity requires the proposed improvement as a whole and whether a necessity exists for the use of such a street or improvement by the public generally. *Kundinger v. Saginaw*, 59 Mich. 355, 358. There is a similar constitutional provision in *Wisconsin*. See *State v. Oshkosh*, 84 Wis. 548, 565. In *Cal-*

ifornia, the question of the necessity of condemnation of a strip of land for a sewer is a question of fact for the jury, and the defendant under a general denial of the necessity was allowed to give evidence that it could be as readily located along a designated street of the city. *Santa Ana v. Gildmacher*, 133 Cal. 395.

¹ *Guernsey v. Burlington Tp.*, 4 Dillon C. C. 372, 375; *Bankhead v. Brown*, 25 Iowa, 540; *Hanscom v. Vernon*, 27 Iowa, 28; *Wyandotte City Cem. Assoc. v. Meineger*, 14 Kan. 312; *Kennebec Water District v. Waterville*, 96 Me. 234; *Commonwealth v. Breed*, 4 Pick. (Mass.) 463; *Hazen v. Essex County*, 12 Cush. (Mass.) 477; *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129; *Cape Girardeau v. Houck*, 129 Mo. 607; *Daugherty v. Brown*, 91 Mo. 26; *Kansas City v. Baird*, 98 Mo. 215; *Aldridge v. Spears*, 101 Mo. 400; *State v. Engelmann*, 106 Mo. 628; *Concord R. Co. v. Greely*, 17 N. H. 47; *Taylor v. Porter*, 4 Hill (N. Y.), 140; *Townsend, In re*, 39 N. Y. 174; *Weisner v. Douglas*, 64 N. Y. 91; *Deansville Cem. Assoc., In re*, 66 N. Y. 569; *Matter of Brooklyn*, 143 N. Y. 596; *Stratford v. Greensboro*, 124 N. Car. 127, citing text; *Memphis Freight Co. v. Memphis*, 4 Coldw. (Tenn.) 419; 2 Kent Com. 340; *Cooley, Const. Lim.* 530 *et seq.*

Speaking of this subject, *Shaw, C. J.*, says: "It is contended that if this act was intended to authorize the defendant company to take the mill power and mill of the plaintiff, it was void, because it was *not taken for public use*, and it was not within the power of the government in the exercise of the right of eminent domain. This is the main question. In determining it, we must look to the declared purposes of the act; and if a public use is declared, it will be so held, unless it manifestly appears by the provisions of the act that they can have no tendency to advance

ful that the courts cannot pronounce it not to be such as to justify the compulsory taking of private property, the decision of the legislature, embodied in the enactment giving the power, that a necessity exists to take the property, is final and conclusive.¹ The *measure of compensation* is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes, — that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property through the legislative body, its representative, to determine what compensation shall be paid, or to declare a rule of compensation in conflict with the constitutional rights of the property owner.²

and promote such public use." *Hazen v. Essex Co.*, 12 Cush. (Mass.) 477; *Mills*, Em. Dom. § 10 and cases; *Lewis*, Em. Dom. § 158; *infra*, §§ 1039, 1055, note. Consult on this subject opinion of *Appleton*, C. J., in *Allen v. Jay*, 60 Me. 124; *Burlington Tp. v. Beasley*, 94 U. S. 310; *Guernsey v. Burlington Tp.*, 4 Dillon C. C. 372; *Dodge County v. Chandler* (toll bridges), 96 U. S. 205; *ante*, § 885 and notes. The Constitution of *Missouri* of 1875 (§ 20, art. 2) provides that "the question whether the contemplated use be really public shall be a judicial question, and, as such, judicially determined, without regard to any legislative assertion that the use is public." See *Savannah v. Hancock*, 91 Mo. 54.

In *Kentucky* it has been decided that where real property has been taken, through the exercise of eminent domain, for a particular public use, it may be applied to another, but a kindred, public use, with the consent of the legislature, without working a reversion to the original owner. *Curran v. Louisville*, 83 Ky. 628. In *Iowa* it is held that the determination of the common council of a city that a particular improvement should be made is final. Its determination of the amount of land necessary to be taken for the improvement is not final, but is subject to review by the courts to the extent of preventing abuse; but the determination of the council will not be interfered with if the land will to some extent conduce to the public use. *Bennett v. Marion*, 106 Iowa, 628. The action of the legislature on the question of what shall be held to be a public use is not, it was said in a *California* case, *Santa Ana v. Harlin*, 99 Cal. 538, ex-

cept in extreme cases, open to review by the courts.

¹ See authorities above cited. *Talbot v. Hudson*, 16 Gray (Mass.), 417; *Maugan v. Texas Transp. Co.*, 18 Tex. Civ. App. 478, quoting text. The Court of Appeals of New York has distinctly held that the question, whether the use is public or private, is a judicial one, and that the judgment of the legislature on the point is not conclusive. *Deansville Cem. Assoc., In re*, 66 N. Y. 569; *s. p. St. Louis Co. Court v. Griswold* (Forest Park case), 58 Mo. 175. The language of the text of this section is guarded, and the view there intimated is the safe and, perhaps, the sound one. The citizen is more secure in his rights where the ultimate decision respecting the *use or right to take* is left to deliberate, unimpassioned, and conservative judgment of the courts; but if the power of eminent domain rests alone upon the basis of the public necessities or of public policy, it seems somewhat difficult to maintain that the legislative determination of this question is not conclusive.

² *Charles River Bridge Prop. v. Warren Bridge Prop.*, 11 Pet. (U. S.) 420, 571; *Monongahela Nav. Co. v. United States*, 143 U. S. 312, 327; *Pennsylvania R. Co. v. Baltimore & O. R. Co.*, 60 Md. 263; *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300; *Matter of New York City*, 190 N. Y. 350; *Commonwealth v. Pittsburgh & C. R. Co.*, 58 Pa. St. 26, 50.

In *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300, 305, the court said: "The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to

§ 1037 (601). **Municipal Exercise of Power.** — In exercising the power of eminent domain, the *city council need not preface their action*, as, for example, laying out of a highway or street, by declaring that they find the same to be necessary or expedient. This necessity is sufficiently implied in their action on the subject, inasmuch as they can act only in such a case. They need not record their motives where they have jurisdiction to act. It might be otherwise, were their jurisdiction made to depend upon their first finding a preliminary fact to be true.¹

§ 1038 (602). **Same Subject.** — The legislature, instead of directly exercising the power to take private property for public use, *may delegate it*, attended, of course, by its constitutional restrictions, to private corporations organized for public purposes, and, of course, therefore, to municipal corporations, which are, for purposes of local government, essentially public in their nature and ends; and it may also confer upon them the right to decide upon the existence of the necessity for its exercise. Thus, a municipal corporation may be constitutionally invested with the power to open and establish, by compulsory acquisition or by purchase, such streets or parks or municipal utilities as its council may judge to be expedient or necessary.²

determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so." This language is quoted by the Supreme Court of the United States in *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327, where a statute authorizing the United States to acquire the lock and dam of the navigation company declared that the franchise to collect tolls should not be considered in estimating the sum to be paid for the property. The court declared it was not concluded by this direction of the statute, and held that as the value of the lock and dam were dependent upon the right to collect

tolls therefor, this element must be considered in determining the compensation to be paid to the owner. To the effect that upon the taking of a bridge by a county the owner of the bridge is entitled to compensation for the right to collect tolls, see *Montgomery County v. Schuylkill Bridge Co.*, 110 Pa. 54, 58; *post*, chapter on Public Utilities.

¹ *Townsend v. Hoyle*, 20 Conn. 1, 9, *per Ellsworth, J.* *Allen v. Jones*, 47 Ind. 438, 442, quoting text; *Poulan v. Atlantic C. L. R. Co.*, 123 Ga. 605, 611, citing text. A finding, by the city authorities, that "public convenience requires" the laying out of a street, is equivalent to finding that it is "necessary" in the sense of the statute. *Hunter v. Newport*, 5 R. I. 325; *Watson v. South Kingston*, *Ib.* 562. See chapter on Ordinances, *ante*, § 588; *ante*, § 1034, note.

² *Wilson v. Blackbird Cr. Marsh Co.*, 2 Pet. (U. S.) 251; *West River Br. Co. v. Dix*, 6 How. (U. S.) 507; *Santa Ana v. Harlin*, 99 Cal. 538; *Cherokee v. Sioux City & I. F. Town Lot Co.*, 52 Iowa, 279; *Alexander v. Baltimore*, 5 Gill (Md.), 383; *Commonwealth v.*

§ 1039 (603). **Construction of Power.** — Whether the power be exercised directly by the legislature, or mediately through municipal corporations or other public agencies, the *purpose or use* for which private property is authorized to be appropriated *should be specified by the legislature*, and the power will not be enlarged by doubtful construction.¹ Therefore, authority to a city corporation to appro-

Charlestown, 1 Pick. (Mass.) 179; Lynch v. Forbes, 161 Mass. 302; Swan v. Williams, 2 Mich. 427; Shaffner v. St. Louis, 31 Mo. 264; Simpson v. Kansas City, 111 Mo. 237; Joplin Consol. Min. Co. v. Joplin, 124 Mo. 129; Scudder v. Trenton Del. Falls Co., Saxt. (N. J.) 694; Syracuse v. Stacey, 86 Hun (N. Y.), 441; Bloodgood v. Mohawk & H. R. R. Co., 18 Wend. (N. Y.) 9; Embury v. Conner, 3 N. Y. 511; People v. Smith, 21 N. Y. 595; Stratford v. Greensboro, 124 N. Car. 127; Harbeck v. Toledo, 11 Ohio St. 219; Mercer v. Pittsburgh, Ft. W. & C. R. Co., 36 Pa. St. 99; Rhine v. McKinney, 53 Tex. 354; Sedgwick on Stat. and Const. Law, 517; *ante*, § 69. See also cases cited to § 1024, note 5, *supra*. In the absence of constitutional restriction, power may be delegated by the legislature to *park commissioners*. West Chicago Park Com'rs v. West. Union Tel. Co., 103 Ill. 33.

As the right of eminent domain appertains to sovereignty, the legislature has no power to make a grant in restraint of it; such a grant is not binding upon the State and, even where it has been relied upon, the State may resume its sovereign right without violating the inhibition of the Federal Constitution against impairing the obligation of contracts. Hyde Park v. Oakwoods Cem. Assoc., 119 Ill. 141. General power to lay out streets held not to authorize the condemnation of the *lands of a cemetery association*. Evergreen Cemetery Association v. New Haven, 43 Conn. 234; s. c. 21 Am. Rep. 643, and note. The expediency of exercising the power usually given to open streets is generally left solely to the judgment of the governing body of the corporation; and its judgment when rightfully exercised is not subject to judicial revision. Methodist Prot. Church v. Baltimore, 6 Gill (Md.), 391; *post*, §§ 1489 *et seq.*; Curry v. Mt. Sterling, 15 Ill. 320. Power may be delegated to local authorities to determine the expediency of building a bridge

over a creek. Commonwealth v. Charlestown, 1 Pick. (Mass.) 179. Streets may be established by direct action of the legislature, as by ordering a survey of a town to be made, and declaring the map to be a public record. Such streets are public highways without being formally opened or used. West v. Blake, 4 Blackf. (Ind.) 234. The law must provide a method of condemning streets before they can be opened and local assessments made. State v. West Hoboken Tp., 37 N. J. L. 177.

It has been said that the exercise of the power of eminent domain is so high and peculiar a thing that nothing less than an act of the legislature will support it, and that act must not only confer the power but prescribe the method by which it is to be exercised. Tacoma v. State, 4 Wash. 64. See also Chaffee's Appeal, 56 Mich. 244; Long v. Billings, 7 Wash. 267, 269. When a State delegates to a municipality the right to condemn private property for a public use, and does not in the act delegating such authority provide a method for its exercise, the *general law of the State* prescribing the procedure and the method of ascertaining the damages is by implication a part of the law delegating the power. Georgia R. & B. Co. v. Union Point, 119 Ga. 809, 814; Marietta Chair Co. v. Henderson, 112 Ga. 399; Poulan v. Atlantic C. L. R. Co., 123 Ga. 605, 610; Stowe v. Newborn, 127 Ga. 421, 423.

¹ *Supra*, § 1023; *infra*, §§ 1048, 1379; Claiborne Street, *In re*, 4 La. An. 7; Exchange Alley, *In re*, 4 La. An. 4; East St. Louis v. St. John, 47 Ill. 463; Cooley, Const. Lim. 530, 541; Kane v. Baltimore, 15 Md. 240. In proceedings to open streets, the *costs* thereof cannot, unless the right to do so be expressly or plainly given by the statute, be added to the damages and collected from the owners of the adjacent property. The words, "the *expenses* of said improvement," do not embrace the costs of the proceedings. In the ab-

private property for streets, lanes, alleys, and public squares or grounds, does not confer the power compulsorily to take private property upon which to erect a city prison.¹ So where the purpose for which land is to be taken is as well met by construing the authority to warrant the taking of an easement only as of the fee, the grant, if doubtful, will be construed most favorably for the citizen.²

sence of authority to collect the same from adjacent owners, the costs must be borne by the corporation. *Morris v. Chicago*, 11 Ill. 650; *s. p. Illinois & Mich. Canal Trs. v. Chicago*, 12 Ill. 403. See *Philip Street, In re*, 10 La. An. 313. See for rule in California, *Sinton v. Ashbury*, 41 Cal. 525; *post*, § 1379.

A delegation of the power of eminent domain must be express. In the absence of an enactment expressly conferring the power, it will not be implied. *People v. Rochester*, 50 N. Y. 525; *Waterbury v. Platt*, 75 Conn. 387; *Tacoma v. State*, 4 Wash. 64; *Ligare v. Chicago*, 139 Ill. 46; *Brunswick & W. R. Co. v. Waycross*, 94 Ga. 102; *Butler v. Thomasville*, 74 Ga. 570; *Stowe v. Newborn*, 127 Ga. 421, 422. Power to condemn land is not conferred by a general power to preserve the public health. *Cavanagh v. Boston*, 139 Mass. 426. Power to construct sewers does not authorize the condemnation of lands therefor. *Allen v. Jones*, 47 Ind. 438. Authority to remove deposits in a stream does not authorize the condemnation of lands to widen it. *Schenectady v. Furman*, 61 Hun (N. Y.), 171; *s. c. 78 Hun (N. Y.)*, 87.

It has been held that power to condemn cannot be implied from a mere grant of the power to lay out and open streets. In the absence of any other provision authorizing the municipal authorities to condemn property for that purpose the presumption is that the legislature intended that the necessary property should be acquired by contract. *Brunswick & W. R. Co. v. Waycross*, 94 Ga. 102; *Georgia R. & B. Co. v. Union Point*, 119 Ga. 809, 811; *Poulan v. Atlantic C. L. R. Co.*, 123 Ga. 605, 609; *Stowe v. Newborn*, 127 Ga. 421, 422; *Tacoma v. State*, 4 Wash. 64; *Vancouver v. Wintler*, 8 Wash. 378, 381. But see *contra*, *Chicago & N. W. R. Co. v. Cicero*, 154 Ill. 656. But if the municipality has statutory authority to lay out and open streets, and has also general

power to condemn lands for public purposes, there is a delegation of the power of eminent domain for street purposes. *Stowe v. Newborn*, 127 Ga. 421, 422; *Grand Rapids v. Coit*, 149 Mich. 668. In *Georgia R. & B. Co. v. Union Depot*, 119 Ga. 809, it is held that the grant of authority to a municipality in its charter "to require any railroad company running through said town to make such crossing as may be needed for public convenience," does not confer on the municipality the right to exercise the power of eminent domain to open a new street across the right of way and tracks of the railroad company and without making compensation for the taking or damaging of its property for such purposes.

The extent of the power delegated to a municipal corporation to exercise the right of eminent domain is limited by the express terms or clear implication of the statute authorizing its exercise. *Waterbury v. Platt*, 75 Conn. 387. Authority to take property for a permanent public use, as to take land for the use of highways, does not imply the right to take it for a temporary use and limit the compensation by a valuation of the land taken for a period of five years. *Waterbury v. Platt*, 75 Conn. 387.

¹ *East St. Louis v. St. John*, 47 Ill. 463. It would seem to be the opinion of Mr. Justice *Woodbury* that private property could not be compulsorily taken for such a purpose, if the legislature had undertaken to grant the power; but *quære*? He says: "Who ever heard of laws to condemn private property for public use for a marine hospital or State prison?" *West River Br. Co. v. Dix*, 6 How. (U. S.) 507, 545; *ante*, § 1035.

² *Edgerton v. Huff*, 26 Ind. 35; *supra*, § 1023. Compare *Indianapolis Water Works Co. v. Burkhart*, 41 Ind. 364. See *Heyneman v. Blake*, 19 Cal. 579; *Kane v. Baltimore*, 15 Md. 240; *Mills, Em. Domain*, § 49, and cases.

§ 1040 (604). **Power must be strictly pursued.** — Not only must the authority to municipal corporations or other delegated legislative agents, to take private property, be expressly conferred, and the use for which it is taken specified, *but the power*, with all constitutional and statutory limitations and directions for its exercise, *must be strictly pursued*. Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity or an urgent public policy, the rule requiring the power to be strictly construed and the prescribed mode for its exercise in all substantial matters strictly followed, is a just one, and should, within all reasonable limits, be inflexibly adhered to and applied.¹

¹ Sanford v. Tucson, 8 Ariz. 247; 71 Pac. Rep. 903; Whitehead v. Denver, 13 Colo. App. 134; Brunswick & W. R. Co. v. Waycross, 94 Ga. 102; Allen v. Jones, 47 Ind. 438, 442, quoting text; Houghton v. Huron Copper Min. Co., 57 Mich. 547, 554, citing text; Shaffner v. St. Louis, 31 Mo. 264; Lexington v. Long, 31 Mo. 369; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 121; Helena v. Harvey, 6 Mont. 114; Manda v. Orange, 75 N. J. L. 251; 66 Atl. Rep. 917; Vreeland v. Jersey City, 54 N. J. L. 49; Loucheim v. Hemsley, 59 N. J. L. 149; Hampton v. Clinton Water & Supply Co., 65 N. J. L. 158; In re Buffalo, 78 N. Y. 362; Schneider v. Rochester, 160 N. Y. 165, quoting text; Erie R. Co. v. Youngstown, 26 Ohio Cir. Ct. 679; Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82; Lance's Appeal, 55 Pa. St. 16; Godchaux v. Carpenter, 19 Nev. 415; Northern Pac. Terminal Co. v. Portland, 14 Ore. 24; St. Louis v. Gleason, 93 Mo. 33; s. c. 89 Mo. 67 (holding also that if the power is vested in one court it cannot be exercised by another); Specht v. Detroit, 20 Mich. 168; Southern Pac. R. R. Co. v. Wilson, 49 Cal. 256; Ventura County v. Thompson, 51 Cal. 577; Trumpler v. Bemerly, 39 Cal. 490; Leslie v. St. Louis, 47 Mo. 474; Anderson v. St. Louis, *ib.* 479; Harbeck v. Toledo, 11 Ohio St. 219; Dyckman v. New York, 5 N. Y. 434, 439; People v. Kniskern, 54 N. Y. 52; State v. Jersey City, 25 N. J. L. 309; State v. Jersey City, 26 N. J. L. 444; State v. Hudson City, 27 N. J. L. 214; Watson v. Acquackanonck Water Co., 36 N. J. L. 195; Cincinnati v. Coombs, 16 Ohio, 181; Mitchell v. Kirkland, 7 Conn. 229; *ib.* 350; Nichols v. Bridgeport, 23 Conn. 189, 208; Judson v. Bridgeport, 25 Conn. 426; Van Wickles v. Camden & A. R. R. Co., 14 N. J. L. 162; Adams v. Saratoga & W. R. R. Co., 10 N. Y. 328; Cooley, Const. Lim. 528, 541; People v. Brighton, 20 Mich. 57; Kidder v. Peoria, 29 Ill. 77; Exchange Alley, *In re*, 4 La. An. 4; Claiborne Street, *In re*, *ib.* 7; Thompson v. Schermerhorn, 6 N. Y. 92; Burnett v. Buffalo, 17 N. Y. 383; Hunt v. Utica, 18 N. Y. 442; Kyle v. Malin, 8 Ind. 34, 37; Redfield on Railways, § 64; People v. Central Pac. R. Co., 43 Cal. 398; People, *ex rel.* v. Whitney's Point, 102 N. Y. 81; Baltimore & O. R. Co. v. Boyd, 63 Md. 325, where the condemnation of land for a street was held void because the damages assessed had not been paid, or tendered to the owner, nor invested, as required by statute; s. p. Baltimore v. Hook, 62 Md. 371, and Bartleson v. Minneapolis, 33 Minn. 468; Tarkio v. Clark, 168 Mo. 285; Helena v. Rogan, 26 Mont. 452; s. c. 27 Mont. 135.

If a charter requires a council to treat with an owner before condemning his land, an honest compliance with the requirement is jurisdictional; merely receiving and tabling a proposal from the owner will not suffice. Lane v. Saginaw, 53 Mich. 442; *infra*, § 1041; Weckler v. Chicago, 61 Ill. 142, holding that two alleys cannot be included in one condemnation proceeding, and the value of lands taken for one be compensated by benefits derived from the other, because one alley intersects the other. "It is a well-established rule that in matters of expropriation to public use, all the forms of law must be rigidly observed." Street Case, 16 La. An. 393; Dennis v.

§1041 (605). **Conditions Precedent.** — Especially will the courts require a *strict compliance with all conditions precedent* to the exercise of the power, and all provisions as to the manner of its exercise intended for the benefit and protection of the citizen. If the authority be not thus pursued, the proceedings will not have the effect to divest the owner of his property.¹ If defective in respect to jurisdictional requisites, they will be void; if irregular, simply, they will be set aside by the courts on *certiorari* or such other remedy as may be deemed appropriate in the particular State.² Not only so, but a municipal corporation, claiming title to streets or other public property by virtue of proceedings under the exercise of the right of eminent domain, must show affirmatively that the material requirements of the statute have been substantially complied with. Thus if, under the statute or charter, the *disagreement of the parties* as to the amount of the compensation is an essential prerequisite of

Hughes, 8 Up. Can. Q. B. 444; *post*, § 1377; Brice on *Ultra Vires* (Green's Am. ed.), 278 *et seq.*, 298.

An *enabling ordinance* held to be necessary before a street can be opened or property condemned for public use in a municipal corporation. *People v. Hyde Park*, 117 Ill. 462; *Tarkio v. Clark*, 186 Mo. 285 (resolution not sufficient). Where a statute authorizing the taking of land for public parks gave to commissioners discretion to take certain particularly described pieces of lands or so much thereof as they should "deem advisable to be acquired," no particular piece of land could be said to be taken until the commissioners had finally acted in the manner prescribed by the State. *Matter of New York*, 24 N. Y. App. Div. 7.

¹ See authorities above cited. *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141, 162, citing text.

A statute of *California* provided for the opening of a street "whenever the owners of a majority on frontage shall petition," &c. The proper officials certified that the petition had been subscribed by the owners of the requisite amount of frontage. This report was confirmed by the court. It was held that a petition from a majority of frontage owners was *jurisdictional*, and that a lot owner, whose lot had been sold for the tax and against whom ejectment was brought, was not estopped to show that the petition was not signed by the owners of the requisite amount of frontage. *Zeigler v. Hopkins*, 117 U. S. 683, approving *Mulligan v. Smith*,

59 Cal. 206. The court held that, under the statute, neither the mayor nor county court was authorized to investigate or adjudicate upon "the sufficiency of the petition, or pass upon the question of frontage, or to make any record in reference to it." Same point as to street improvement, *post*, § 800. A different rule has been generally adopted and applied to negotiable municipal bonds in favor of *bona fide* holders for value, as shown in the chapter on Municipal Bonds, *ante*.

² *Harbeck v. Toledo*, 11 Ohio St. 219; *Parks v. Boston*, 8 Pick. (Mass.) 218; *Shaffner v. St. Louis*, 31 Mo. 264; *Baltimore v. Eschback*, 18 Md. 276; *Welker v. Potter*, 18 Ohio St. 85; *infra*, § 1048, and note; *post*, chap. xxxi. On the motion for reargument in the *Cable Co.* case, the Court of Appeals through *Rapallo, J.* (104 N. Y. 38, 43), said: "In order to sustain proceedings by which a body claims to be a corporation and, as such, empowered to exercise the right of eminent domain, and under that right to take the property, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*. Where it is sought to take the property of an individual under powers granted by an act of the legislature to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted by the legislature be strictly pursued, and all the prescribed conditions performed."

the right of the city compulsorily to appropriate private property, this fact must be shown by the city.¹

§ 1042 (606). *Notice*. — So *notice of the proceedings* to take property for public use is, when required to be given, the basis of the jurisdiction or of the right to proceed, and if not given, or if not given in substantially the required manner, the proceedings are unauthorized and void.² It is, however, competent for the legislature,

¹ *Dyckman v. New York*, 5 N. Y. 434, a fully considered case arising out of the condemnation of the plaintiff's land for the Croton Water Works. If the statute authorizes the exercise of the power in case the parties fail to agree, an effort to agree which is unsuccessful is all that is necessary. *Re Middletown*, 82 N. Y. 196. The petition or complaint should state the failure to agree. *Dyckman v. New York*, *supra*; *Mills*, Em. Dom. § 107. If, however, the owner appears in the proceedings to assess his damages, and contests the amount, without objecting that no effort had been made to agree, the court (it was held) will presume it to have been made. *Reitenbaugh v. Chester Val. R. Co.*, 21 Pa. St. 100. As to failure to agree with owner, see also *Pennsylvania R. R. Co. v. Porter*, 29 Pa. St. 165; *Neal v. Pittsburg & C. R. R. Co.*, 2 Grant (Pa.) Cases, 137; *Doughty v. Somerville & E. R. R. Co.*, 21 N. J. L. 442; *Gilmer v. Lime Point*, 19 Cal. 47; *Moses v. St. Louis Dock Co.*, 84 Mo. 242; *Elberton v. Hobbs*, 121 Ga. 750; *supra*, § 1040, note. *Mills*, Em. Dom. chap. xii. §§ 107, 108, collects the cases on this subject. The incapacity of the land-owner to sell is a sufficient refusal to sell within the Massachusetts Act of 1866. *Balch v. Essex Co. Com'rs*, 103 Mass. 106. Effort and failure to agree held not a condition precedent. *Bigelow v. Miss. Central & T. R. R. Co.*, 2 Head (Tenn.), 624. How the fact of the attempt to agree, and its failure, may be shown, *vide* opinions of *Foot* and *Gardiner*, JJ., in *Dyckman v. New York*, 5 N. Y. 434. See also as to principle in text, *Sharp v. Speir*, 4 Hill (N. Y.), 76; *Sharp v. Johnson*, *ib.* 92; *Nichols v. Bridgeport*, 23 Conn. 189. Effort to purchase should first be made before condemnation. *Hickory v. Southern R. Co.*, 137 N. Car. 189. A general law regulating the condemnation of lands for public uses held not unconstitutional for not

providing that before proceedings under it can be taken some attempt must be made to secure the consent of the owners. *Grand Rapids v. Grand Rapids & Ind. R. R. Co.*, 58 Mich. 641.

That owner may waive constitutional or statutory provisions for his benefit, — effect of receipt of payment, — powers and nature of jurisdiction of Supreme Court as to confirmation (under statute) of reports of commissioners, — and that title passes by force of the statute and payment, see *Embury v. Conner*, 3 N. Y. 511; *ib.* 197; *Arnot v. McClure*, 4 Denio (N. Y.), 45; *Striker v. Kelly*, 7 Hill (N. Y.), 9; s. c. in error, 2 Denio, 323; *Doughty v. Hope*, 3 Denio (N. Y.), 249; *Kennedy v. Newman*, 1 Sandf. (N. Y.) 187.

² *Molett v. Keenan*, 22 Ala. 484; *Nichols v. Bridgeport*, 23 Conn. 189; *Kidder v. Peoria*, 29 Ill. 77; *Long v. Emporia*, 59 Kan. 46; *Baltimore v. Bouldin*, 23 Md. 328; *Specht v. Detroit*, 20 Mich. 168; *Kundinger v. Saginaw*, 59 Mich. 355, 361; *McMicken v. Cincinnati*, 4 Ohio St. 394; *Harbeck v. Toledo*, 11 Ohio St. 219; *Erie Co. v. Youngstown*, 26 Ohio Cir. Ct. 679; *Darlington v. Commonwealth*, 41 Pa. St. 68; *Seifert v. Brooks*, 34 Wis. 443; *State v. Fond du Lac*, 42 Wis. 298; *State v. Oshkosh*, 84 Wis. 548, 559; *Dietz v. Neenah*, 91 Wis. 422, 427.

As to notice and its requisites, see also *Redfield on Railways*, § 72. *Mills*, Em. Dom. chap. xi. §§ 94–104, is devoted to the subject of *Notice*, when necessary, how given, when waived, &c.; *Lewis*, Em. Dom. treats of the same subject in chap. xv. Waiver of notice. *Cruiger v. Hudson R. R. Co.*, 12 N. Y. 190; *State v. Paterson*, 36 N. J. L. 159; *State v. Atlantic City*, 34 N. J. L. 99; *State v. Perth Amboy*, 29 N. J. L. 259; *post*, § 1457. Record must show proof of service. *Nielson v. Wakefield*, 43 Mich. 434; *Tarkio v. Clark*, 186 Mo. 285; *Kansas City & S. W. R. Co. v. Fisher*, 53 Kan. 512. As to notice in similar

in the absence of a special constitutional restriction, to provide for constructive notice only to those interested.¹

cases. Myrick v. La Crosse, 17 Wis. 442; Rathbun v. Acker, 18 Barb. (N. Y.) 393; Risley v. St. Louis, 34 Mo. 404; Welker v. Potter, 18 Ohio St. 85. Compare Furnell v. Cotes, 19 Ohio St. 405; State v. Elizabeth, 32 N. J. L. 357; Cairo & F. R. Co. v. Trout, 32 Ark. 17; McIntyre v. Easton & A. R. R. Co., 26 N. J. Eq. 425; State v. Orange, 32 N. J. L. 49; see also Lennon v. New York, 5 Daly, 347; aff'd, 55 N. Y. 361; Cowen v. West Troy, 43 Barb. (N. Y.) 48; State v. Hudson, 29 N. J. L. 475; Specht v. Detroit, 20 Mich. 168; Knoblauch v. Minneapolis, 56 Minn. 321; James v. St. Paul, 58 Minn. 459; Joplin Consol. Min. Co. v. Joplin, 124 Mo. 129; Woolard v. Nashville, 108 Tenn. 353. A similar principle as to notice applies in proceedings to assess the owners of land for local improvements. State v. Jersey City, 24 N. J. L. 662, 666; Kean v. Asch, 27 N. J. Eq. 57; State v. Plainfield, 38 N. J. L. 95; *Ib.* 419; Adams v. Clarksburg, 23 W. Va. 203. In this case the law required service of the notice by publication, and posting, and a notice by publication only was held insufficient, there being no personal service upon nor appearance entered by the owners. See *post*, chapter on Taxation.

The owner must under the Constitution have notice of the time and place when he may be heard as to his compensation or damages. If the statute fails to provide for notice, it is unconstitutional. Sterritt v. Young, 14 Wyo. 146. Notice to equitable owner in actual possession sufficient where legal title in non-resident trustee under deed of trust. Harkins v. Asheville, 123 N. Car. 636. Personal notice to those whose lands are to be taken for extension of street not necessary where act requires posting and publishing of notice. Wulzen v. San Francisco Board of Supervisors, 101 Cal. 15.

¹ Stewart v. Hinds Co. B. of Police, &c., 25 Miss. 479; Owners, &c. *Re* Pine St. v. Albany, 15 Wend. (N. Y.) 374; Wilkin v. St. Paul & Pac. R. R. Co., 16 Minn. 271. Notice "may be by advertisement, even to resident owners." Mills, Em. Dom. § 98, citing cases; Matter of Rochester (*In re McLean*), 102 N. Y. App. Div. 181. Such questions depend, however, upon the terms of the Constitution and statute confer-

ring and regulating the power. Palmyra v. Morton, 25 Mo. 593, 597; Swan v. Williams, 2 Mich. 427. But in a later case it was said that in *Swan v. Williams*, *supra*, it was contemplated that notice should be given the owner for the reason that it authorized him to assist in drawing a jury; and it was held that a charter which did not provide for personal service of notice upon known owners, if residing in the city and upon whom service could be had, was fatally defective. Kunder v. Saginaw, 59 Mich. 355, 363 (citing State v. Fond du Lac, 42 Wis. 298; and Seifert v. Brooks, 34 Wis. 443); St. Paul, Minneapolis, & M. Ry. Co. v. Minneapolis, 35 Minn. 141. The publication of the ordinance which authorizes the opening of the street is frequently the only notice to property owners which is required by the charter or constituent act of the corporation. Curry v. Mt. Sterling, 15 Ill. 320; Johnson v. Joliet & C. R. R. Co., 23 Ill. 202. Where notice of the proceedings to open streets is required to be given by publication only, and it is thus given, "the law imputes notice, and will not admit testimony to disprove it;" and in such case want of actual notice in any part is no ground for relief, in equity or otherwise, against such proceedings. Methodist Prot. Church v. Baltimore, 6 Gill (Md.), 391. See State v. Jersey City, 24 N. J. L. 662; State v. Plainfield (constructive notice), 38 N. J. L. 95; Dubuque v. Wooten, 28 Iowa, 571; *post*, chap. xxviii., § 1457. Where the statute directed the city council to give notice of meetings for condemnation purposes, it was held that this duty could not be delegated to the clerk. State v. Jersey City, 25 N. J. L. 309; *ante*, § 244, as to delegation of public powers. Index, *Delegation of Power*. A non-resident owning property within city limits is bound to take notice of an ordinance affecting his property which has been duly promulgated as required by law. McIntosh v. Pittsburg, 112 Fed. Rep. 705.

In *Massachusetts*, it is immaterial that no personal notice of taking is given to the owner. Notice by the public acts of the town and its officers, and the registration required by the statute is sufficient to vest a good title in the town. Appleton v. Newton, 178 Mass.

Where the charter, by a fair construction, provided that *each* applicant for a review of an assessment should himself have the right to select two appraisers, an ordinance denying this right and giving it to a majority of those to be affected by the laying out of a street is void.¹ So authority to *open a street and assess the damages* on the property benefited does not give the power to assess for anything more than opening the street and paying for the right of way; it does not include the power to assess other property for the *improvement* of the street by grading,^{*} culverting, and the like.²

§ 1043 (607). **Procedure.** — So if *damages* are to be assessed by *commissioners who are freeholders*, the fact that they are such should, it has been held, appear on the face of the proceedings.³ But where the charter required the city council to appoint as commissioners disinterested freeholders residing in the city, and the corporation, in a proceeding *against it* by the land-owner for a *mandamus* to compel it to collect the amount awarded, admitted that its council had appointed the commissioners, it was held as against the city that the commissioners would be presumed to possess the requisite qualification, the contrary not appearing on the face of the proceedings.⁴

276; *Sweet v. Boston*, 186 Mass. 79; *Lancy v. Boston*, 185 Mass. 219; *Walpole v. Massachusetts Chemical Co.*, 192 Mass. 66. In *Appleton v. Newton* 178 Mass. 276, it was held that *constructive notice* of the appropriation of lands by registration of an instrument of taking in the registry of deeds was sufficient notice. A statute authorized a town to take lands for water supply and gave the owner of lands taken three years within which to file a petition for assessment of damages for the taking. It did not require that formal notice of the taking be given to him other than constructive notice by filing the instrument of taking in the registry of deeds. It was held that the notice provided was sufficient; that a proceeding to condemn lands is a proceeding *in rem*; and that it is sufficient if such notice be given as makes it reasonably certain that all persons interested who easily can be reached will have information of the proceedings; that there is such probability as can reasonably be provided for that those at a distance will also be informed. It is for the legislature to say what means of knowledge will be sufficient to affect land-owners with notice.

Notice by publication is sufficient, and the legislature may prescribe the manner and time. *Matter of New York City*, 99 N. Y. 569, 580; *Matter of Rochester*, 102 N. Y. App. Div. 181.

¹ *Cincinnati v. Coombs*, 16 Ohio, 181; and see *Ib.* 574.

² *Reed v. Toledo*, 18 Ohio, 161. "Opening" street defined. *Ib.*; *post*, chapter on Taxation and Local Assessments. Whether the lowering of a sidewalk to the level of a street is a "construction of a highway," under the Constitution of *Alabama*, is a mixed question of law and fact. *Montgomery v. Townsend*, 80 Ala. 489.

³ *Nichols v. Bridgeport*, 23 Conn. 189, 208. If not thus appearing, the proceedings will be held void. *Ib.* *Tarkio v. Clark*, 186 Mo. 285. See also *Judson v. Bridgeport*, 25 Conn. 426; *Griffin v. Rising*, 2 Cush. (Mass.) 75; *People v. Brighton*, 20 Mich. 57. *Mills, Em. Dom.* §§ 248, 249, as to *qualification of jurors*; *Lewis, Em. Dom.* § 450.

⁴ *State v. Keokuk*, 9 Iowa, 438. See *Higgins v. Chicago*, 18 Ill. 276; *Chicago v. Wheeler*, 25 Ill. 478; *Bloomington v. Brokaw*, 77 Ill. 194, 196; *Knoblauch v. Minneapolis*, 56 Minn. 321. A provision in a charter that plans for open-

§ 1044 (608). **Discontinuance of Proceedings.**—Under the language by which the power to open streets and to take private property for that purpose is usually conferred upon municipal corporations, they may at any time before taking possession of the property under completed proceedings, or before the final confirmation, recede from or *discontinue the proceedings* they have instituted. This may be done, unless it is otherwise provided by legislative enactment, at any time before vested rights in others have attached. Until the assessments of damages have been made, the amount cannot be known; and on the whole, it is reasonable that after having ascertained the expense of the project, the corporation should have a discretion to go on with it or not, as it sees fit,¹ it being

ing streets shall be recorded in the recorder's office, is directory. *Sower v. Philadelphia*, 35 Pa. St. 231. An order laying out a street or highway may refer to a "plan," in which case the plan meant may be shown and identified by evidence *aliunde*, and used to prove the location and limits of the highway. *Stone v. Cambridge*, 6 Cush. (Mass.) 270. *Sufficiency of description of proposed street.* *Stewart v. Baltimore*, 7 Md. 500.

As to *mode of procedure*, and various points of practice respecting the assessment of damages, see Redfield on Railways, § 72, where many of the cases are referred to and stated. The procedure of commissioners appointed by stipulation of parties to assess damages in an action for damages to town lots must be controlled by the same rules as control the conduct of jurors and other like bodies. *Pueblo v. Schutt Inv. Co.*, 28 Colo. 524.

A commissioner was held not to be disqualified because he was a trustee of a religious corporation owning premises liable to assessment for benefits, he being under no personal liability for the debts of the corporation. *People v. Syracuse*, 63 N. Y. 291. Effect of *death* of one of the commissioners. *Ib.*; *ante*, § 247.

¹ *Carson v. Hartford*, 48 Conn. 68; *Higgins v. Chicago*, 18 Ill. 276; *Bloomington v. Miller*, 84 Ill. 621; *Hyde Park v. Dunham*, 85 Ill. 569; *Kerfoot v. Breckenridge*, 87 Ill. 205; *Chicago v. Weber*, 94 Ill. App. 561, citing text; *Meeker v. Chicago*, 96 Ill. App. 23; *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141; *Sowers v. Cincinnati, R. & M. R. Co.*, 162 Ind. 676, quoting text; *Rofignac Street, In re*, 4 Rob. (La.) 357;

Hullin v. Municipality, 11 Rob. (La.) 97; *Millard v. Lafayette*, 5 La. An. 112; *McLaughlin v. Municipality*, 5 La. An. 504; *Pumphrey v. Baltimore*, 47 Md. 145; *St. Joseph v. Hamilton*, 43 Mo. 282; *State v. Hug*, 44 Mo. 116; *Pillsbury v. Springfield*, 16 N. H. 565; *Clough v. Unity*, 18 N. H. 75; *Jersey City Water Com'rs*, 31 N. J. L. 72; *Walsh v. Newark Board of Education*, 73 N. J. L. 643, 650, citing text; *Martin v. Brooklyn*, 1 Hill (N. Y.), 541; *Dover Street, In re*, 18 Johns. (N. Y.) 506; *Canal Street, In re*, 11 Wend. (N. Y.) 155; *Anthony Street, In re*, 20 Wend. (N. Y.) 618, 619, and prior cases in New York there cited; *Com'rs of Wash. Park, Albany, In re*, 56 N. Y. 144; *Military Parade Ground, In re*, 60 N. Y. 319; *Matter of Mayor, &c., of New York*, 34 N. Y. App. Div. 468; *Franklin Street*, 14 Pa. Super. Ct. 403, 411, citing text; *Woolard v. Nashville*, 108 Tenn. 353, citing text; *infra*, § 1050, note; *State v. Graves*, 19 Md. 351, where the subject is well discussed by *Bowie, C. J.* Mills Em. Dom., chap. xxvi, relates to the right to abandon proceedings. *Lewis Em. Dom.*, § 655, 663, treats at large of the right to discontinue and abandon the proceedings.

Unless otherwise provided by statute, the proceedings may be discontinued by the municipality at any time before the title is acquired. The subject is very fully examined, and the English cases, which it is admitted lay down a different doctrine, are reviewed by *Rapallo, J.*, *Com'rs of Wash. Park, In re*, 56 N. Y. 144. He says, "A long series of decisions [in this State] has established that in these street cases the corporation may be permitted to discontinue proceedings . . . at any

liable in proper cases in damages for any wrongful acts injurious to the owner, as shown in the next section.

time before the report of the commissioners is finally confirmed, and there is a final award in the nature of a judgment in favor of the property owners for their compensation." *Ib.* p. 154. See also *Hamersley v. New York*, 56 N. Y. 533; *People v. Syracuse Com. Council*, 78 N. Y. 56; *Rhinebeck & C. R. Co., In re*, 67 N. Y. 242. This doctrine is opposed to the English cases. *King v. Market St. Com'rs*, 4 B. & Ad. 335; *King v. Hungerford Market Co., Ib.* 327; *Stone v. Commercial Ry. Co.*, 4 M. & C. 122; *Tawney v. Lynn & Ely Ry. Co.*, 16 L. J. N. s. Eq. 282; *Walker v. Eastern Counties Ry. Co.*, 6 Hare, 544. The general doctrine of the English cases is that when the public authorities have elected to take the property in such a way as to be binding on the owner of the property, the electing authorities ought in like manner to be bound. Accordingly, all the appropriate legal remedies are open to the land-owner, such as *mandamus* or specific performance, a relation analogous to that of vendor and vendee being established, though the notice to take the land does not strictly amount to a contract. *Haynes v. Haynes*, 1 Drew. & Sm. 426. *Rapallo, J.*, admitted that there was a "strong equity" in the claim of the land-owner in this class of cases. Opinion of the court by *Rapallo, J.*, Com'rs of Wash. Park, *In re*, 56 N. Y. 148. See also remarks of *Keating, J.*, in *Fotherby v. Metrop. Ry. Co.*, L. R. 2 C. P. C. 196.

A municipality which abandons a contemplated and intended work of public improvements assumes thereby no obligation to any parties who have invested on the faith and expectation of benefit from the completion of the work. *Peake v. New Orleans*, 139 U. S. 342. A corporation may abandon a proceeding to take lands, upon paying the taxable costs and expenses, without being required to pay also other charges and the counsel fees. *Waverly Water Works Co., In re*, 16 Hun (N. Y.), 57. City is liable, on discontinuance of proceeding, for *counsel fees* paid by land-owner only where the proceedings were "needlessly, wrongfully and vexatiously continued by the city, against the protest of the land-owner, when it was in the power of the city to dismiss and avoid the injury to him." *Lester*

Real Estate Co. v. St. Louis, 170 Mo. 31; *St. Louis Brewing Assn. v. St. Louis*, 168 Mo. 37; *Simpson v. Kansas City*, 111 Mo. 237. City held liable in owners costs and expenses. *Huckestein v. Allegheny City*, 165 Pa. 367; Liability for owner's attorneys fees, under statute, *Mellichar v. Iowa City*, 116 Iowa, 390.

Where the power of eminent domain is conferred upon a merely public agent, and the compensation to be made is to be ascertained by another body, as commissioners, or a jury, the agent has an election whether to pursue or abandon the condemnation, after the price is fixed, unless a contrary legislative intent is clearly indicated. If such an election has been once made no right of reconsideration remains. *Mabon v. Halsted*, 39 N. J. L. 640. Upon verdict and judgment in favor of the land-owner (*Hawkins v. Rochester*, 1 Wend. (N. Y.) 54), or upon confirmation of the report, private rights attach, and the corporation cannot afterwards discontinue the proceedings, although the court may refuse a *mandamus* and leave the parties to their remedy by action. *People v. Brooklyn*, 1 Wend. (N. Y.) 318, and cases cited; *Dover Street, In re, supra*; *Duncan v. Louisville*, 8 Bush (Ky.), 98; *Lafayette v. Schultz*, 44 Ind. 97; *Harrington v. Berkshire Co. Com'rs*, 22 Pick. (Mass.) 263. See on this point *Garrison v. New York*, 21 Wall. 196; *Farnsworth v. Boston*, 121 Mass. 173. Text approved, *O'Neill v. Hudson County*, 41 N. J. L. 161.

A city "may revoke ordinances establishing new streets *before* they are opened, if, in the exercise of its discretion, it ascertains that the opening of them would be injurious to the public interest, provided, however, that no vested right acquired under the dedication is affected by the change. *Per Rost, J., Municipality No. 3 v. Levee S. C. P. Co.*, 7 La. An. 270. The author does not understand the case of the *State v. Keokuk* (9 Iowa, 438), to deny, but rather to affirm, the power of the city to abandon the project of the opening of a street at any time before the property is taken; but the case holds that the city, *while proceeding* with the work, has no *implied power* to set aside the report of commissioners

§ 1045 (609). **Remedy of Land-Owner.** — Where proceedings are rightfully discontinued, the land-owner cannot have a *mandamus* to collect, nor can he recover by action, the sum that may have been estimated by commissioners; yet he may have a *special action for damages* for any wrongful and injurious acts of the corporation in the course of the proceedings.¹ And it has been even held that

it had appointed, and to appoint new ones at discretion "until the damages are brought to square" with its views. On this ground the case is sustainable, and in accordance with settled principles and sound reason. It is not to be taken as holding that the land-owner has a vested right to an assessment simply because one has been made. Power to set aside report and appoint a new board, see *Redfield on Railways*, § 72, and notes. Assessment made by commission must be approved or rejected by the court *in toto*; it cannot amend the report. *Claiborne Street, In re*, 4 La. An. 7; *Anthony Street, In re*, 20 Wend. (N. Y.) 618; *Simmons v. Mumford*, 2 R. I. 172; *Clarke v. Newport*, 5 R. I. 333. Where a city has accepted and confirmed the report of commissioners to assess damages, it is concluded from withholding payment because of an alleged error. *Higgins v. Chicago*, 18 Ill. 276; *Chicago v. Wheeler*, 25 Ill. 478. *Mandamus* to enforce payment by sale of city bonds, *Duncan v. Louisville*, 8 Bush (Ky.), 97. Although the statute may provide that the report of the commissioners, when confirmed, shall be "final and conclusive," this does not vest such a right in the award as to prevent the legislature from authorizing the proceedings to be vacated, and to refer the matter to new commissioners. *Garrison v. New York*, 21 Wall. (U. S.) 196.

In *Illinois* a municipality may abandon a public improvement, such as a street opening, at any time before it has taken possession of the property. The judgment awarding the compensation to be paid for the land taken does not pass either title or possession to the municipality, but merely the right to take possession upon payment of the sum awarded. *Chicago v. Barbican*, 80 Ill. 482; *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141; *Chicago v. Hayward*, 176 Ill. 130; *Chicago v. Shepard*, 8 Ill. App. 602; *Rice v. Chicago*, 57 Ill. App. 558; *Price v. Engelking*, 58 Ill. App. 547; *Evanston v. O'Leary*, 70 Ill. App. 124. See also

Pearce v. Chicago, 67 Ill. App. 671, aff'd 176 Ill. 152, where it was held that the dismissal of condemnation proceedings at the instance of the owner of the property condemned has the same effect as an abandonment thereof by the city.

The passage of an ordinance by a city, stating its election to appropriate property amounts to a present taking of the property, and the city cannot delay or defeat proceedings by the land-owner to recover compensation by failing to file the statutory bond required before taking possession. *In re Delafield*, 109 Fed. Rep. 577.

¹ *State v. Graves*, 19 Md. 351; *Graff v. Baltimore*, 10 Md. 544; *Norris v. Baltimore*, 44 Md. 606; *Baltimore v. Musgrave*, 48 Md. 272; *Milliard v. Lafayette*, 5 La. An. 112; *Roffignac Street, In re*, 4 Rob. (La.) 357; *Canal Street, In re*, 11 Wend. (N. Y.) 155; *Anthony Street, In re*, 20 Wend. (N. Y.) 618; *Walling v. Shreveport*, 5 La. An. 660; *Winkelman v. Chicago*, 213 Ill. 360, citing text. *Mills Em. Dom.* § 313, and cases; *Lewis Em. Dom. chap. xxvii*, treats at large of the statutory and other remedies of the land-owner. Where a corporation commences proceedings to open a street, and notifies the proprietor not to continue the making of improvements he had begun, and the corporation *needlessly delays* and finally abandons the proceedings, it is, under these circumstances, liable for the actual damages suffered by the proprietor, arising from the suspension of his improvements. *McLaughlin v. Municipality*, 5 La. An. 594, distinguished from *Milliard v. Lafayette*, *ib.* 112; *Graff v. Baltimore*, 10 Md. 544. *Mandamus* held to be the remedy of the abutter for delay in completing street improvements. *Whiting v. Boston*, 106 Mass. 89. Such delay is no legal excuse for refusal to pay assessment. *ib.* *Mandamus* to compel city council to appoint a commissioner to assess damages to abutting property by altering grade of street. *Gitson v. Greenville*,

if the municipality deems it best to abandon the proposed work or project, it may do so, and discontinue proceedings, although it may have taken possession of the premises. By taking such possession, it is argued, the corporation does not impliedly agree to purchase at the appraisement. It may, nevertheless, discontinue the proceedings, and the land-owner can only demand the premises, and damages for being deprived of them and for injuries thereto.¹

§ 1046 (610). *When Municipality concluded.* — Nor has the municipal corporation always been considered as concluded and bound to pay the damages awarded, although the report of the commissioners appointed by it had been confirmed. The act to enable the city of Baltimore to procure a supply of water authorized the city to condemn lands, required the inquisition of damages to be returned to the Circuit Court, and provided that it "should be confirmed by the said court at its next sitting, if no sufficient cause to the contrary be shown," and the "valuation when paid or tendered shall entitle the city to use the land as fully as if it had been conveyed by the owner." It was held that the city was not bound by the mere inquisition of damages, although confirmed by the court, to pay the amount awarded, but could, nevertheless, abandon the location in question; that the judgment of confirmation simply decided the value of the land, and that payment or tender of the valuation is necessary to give the city a title to the property. It was admitted by the court, however, that if the owner suffered loss or injury by reason of the wrongful acts of the city, he might recover damages therefor.² But the language of the act or charter may be such as

64 S. Car. 455. *Injunction* a remedy for injury to a stone wall by a city taking up a sidewalk in front of premises. *Niehaus v. Cooke*, 134 Ala. 223.

¹ *Hullin v. Municipality*, 11 Rob. (La.) 97; *Feiten v. Milwaukee* (approving text), 47 Wis. 494; *Norris v. Baltimore*, 44 Md. 606; and see *Baltimore v. Musgrave*, 48 Md. 272; *Brokaw v. Terre Haute*, 97 Ind. 176; *Sowers v. Cincinnati, R. & M. R. Co.*, 162 Ind. 676.

A city has the right through its council to authorize the purchase of a right of way for a ditch, and will be bound to reimburse the party authorized to procure it; but it cannot enter into an agreement with such party that it will construct the ditch, nor can he recover damages for any alleged injuries he may have suffered by a

subsequent determination of the council not to proceed with the work. *Stewart v. Council Bluffs*, 50 Iowa, 668.

² *Graff v. Baltimore*, 10 Md. 544; *State v. Graves*, 19 Md. 351; *Merrick v. Baltimore*, 43 Md. 219; *Norris v. Baltimore*, 44 Md. 598; *Black v. Baltimore*, 50 Md. 236; *Baltimore v. Black*, 56 Md. 333; *Baltimore v. Musgrave*, 48 Md. 272, approving *Baltimore & Susq. R. R. Co. v. Nesbit*, 10 How. (U. S.) 395; *Garrison v. New York*, 21 Wall. (U. S.) 196. See also as to private rights vesting, *State v. Clunet*, 19 Md. 351.

In *New York*, the rule is that where proceedings to condemn lands have so far progressed that the amount of compensation to be paid to the owner has been fixed as a finality, the proceedings cannot be discontinued or abandoned, the owner has a vested right to the

to give the land-owner a right to the sum assessed, and to prevent the corporation from setting aside or discontinuing proceedings, as where it is provided "that after the value and damages shall have been ascertained, the amount with interest shall be paid to the person interested, on demand."¹

§ 1047 (611). **Revisory Proceedings; Certiorari.** — If no *appeal* or other special remedy be given, it has been very generally held that *certiorari* lies against a town or city corporation with respect to its proceedings in laying out, altering, or improving a street, and if invalid they will be set aside by the courts.² Adopting what it

compensation, and payment may be enforced according to statute, under which the proceedings were instituted. *People v. Syracuse Com. Council*, 78 N. Y. 56. On confirmation of report, the right of the city, in New York, to abandon proceedings ceases, and the duty to pay is absolute. *Rhinebeck & C. R. Co., In re*, 67 N. Y. 242. *Mills Em. Dom.* § 312; *Lewis Em. Dom.* § 532. In *New Jersey*, it is held that there is no power in the legislature to provide for the payment of an award for damages in anything but money, or to postpone the right of the land-owner to receive the same after the award becomes a finality. *Butler v. Ravine R. Sewer Com'rs*, 39 N. J. L. 665.

¹ *Stafford v. Albany*, 7 Johns. (N. Y.) 541; s. c. 6 *Ib.* 1. Thus under the legislation of *Indiana*, which provides that if the city accepts the report of the commissioners it "shall direct the treasurer to tender to the owner the damages awarded by the commissioners," the city becomes liable for the damages when the report is accepted and may be sued therefor. *Lafayette v. Schultz*, 44 Ind. 97, following *Stafford v. Albany*, *supra*, and *Higgins v. Chicago*, 18 Ill. 276, and *Chicago v. Wheeler*, 25 Ill. 478. See *Garrison v. New York*, 21 Wall. (U. S.) 196; *Farnsworth v. Boston*, 121 Mass. 173.

Condemnation proceedings cannot be rescinded or nullified to the detriment of a land-owner who by virtue thereof has acquired a constitutional or vested right to the damages awarded him. In *Bohannon v. Stamford*, 80 Conn. 107, the city took all the steps prescribed by the charter to condemn land for park purposes, the last step being the recording and publication by the city clerk of the descriptive survey

of lands to be taken, the names of the owners and the damages payable to each. By charter these damages became payable thirty days after publication. It was held that by publication the city became indebted to the land-owner in the amount of the damages and it could not thereafter, though within thirty days, rescind its action so as to prevent recovery thereof.

² See *post*, chap. xxxi.; *ante*, § 752. Also *State v. Wakely*, 2 Nott & McCord (S. Car.), 410; *State v. Cockrell*, 2 Rich. Law (S. Car.), 6; *Parks v. Boston*, 8 Pick. (Mass.) 218; *Preble v. Portland*, 45 Me. 241; *Stone v. Boston*, 2 Met. (Mass.) 220; *Pridgen v. Bannerman*, 8 Jones (N. Car.), 53; *Baldwin v. Bangor*, 36 Me. 518; *Gay v. Bradstreet*, 39 Me. 580; *Dwight v. Springfield*, 4 Gray (Mass.), 107; *Kingman v. Plymouth Co. Com'rs*, 6 Cush. (Mass.) 306; *French v. Springwells H. Com'rs*, 12 Mich. 267; *Monterey v. Berkshire Co. Com'rs*, 7 Cush. (Mass.) 394; *Intendant v. Chandler*, 6 Ala. 899; *Ruhlman v. Commonwealth*, 5 Binn. (Pa.) 26; *Tarlton, In re*, 2 Ala. 35; *Swann v. Cumberland*, 8 Gill (Md.), 150; *Camden v. Mulford*, 26 N. J. L. 49; *Dorchester v. Wentworth*, 31 N. H. 451; *State v. Stewart*, 5 Strob. (S. Car.) Law, 29; *State v. Swift*, 1 Hill (S. Car.), 360; *Myers v. Simms*, 4 Iowa, 500; *McCrory v. Griswold*, 7 Iowa, 248; *Spray v. Thompson*, 9 Iowa, 40; *Campau v. Detroit*, 14 Mich. 276; *Duffield v. Detroit*, 15 Mich. 474. *Faust v. Huntsville*, 83 Ala. 279, citing text. See also *Barr v. New Brunswick*, 58 N. J. L. 255. As to function of appeal and *certiorari*. *People v. Brighton*, 20 Mich. 57; *post*, §§ 1591-1595.

So in *Vermont*, it is held that the

regarded as the well-established general doctrine, the Supreme Court of the United States has held that the Federal Circuit Courts, sitting in equity, will not interfere, by injunction or otherwise, with the proceedings and determinations of the municipal authorities in exercising the power to open streets, unless it becomes necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be proved by extrinsic evidence. There must be some recognized ground of chancery jurisdiction, or equity will not interfere. If the proceedings are void, and do not cast a cloud upon the owner's title, he must resort to the ordinary legal remedies. If the municipal authorities have failed to follow the provisions of the charter, or have exceeded the jurisdiction which it confers, the remedy of the land-owner for the review and correction of the proceedings is by *certiorari*, or other legal remedy, and not by bill in equity.¹

proceedings by the county court to lay out roads are not by the course of the common law, and can only be revised upon *certiorari*, or by writ of *mandamus* in the nature of a *procedendo*. *Adams v. Newfane*, 8 Vt. 271; *Lyman v. Burlington*, 22 Vt. 131; *Woodstock v. Gallup*, 28 Vt. 587, where *Redfield*, C. J., very fully considers the proper office of writs of *certiorari* and *mandamus* in the nature of a *procedendo*. The latter was deemed the more appropriate remedy where the inferior tribunal disposed of the case upon an incidental question, and not upon the merits. See *Rand v. Townsend*, 26 Vt. 670. When remedy of abutter is by *certiorari*, and when in equity. See further *Whiting v. Boston*, 106 Mass. 89; *Jones v. Boston*, 104 Mass. 461; *post*, §§ 1570-1590. It is held in *New York* (*People v. New York*, 2 Hill (N. Y.), 9), and *Ohio* (*Dixon v. Cincinnati*, 14 Ohio, 240), that *certiorari* will not lie in such cases unless given by statute, but the cases above referred to will show that the opposite opinion has been very generally adopted. See *People v. Stilwell*, 1 N. Y. 531. Office of *certiorari*, in such cases. *Mills Em. Dom.* § 333. *Post*, chap. xxxi. Review of proceedings and mode thereof. *Lewis Em. Dom.* chap. xxii. *Post*, §§ 1591-1593, and cases. Index—*Certiorari*; *Remedy*.

In *California* it is held that *certiorari* will not lie to review the action of a city council, to whom power has been

delegated to appropriate land for public use, in passing a resolution of its intention to extend a street, such action being the exercise of a purely legislative function. But *certiorari* will lie to review an order of the council condemning land for public use, such order being the exercise of a function judicial in its character. *Wulzen v. San Francisco*, 101 Cal. 15.

¹ *Ewing v. St. Louis*, 5 Wall. 413; *Hannewinkle v. Georgetown*, 15 Wall. 548; *Illinois Cent. R. Co. v. Chicago*, 138 Ill. 453, 462; *Marsh v. Brooklyn*, 59 N. Y. 280; *Hatch v. Buffalo*, 38 N. Y. 276; *Guest v. Brooklyn*, 69 N. Y. 506. In case first cited, the city of St. Louis had condemned a portion of the complainant's property for a street, and assessed benefits and damages, and rendered judgment accordingly. The complainant filed a bill in the United States Circuit Court to enjoin the enforcement of the judgment and also to obtain compensation for the property appropriated for the street. The bill set forth various grounds of alleged illegality in the proceedings, and a demurrer thereto was sustained. "Of these grounds for relief, the principal are," says Mr. Justice *Field*, giving the judgment of the Supreme Court, "that the proceedings were taken without notice to the complainant, or any appearance by him; that the notice provided by law was not published as required; that no provision was made for compensation for the

§ 1048 (612). **Compensation to Owner; Remedies.** — Respecting compensation, the mode of ascertaining the amount in case of disagreement, the time and manner of payment, and the remedies for

property taken; that no power to render the judgment was vested in the mayor by the legislature or charter, and that the statute under which the proceedings purported to have been taken was repealed before the proceedings were completed. These grounds are, by the demurrer, admitted to be true; and being true, no reason exists upon which to justify the interposition of a court of equity. . . . The second object of the bill — the obtaining of compensation for the property actually appropriated by the city — falls with the first. If the proceedings for its appropriation were void, the title remains in the complainant, and he can resort (unless the legislature has required him to pursue a particular remedy) to the ordinary remedies afforded by law for the recovery of the possession of the real property wrongfully withheld, or for the redress of trespasses upon it." 5 Wall. 418, 419. Followed and approved; *Anderson v. St. Louis*, 47 Mo. 479, 486; distinguished, *Leslie v. St. Louis*, 47 Mo. 474; commented on, *Coulson v. Portland*, Deady, 481; *Miller v. Mobile*, 47 Ala. 163. The owner of land wrongfully taken by a city and converted into and used as a public street, may maintain ejectment against a city for its recovery. *Armstrong v. St. Louis*, 69 Mo. 309; *Anderson v. St. Louis*, 47 Mo. 479, 484; *Hammerslough v. Kansas City*, 57 Mo. 219. The general subject is further treated in chap. xxxi., *post*, §§ 1589, 1590, 1592.

Where the charter of a city, in conferring upon it the power of opening streets, gives to the parties considering themselves aggrieved by the proceedings an appeal to a court of competent jurisdiction, with a right to a jury trial, they should seek redress in that tribunal, and not, at least ordinarily, by a bill in equity. *Methodist Prot. Church v. Baltimore*, 6 Gill (Md.), 391; *Dussau v. Municipality No. 1*, 6 La. An. 575; *Stewart v. Baltimore*, 7 Md. 500; *Baltimore v. Chumet*, 23 Md. 449. If an appeal is given, that course is proper for an aggrieved party to pursue; if he has no other remedy, he may have a *certiorari*, but not an injunction, unless on equitable grounds. *State v.*

Wakely, 2 Nott & McCord (S. Car.), 410; *State v. Cockrell*, 2 Rich. (S. Car.) L. 6; *Spray v. Thompson*, 9 Iowa, 40; *Ewing v. St. Louis*, 5 Wall. (U. S.) 413.

A municipal corporation will, on application of the owner, be enjoined from appropriating private property for the purpose of a street, until it complies with the law, by assessing and tendering damages to the owner, *Lafayette v. Bush*, 19 Ind. 326, or securing them; *Sower v. Philadelphia*, 35 Pa. St. 231; *Eidemiller v. Wyandotte City*, 2 Dillon C. C. 376; *Gardner v. Newburgh Trs.*, 2 Johns. Ch. (N. Y.) 162.

When equity will interfere by injunction to restrain the illegal and unauthorized acts of municipal corporations. See *post*, chap. xxxi., § 1570. Index, tit. *Equity; Injunction; Remedy*; *Reddall v. Bryan* (condemnation of property), 14 Md. 444; *Richardson v. Baltimore*, 8 Gill (Md.), 433; *Alexander v. Baltimore*, 5 Gill (Md.), 383; *Mills Em. Dom.* §§ 90, 128, 130, 141; *Lewis Em. Dom.* chap. xxviii, on the remedy for a wrongful interference with property under color of eminent domain. *Opening streets*. *Attorney-General v. Patterson*, 9 N. J. Eq. 624; *Iowa Col. Trs. v. Davenport*, 7 Iowa, 213; *Connolly v. Griswold*, 7 Iowa, 416; *Ib.* 248; *Harness v. Chesapeake & O. Canal Co.*, 1 Md. Ch. Dec. 248; *Walker v. Mad River & L. R. Co.*, 8 Ohio, 38; *Western Md. R. Co. v. Owings*, 15 Md. 199; *Henry v. Dubuque & Pac. R. Co.*, 10 Iowa, 540; *Browning v. Camden & W. R. & Tr. Co.*, 3 H. W. Green Ch. (N. J.) 47; *Ragatz v. Dubuque*, 4 Iowa, 349.

As to prohibition as a remedy against illegal corporate proceedings. *State v. Wakely*, *supra*; *Mayo v. James*, 12 Gratt. (Va.) 17; *Warwick v. Mayo*, 15 Gratt. (Va.) 528; *Williams, In re*, 4 Ark. 537 and note, with forms. *Arnold v. Shields*, 5 Dana (Ky.), 18; *post*, chap. xxxi., § 1596.

In *Missouri*, the title to real estate being involved, it is held that the Supreme Court has appellate jurisdiction in a condemnation case begun by a city to establish a public street. *Tarkio v. Clark*, 186 Mo. 285.

its enforcement, some principles applicable to municipal corporations must be noticed. Nearly all of the Constitutions provide that "just compensation" shall be made for the property taken; and that view is believed to be sound which regards this language as necessarily contemplating compensation of a pecuniary character, in respect to the property appropriated. Some of the Constitutions go more into detail, and in terms provide that the compensation shall be made "in money," and some contain a clause as to the time of payment, as that it shall be *first made or secured*, that is, made or secured before the property is taken or applied to the proposed public use; and some contain a provision giving the landowner the right to have the compensation determined by a jury.¹ It is not within the scope of this work to follow out these different provisions into the construction which they have received in the courts of the various States, nor to descend to a detailed notice of the decisions upon special enactments or charters. It must suffice to state the leading principles which the adjudications have established, and to refer to the authorities for a more full illustration and development of the subject. In the outset it is proper to observe that a fundamental consideration in the construction and application of these constitutional provisions is, that they have been found necessary to secure adequate protection to private property, and that they should be vigorously upheld in their full extent and fair meaning. In construing statutes or charters delegating the power of eminent domain, and pointing out the mode of exercising it, it is the duty of the judicial tribunal to insist that every provision intended for the benefit of the owner shall be substantially and in all material respects complied with before he shall be divested of his property. Except so far as the mode of pro-

¹ "The compensation under the statute is for damages resulting from the taking of the land; the award, therefore, must be taken to be for so much as the property of the claimant was thereby reduced in value." *Dunlop v. York*, 16 Grant (Canada), 216, 223. This raises the question as to the title of the claimant. It is not to be assumed that the person in possession is the absolute owner of the land. He may not have any title, an imperfect title, or a title subject to encumbrances. Unless a charge on the land were made a charge upon the compensation, the security would be impaired at the expense of the chargee. The money becomes, as it were, impressed with the

trusts to which the land was subject, and stands in its place. *Dunlop v. York*, *supra*; *East Lincolnshire R. Act*, *In re*, 1 Sim. (N. S.) 260; *Cuckfield Burial Board*, *In re*, 19 Beav. 153; *Lippincott v. Smyth*, 2 L. T. N. S. 79; *Hall v. London, Chatham & Dover Ry. Co.*, 14 L. T. N. S. 351; *Cooper v. Gostling*, 9 L. T. N. S. 77; *Harr. Munic. Man.* (5th ed.) 370.

Where proceedings have no effect because of failure to pay the compensation within the specified time, *new proceedings* may be inaugurated. *Cincinnati Southern Ry. Trs. v. Haas*, 42 Ohio St. 39. See *ante*, § 994; *post*, §§ 1151, 1677, and notes.

cedure is ordained by the Constitution, it is competent for the legislature to prescribe it, and the mode prescribed must, as we have seen, be strictly and guardedly pursued, although unreasonable nicety should not be, and is not, required.¹

§ 1049 (613). **Same Subject.** — If the act or charter authorizing the appropriation of the property itself provides a *specific remedy to the land-owner*, by which the amount of his compensation shall be ascertained, that method, if it is complete or adequate, is usually regarded as exclusive.² So long as the municipality pursues and keeps within its legislative grant of power, it is not liable to a common-law action, nor will it be enjoined; yet if it violates or transcends its authority, the land-owner may bring his action of case, ejectment, or trespass; and equity will frequently grant an injunction to restrain an unauthorized use or appropriation of private property.³

§ 1050 (614). **Same Subject.** — When a *street is finally established*, the party whose land has been taken is entitled to payment, al-

¹ *Supra*, §§ 1039-1042. Redfield on Railways, § 64, and notes; *Ib.* § 72. See also Cooley Const. Lim., p. 465; Chaffee's Appeal, 56 Mich. 244; St. Louis v. Franks, 78 Mo. 41, quoting the text, and holding that a restriction upon extending a street except upon the *unanimous consent* of the board of public improvements had the effect of making such consent a *jurisdictional fact* without which the city could not take action. See *supra*, § 1041.

² Mills Em. Dom. §§ 87, 88; *infra*, § 1050, note; Lewis Em. Dom. § 608; Cotton v. Hamilton & T. Ry. Co., 14 Up. Can. Q. B. 87; Rankin v. Great Western Ry. Co., 4 Up. Can. C. P. 463; Grimshawe v. Grand Trunk Ry. Co., 19 Up. Can. Q. B. 493; Welland County v. Buffalo & L. H. Ry. Co., 30 Up. Can. Q. B. 147; s. c. 31 Up. Can. Q. B. 539; Jones v. Stanstead, S. & C. R. Co., L. R. 4 P. C. App. 98, 120; McLean v. Great Western Ry. Co., 33 Up. Can. Q. B. 198; Harr. Munic. Man. (5th ed.) 367-371; Kimble v. White W. V. Canal Co., 1 Ind. 285; Calking v. Baldwin, 4 Wend. (N. Y.) 667; Lafayette & I. R. R. Co. v. Smith, 6 Ind. 249; New Albany & S. R. Co. v. Connelly, 7 Ind. 32; Indiana Cent. R. Co. v. Oakes, 20 Ind. 9; Mitchell v. Franklin & C. Turnp. Co., 3 Humph. (Tenn.) 456; Brown v. Beatty,

34 Miss. 227; Dodge v. Essex Co. Com'rs, 3 Met. (Mass.) 380; Joplin Consol. Min. Co. v. Joplin, 124 Mo. 129, citing text.

³ See authorities cited, *supra*, § 1047 note. This subject is very fully treated in Redfield on Railways, § 81, p. 336 (6th edition); in Mills Em. Dom. §§ 84-93, 292; and in Lewis Em. Dom. chap. xxviii. See also 1 American Railway Cases, 166-171, note, and cases cited and reviewed; Floyd v. Turner, 23 Tex. 293; Doe v. Manchester, B. & R. R. Co., 14 M. & W. 687; Cairo & F. R. Co. v. Turner, 31 Ark. 495; Pierce Am. Railroad Law, 230; Smalley v. Blackburn Ry. Co., 2 H. & N. 158; Boston v. Robbins, 126 Mass. 384; Cushman v. Smith, 34 Me. 247; Sower v. Philadelphia, 35 Pa. St. 231; Huntington v. Kenower, 12 Ind. App. 456. If the statute provides no method by which the land-owner may coerce payment from the municipality, he may bring an independent action. Jamison v. Springfield, 53 Mo. 224. Under Constitution of Iowa unpaid owner may maintain ejectment. Daniels v. Chicago & N. W. R. Co., 35 Iowa, 129. So in Mississippi. Memphis & C. R. Co. v. Payne, 37 Miss. 700. But not in Arkansas. Cairo & F. R. Co. v. Turner, 31 Ark. 495; Index, *Remedy*.

though the street has not been opened.¹ So it is generally held that such a party is entitled to payment when the report of the commissioners of assessment has been finally acted on and confirmed, or when, before confirmation, the municipal authorities have taken and retain actual use of his property.² When the owner's

¹ *Shaw v. Charlestown*, 3 Allen (Mass.), 538; *Philadelphia v. Dickson*, 38 Pa. St. 247; *Griggs v. Foote*, 4 Allen (Mass.), 195; *Kimball v. Rockland*, 71 Me. 137. The constitutional provision against taking private property until compensation be made, means *taking* the property from the owner and *actually* applying it to the use of the public. A survey and other preliminary steps are not a *taking*, within the meaning of the Constitution. But until the compensation the owner is entitled to has been made or tendered as required by law a street cannot be opened or used, and an entry to grade or prepare the ground for a street would be illegal and a trespass. *Stewart v. Baltimore*, 7 Md. 500. That preliminary surveys may be authorized by the legislature without making compensation therefor, and that they, when so authorized, are not trespasses, see authorities cited in *Redfield on Railways*, § 66. But while the state has the right to enter upon private lands for the purpose of *surveying and locating boundary lines*, *e. g.*, boundary lines between counties, its agents exceed their lawful powers when, without provision for compensation, they inflict substantial and permanent damages upon such property in locating a permanent base line, although the work is done with due care and skill; as, for example, where they fell trees on a strip of land several miles in length and several feet wide. *Litchfield v. Bond*, 186 N. Y. 66, rev'g 105 N. Y. App. Div. 229. Where a street is laid out by the municipal authorities and remains unopened upon the confirmed plan, the fact that an owner sold lots described with reference to the street does not affect his right to compensation when the land is actually taken for the street. *In re Brooklyn Street*, 118 Pa. St. 640.

The right to compensation is a *personal* one, and belongs to the owner of the property at the time the property is taken. *King v. New York*, 102 N. Y. 171, where a highway had been closed by statutory authority. What is deemed a "taking." *Post*, § 1679, note;

supra, § 1014; *Mills Em. Dom.* §§ 30-36 *a.* *Lewis Em. Dom. chap. v.* is devoted to the question "What constitutes a taking," within the meaning of the constitutional provision. By actual opening and construction of a street, the date of taking relates back to the date of the ordinance adopting the route, and an owner through whose land the street was surveyed is entitled to damages for the compulsory stoppage of an improvement on which he had expended a considerable sum of money, the ordinance adopting the route having warned the owner to stop his improvement. *Witman v. Reading*, 191 Pa. St. 134.

² *Ante*, §§ 1045, 1046. See *Johnson v. Alameda County*, 14 Cal. 106. As to right of land-owner to recover *interest* on assessment of damages. *Shoemaker v. United States*, 147 U. S. 282; *Phillips v. South Park Com'rs*, 119 Ill. 626; *Old Colony R. R. Co. v. Miller*, 125 Mass. 1; *Fink v. Newark*, 40 N. J. L. 11; *Matter of Bassford*, 36 N. Y. Misc. 732; *Matter of East 175th Street*, 49 N. Y. App. Div. 114, aff'd 162 N. Y. 661; *Deering v. New York*, 51 N. Y. App. Div. 402; *Matter of Riverside Park*, 59 N. Y. App. Div. 603, aff'd 167 N. Y. 627; *Haley v. Philadelphia*, 68 Pa. 45, 48, 49. In *Pennsylvania*, on the theory that an award is a judgment, it bears *interest* from the date of confirmation. *Philadelphia v. Dyer*, 41 Pa. St. 463; *North Whitehall v. Keller*, 100 Pa. 105; *Second Avenue*, 7 Pa. Super. Ct. 62; *King v. Brown*, 31 Pa. Super. Ct. 50. *As to taxes and assessments*, *Deering v. New York*, 51 N. Y. App. Div. 402; *Carpenter v. New York*, 51 N. Y. App. Div. 584; *Matter of Riverside Park*, 59 N. Y. App. Div. 603; aff'd 167 N. Y. 627.

After proceedings *in invitum* to establish a street have been commenced and damages awarded, the land-owner does not debar himself of the right to damages by platting his property and selling lots recognizing the existence of the street. *Jersey City v. Sackett*, 44 N. J. L. 428.

right to damages is vested or complete, he may, in proper cases sue the municipality therefor, or have a *mandamus* to compel it to pay or to proceed to collect the assessments which constitute the fund from which payment must come.¹

§ 1051 (615). **When Payment to be made.** — In the absence of controlling constitutional provisions, it is competent for the State to *authorize municipal corporations* to take private property for public use *without first making payment*; but it is not usual for the legislature to confer this power, and, even if it does, it is still necessary, by some enactment, that it shall make certain and adequate provision by which the owner can coerce compensation, through the judicial tribunals or otherwise, without unreasonable delay.² Either

¹ *Mobile v. Richardson*, 1 Stew. & Port. (Ala.) 12; *Shaw v. Charlestown*, 3 Allen (Mass.), 538; *Philadelphia v. Dyer*, 41 Pa. St. 463; *Philadelphia v. Dickson*, 38 Pa. St. 247; *State v. Hugg*, 44 Mo. 116; *State v. Keokuk* (*mandamus* to collect assessment), 9 Iowa, 438; *Rexford v. Knight*, 11 N. Y. 308; *Higgins v. Chicago*, 18 Ill. 276; *Rome v. Jenkins* (action for value), 30 Ga. 154; *McCormack v. Brooklyn*, 108 N. Y. 49; *Hollingsworth v. Tensas Parish*, 17 Fed. Rep. 109; *Wrought Iron Bridge Co. v. Utica*, 17 Fed. Rep. 316. Where all the proceedings have been provisional and subject to final action of the proper authorities, their abandonment will not entitle the owners of land to damages; the fact that an owner has been led to suppose that a street would be laid out and had acted on such belief gives him no right of action. *Carson v. Hartford*, 48 Conn. 68; *supra*, § 1044; *post*, § 1651, note; *Mills Em. Domain*, § 145. A city is not primarily liable for benefits assessed against individuals. *Shaffner v. St. Louis*, 31 Mo. 264. If land be taken for a public improvement under the charter of a city, and the assessment made to the owner be set aside, an action at law will not lie, as upon an *assumpsit* for the value of such land and damages. *Paret v. Bayonne*, 40 N. J. L. 333. Index, *Actions and Liability*; *Remedy*.

² *Sweet v. Rechel*, 159 U. S. 380; *McCann v. Sierra County*, 7 Cal. 121; *Curran v. Shattuck*, 24 Cal. 427; *Meeker v. Chicago*, 96 Ill. App. 23; *Hughes v. Milligan*, 42 Kan. 396; *State v. Spencer*, 53 Kan. 655; *Buckwalter v. School Dist. No. 42*, 65 Kan.

603; *Haverhill Bridge Proprietors v. Essex County*, 103 Mass. 120; *State v. Several Pieces of Land*, 79 Neb. 638; 113 N. W. Rep. 248; *Loweree v. Newark*, 38 N. J. L. 151; *State v. Happenheimer*, 54 N. J. L. 268; *People v. Hayden*, 6 Hill (N. Y.), 359; *Rexford v. Knight*, 11 N. Y. 308; *Sage v. Brooklyn*, 89 N. Y. 189; *Re United States*, 96 N. Y. 227; *Matter of New York City*, 99 N. Y. 569, 577; *People v. Adirondack R. Co.*, 160 N. Y. 225; *Matter of Gilroy*, 32 N. Y. App. Div. 216, 220; *State v. McIver*, 88 N. Car. 686; *State v. Lyle*, 100 N. Car. 497, quoting text; *Cherry v. Lane County*, 25 Oreg. 487; *In re Sedgeley Ave.*, 88 Pa. St. 509; *Delaware County's Appeal*, 119 Pa. 159; *Searle v. Lead*, 10 S. Dak. 312; *Smith v. Taylor*, 34 Tex. 589; *Brock v. Hishen*, 40 Wis. 674; *State v. Hogue*, 71 Wis. 384; *State v. Superior*, 81 Wis. 649; *Cooley Const. Lim.* 560.

So far as the *Federal Constitution* is concerned, it is settled by repeated decisions that a state may authorize the taking of property prior to any payment or even final determination of the amount of compensation. *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568; *Cherokee Nation v. Southern Kan. R. Co.*, 135 U. S. 641; *Sweet v. Rechel*, 159 U. S. 380; *Williams v. Parker*, 188 U. S. 491, 502; *Adirondack R. Co. v. New York*, 176 U. S. 335, 339. In *Massachusetts*, payment need not precede the vesting of title in the municipality when a definite and fixed method of ascertaining and recovering compensation is provided. *Sweet v. Rechel*, 159 U. S. 380; *Haver-*

by constitutional provision or legislative enactment, the almost invariable, and certainly the just, course, is to require payment to

hill Bridge Proprietor *v.* Essex County, 103 Mass. 120, 124, 125; Attorney General *v.* Old Colony R. Co., 160 Mass. 62, 90.

In *Chapman v. Gates*, 54 N. Y. 132, 146, *Allen, J.*, referring to *People v. Hayden*, 6 Hill (N. Y.), 359, *supra*, expresses the opinion that provision for compensation to the land-owners, by means of a local special assessment on lands adjoining those taken, to raise the money required, is not a sufficient compliance with the requirement of the Constitution as to compensation, and does not bring the case within the doctrine laid down by *Nelson, C. J.*, in *People v. Hayden*. To the effect that a fund to be created by a special assessment upon lands benefited is not a sure and adequate provision for compensation which will meet the constitutional requirement, see *Sage v. Brooklyn*, 89 N. Y. 189, 196; *Brewster v. Rogers Co.*, 169 N. Y. 73, 80; *Mitchell v. White Plains*, 62 Hun (N. Y.), 231; *Matter of South Market Street*, 67 Hun (N. Y.), 594. But sufficient and definite provision to secure the compensation is made when the municipality is liable for any deficiency in the awards resulting from failure of the assessment. *Matter of Church*, 92 N. Y. 1, 6; *State v. Superior*, 81 Wis. 649.

Authority to towns and cities to open streets, and to take private property for public use, without first making compensation therefor, has frequently been held legal in the absence of special constitutional provisions requiring payment before possession or use be enjoyed. *Dronberger v. Reed*, 11 Ind. 420; *Loweree v. Newark*, 38 N. J. L. 151; *Johnson v. Ocean City*, 74 N. J. L. 187; *Randolph v. Union County*, 63 N. J. L. 155, 162; *McCormick v. Lafayette*, 1 Ind. 48; *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. (N. Y.) 9; *Beekman v. Saratoga & S. R. Co.*, 3 Paige (N. Y.) Ch. 45; *Lowndes County v. Bowie*, 34 Ala. 461; *Lafayette v. Bush*, 19 Ind. 326. Later decisions in *Indiana* hold that land cannot be appropriated for the purpose of a street unless compensation is first assessed or paid or tendered. *Huntington v. Griffith*, 142 Ind. 280; *Holden v. Crawfordsville*, 143 Ind. 558; *Faust v. Huntington*, 91 Ind. 493; *New Albany v. Endres*,

143 Ind. 192. *Distinction* in this respect between municipal and private corporations. See *Loweree v. Newark*, 38 N. J. L. 151; *Morris Canal & B. Co. v. Jersey City*, 26 N. J. Eq. 294; *Webber v. Toledo*, 23 Ohio Civ. Ct. 237. Requirement to first make payments construed. *Redman v. Phila., M. & M. R. Co.*, 33 N. J. Eq. 165; *Lewis Em. Dom.* §§ 454-456, 457. *Mills Em. Dom.* §§ 124-126. The Constitution of California (art. 1, § 14) excepts municipal corporations from the limitation "that compensation shall be first made," &c.

The charter of *Mobile*, which authorizes the taking of private property for streets, without compensation, except assumed benefits or damages assessed by a jury, is unconstitutional, as the Constitution provides that no property shall be appropriated for use of a corporation for right of way until full compensation therefor be made in money, irrespective of any benefit to be derived therefrom. *Miller v. Mobile*, 47 Ala. 163. Under the same constitutional provision a clause in charter of city requiring assessment of damages to be made by a jury of viewers or commissioners who shall take into consideration the benefits to the owner's lands, and after payment or tender of the assessed damages, providing that pending appeal, if any, the corporate authorities may take possession of the land and proceed with the opening, &c., of the street on giving a bond with security, held void. *Faust v. Huntsville*, 83 Ala. 279.

In *Maryland*, until streets are opened and compensation paid to the owner, the city has no more right to the bed of the street than any other stranger would have. *Baltimore v. St. Agnes Hosp.*, 48 Md. 419; *Casey v. Inloes*, 1 Gill (Md.), 510.

If an adequate and complete mode of obtaining compensation is specifically provided, compensation, it has been held, must be sought in that way, and not by action, and in such case the doctrine of cumulative remedies is not applicable. *Supra*, § 1049; *Kimble v. White W. V. Canal Co.*, 1 Ind. 285; *Calking v. Baldwin*, 4 Wend. (N. Y.) 667; *Lafayette & I. R. Co. v. Smith*, 6 Ind. 249; *New Albany & S. R. R. Co. v. Connelly*, 7 Ind. 32; *Indiana Cent. R. Co. v. Oakes*, 20 Ind. 9; *Mitchell v.*

precede or to accompany the act of appropriation.¹ When the claim of the property owner is not for property taken for public use, but is made under the provisions of the Constitution *for damages resulting from a municipal improvement*, the courts with practical unanimity hold that these damages need not be paid in advance of the making of the improvement and as a condition of the right to do so,² except in some States where constitutional

Franklin & C. Turnp. Co., 3 Humph. (Tenn.) 456; Brown v. Beatty, 34 Miss. 227; Dodge v. Essex County, 3 Met. (Mass.) 380.

In *Illinois* the statute requires the payment to the land-owner, or tender of compensation or a deposit of it with the county treasurer, before possession shall be taken. Phillips v. South Park Commissioners, 119 Ill. 626. Under this statute payment into court to await the determination of the question who is entitled to it is error. McCormick v. West Chicago Park Commissioners, 118 Ill. 655. So also in *Missouri*, St. Joseph v. Crowther, 142 Mo. 155. And in *Kentucky* both under constitution and statute prior just compensation must be made. Clinton v. Franklin, 119 Ky. 143.

¹ 2 Kent Com. 339, note; Redfield on Railways, 147; Mills, Am. Dom. § 130; Lewis, Em. Dom. § 459; Colton v. Rossi, 9 Cal. 595; McCann v. Sierra County, 7 Cal. 121. An injunction was granted to restrain a municipal corporation, with very limited powers of taxation, from opening a street until adequate security for compensation be given. Keene v. Bristol, 26 Pa. St. 46. See Long v. Fuller, 68 Pa. St. 170. Under a statute of *Pennsylvania*, land taken for corporate purposes vests in the corporation in fee, on payment, and the corporation is not bound to see to the application of the purchase money. Crangle v. Harrisburg, 1 Pa. 132. When payment of damages is required within a limited time, or proceedings become void, see Commonwealth v. Phila. Co. Com'rs, 2 Whart. (Pa.) 286.

If a railroad company enter into possession of the land of an individual for the use of the road without first having his damages assessed and tendered, the owner may maintain an action to recover possession of the lands; and he may enjoin the use of this land by the railroad company until his damages are assessed and tendered. Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; Bohlman v. Green Bay & L. P. R. Co.,

30 Wis. 105. Williams v. New Orleans, M. & F. R. Co., 60 Miss. 680. Preliminary proceedings by which the amount of compensation to be paid is ascertained may be kept alive for a reasonable time in which to make the payment because, until they culminate in actual payment, the owner's rights remain unimpaired. The delay or ultimate failure, which may mark the course of their prosecution, are the necessary incidents of the right of eminent domain in an orderly and judicial manner, and cannot be wholly provided against by legislation. In no event can the property be taken until paid for. Kansas City v. Ward, 134 Mo. 172; Plum v. Kansas City, 101 Mo. 525. See also Shanfelter v. Baltimore, 80 Md. 483.

² Manigault v. Springs, 199 U. S. 473, 485; Lorie v. North Chicago C. R. Co., 32 Fed. Rep. 270; Blodgett v. Northwestern El. R. Co., 80 Fed. Rep. 601; De Lucca v. North Little Rock, 142 Fed. Rep. 597; Stetson v. Chicago & E. R. Co., 75 Ill. 74, 76; Patterson v. Chicago, D. & V. R. Co., 75 Ill. 588; Peoria & R. I. R. Co. v. Schertz, 84 Ill. 135; Pennsylvania Mutual Life Ins. Co. v. Heiss, 141 Ill. 35, 55; Parker v. Chicago Catholic Bishop, 146 Ill. 158; White v. Metrop. West Side El. R. Co., 154 Ill. 620; Doane v. Lake Street El. R. Co., 165 Ill. 510, 518; Elser v. Gross Point, 233 Ill. 230, 243; Garrett v. Lake Roland El. R. Co., 79 Md. 277; Knapp v. St. Louis, 153 Mo. 560; Clemens v. Connecticut Mutual Life Ins. Co., 184 Mo. 46; Morris v. Philadelphia, 199 Pa. 357.

In *West Virginia*, the Constitution provides that "private property shall not be taken or damaged for public use without just compensation, nor shall the same be taken by a company incorporated for the purpose of internal improvement until just compensation shall have been paid or secured to be paid to the owner." The court has held that when property is taken, the taking will be enjoined until payment

provisions expressly require pre-payment of damages to property not taken as well as compensation for property taken.¹

of compensation, but the construction of the improvement will not be enjoined because of the fact that consequential damages are not paid before making the improvement, unless the consequential damages are great and cause an irreparable injury to the property owner. *Spencer v. Point Pleasant & O. R. Co.*, 23 W. Va. 406, 407; *Belington & N. R. Co. v. Alston*, 54 W. Va. 597, 599; *Clayton v. Gilmer County Court*, 58 W. Va. 253, 262; *Watson v. Fairmont & S. R. Co.*, 49 W. Va. 528.

By the *Minnesota* Constitution it is provided that "private property shall not be taken, destroyed or damaged for public use, without just compensation therefor *first paid or secured*." When the damage resulting from a municipal improvement is purely consequential, *e. g.*, vacating a street near to but not abutting on the property, — and no property is actually taken, the damages need not be paid before making the improvement and as a condition of the right to do so. The reason advanced for so holding is the difficulty of determining the damages in advance of the improvement, and the fact that municipal liability for the damages is sufficient provision for securing payment. *Vanderburgh v. Minneapolis*, 98 Minn. 329.

By the *Georgia* Constitution it is provided that "private property shall not be taken or damaged for public purposes without just and adequate compensation *being first paid*." It is held in this State that an injunction should not issue to stop an improvement by the city, *e. g.*, grading a street. *Moore v. Atlanta*, 70 Ga. 611; *Bacon v. Walker*, 77 Ga. 336, 338; *Brown v. Atlantic R. & P. Co.*, 113 Ga. 462, 476. By the *Louisiana* Constitution it is provided that "private property shall not be taken nor damaged for public purposes without adequate compensation *being first paid*." By the law of this State the construction of a railroad in a street does not take property, but only causes consequential damages. It was held that an injunction against the construction of the railroad should be dissolved upon the giving of a bond, and that the constitutional provision did not prevent the court from so

doing. *McMahon v. St. Louis, A. & T. R. Co.*, 41 La. An. 827.

¹ In *North Dakota* the Constitution provides that "private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." In a case where the fee of the street was in the abutting owner, it was held that the erection of telegraph poles constituted a new servitude thereon, and an injunction restraining the erection was granted for failure to prepay the damages. It is to be observed that on the facts property was taken in this case and that the damage was not merely consequential, but the court in disposing of the case made no distinction between the two classes of damage and declared that both must be prepaid saying: "The defendants have the ultimate right, under their franchise, to use the street for telephone purposes; but payment of damages, actual or consequential, to plaintiff's property must first be attended to." *Donovan v. Albert*, 11 N. Dak. 289.

By the *South Dakota* Constitution it is provided that "private property shall not be taken for public use or damaged without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken." It was held that a substantial change of the grade of a street, which affected abutting property was within the constitutional protection, and that payment of damages to the property was a condition precedent to the right to make the improvement. *Searle v. Lead City*, 10 S. Dak. 312.

Under the provision of the *Washington* Constitution that: "no private property shall be taken or damaged for public use without just compensation having been first made or paid into court for the owner," payment must precede the improvement; and in case of serious damage the landowner may have an injunction until payment is made. *Brown v. Seattle*, 5 Wash. 35. See also *State v. King County Super. Ct.*, 26 Wash. 278; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 526; *Olson v. Seattle*, 30 Wash. 687; *Swope v. Seattle*, 35 Wash. 69, 76; *Hart v. Seattle*, 42 Wash. 113.

§ 1052 (616). **Apportionment of Damages among Lots benefited.**

— In the absence of special constitutional restrictions upon the power of the legislature, it may be regarded as settled by repeated adjudications in different States that authority may be conferred by the legislature upon municipal corporations to open streets and to *apportion the damages* awarded or found due to those whose lands are taken, *among the lots specially benefited* by the improvement, and to make the amount thus apportioned or assessed a lien thereon. The legislature may, in its discretion, authorize the whole expense to be assessed upon the lots similarly situated fronting on the street to be opened, thus treating the adjacent property as exclusively benefited, or may authorize an assessment of specific benefits to be made upon other property in addition, or it may provide for the payment of damages, in whole or in part, from the general treasury.¹

¹ *People v. Brooklyn*, 4 N. Y. 419, the leading case upon the subject. *Approved*, *Commonwealth v. Woods*, 44 Pa. St. 113; *Stroud v. Philadelphia*, 61 Pa. St. 255; *Scovill v. Cleveland*, 1 Ohio St. 126, 135; *Alexander v. Baltimore*, 5 Gill (Md.), 383; *Moale v. Baltimore*, 5 Md. 314; *Longworth v. Cincinnati*, 34 Ohio St. 101; *Chapin v. Worcester*, 124 Mass. 464; *Burlington v. Quick*, 47 Iowa, 222, expressly approving *People v. Brooklyn*, 4 N. Y. 419, *supra*; *McMasters v. Commonwealth*, 3 Watts (Pa.), 292, commented on by *Agnew, J.*, in *Washington Av. Case*, 69 Pa. St. 352; *Livingston v. New York*, 8 Wend. (N. Y.) 85; *Schenley v. Allegheny*, 25 Pa. St. 128; *Betts v. Williamsburg*, 18 Pa. St. 26; *Lexington v. McQuillan's Heirs*, 9 Dana (Ky.), 513; *Howell v. Bristol*, 8 Bush. (Ky.) 493; *Williams v. Cammack*, 27 Miss. 209, 224; *Nichols v. Bridgeport*, 23 Conn. 189, 207. See also *McGehee v. Mathis* (levee tax), 21 Ark. 40. Compare *Peay v. Little Rock*, 32 Ark. 31, 35; *Argenti v. San Francisco*, 16 Cal. 255; *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Howard v. First Indep. Church*, 18 Md. 451; *Peoria v. Kidder*, 26 Ill. 351; *Weckler v. Chicago*, 61 Ill. 142; *Hussen v. Rochester*, 65 N. Y. 516; *State v. Portage*, 12 Wis. 562; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Cumming v. Brooklyn*, 11 Paige (N. Y.), 596; *White v. Nashville*, 2 Swan (Tenn.), 364; *Palmyra v. Morton*, 25 Mo. 593; *Egyptian Levee Company v. Hardin*, 27 Mo. 495; *Lockwood v. St. Louis*, 24 Mo. 20; *Eyermaier v. Blaksley*, 78 Mo. 145; *Smith v. Aber-*

deen, 25 Miss. 458; *Municipality No. 2 v. Dunn*, 10 La. An. 57; *Cruikshank v. Charleston*, 1 McCord (S. Car.) Law, 360; *Williams v. Detroit*, 2 Mich. 560; *Cone v. Hartford*, 28 Conn. 363, 374; *Wallace v. Shelton*, 14 La. An. 498; *Clapp v. Hartford*, 35 Conn. 66; *Dorgan v. Boston*, 12 Allen (Mass.), 223; *Boston Seamen's F. Soc. v. Boston*, 116 Mass. 181; *Edgerton v. Green Cove Springs*, 19 Fla. 140; *post*, chap. xxviii. on Taxation.

Under a constitutional provision, giving the power of taxation by assessment, and another which guarantees to owners of land taken for public use full compensation "without deduction for benefits," an *assessment* may be made upon lands fronting on a new street laid out through it, to reimburse the amount of compensation paid the owner for the land taken for the street. *Cleveland v. Wick*, 18 Ohio St. 303. See *Chicago v. Larned*, 34 Ill. 203; criticising *People v. Brooklyn*, *supra*, and the decisions in other States which follow it, and holding them inapplicable in that State under its Constitution. *s. p. Ottawa v. Spencer*, 40 Ill. 211; *s. c.* 36 Ill. 211.

Benefits limited by the charter of the city to the improvement for which the land is condemned and assessments of benefits for other improvements impliedly forbidden. *Weckler v. Chicago*, 61 Ill. 142. Equality between assessment and benefits. *Greeley v. People*, 60 Ill. 19.

Under the Constitution of *Illinois*, the full value of land taken for a public highway must be paid in money alone,

§ 1053 (617). **Same Subject; Benefits.**—The *compulsory acquisition of property* for streets or other public purposes, and the payment therefor in any of the above modes, involve the exercise of two different and high prerogative or sovereign powers, namely, that of the *eminent domain*, so called, by which the property is taken, and that of *taxation* (which includes assessments upon the property specially benefited, or perhaps upon such as is legislatively deemed to be thus benefited), by which compensation is made to those whose property has been thus appropriated. We have already pointed out the usual constitutional limitations upon the power of eminent domain. What limitations exist upon the power of taxation must be found in the nature of the power itself, and in express or implied restrictions of the organic law; in all other respects the power is supreme, transcendent, and without theoretical limits. The subject of taxation and of assessments for local improvements, and the limitations upon the power, expressed and implied, will be hereafter considered, and need not, therefore, be referred to in detail in this place.¹ An *assessment against abutters for benefits received* from the opening of a street does not contravene the provision of the Constitution, "that all property subject to taxation shall be taxed in proportion to its value."² Nor is an assessment upon lands

disregarding all benefits and advantages that may result to that portion of the owner's land not taken, by reason of the establishing of the road; and it is not in the power of the legislature to provide otherwise. *Carpenter v. Jennings*, 77 Ill. 250. In *California*, by constitutional provision, (art. 1, § 14) "compensation must be made in money irrespective of any benefit from any improvement." Other similar constitutional provisions, see *supra*, § 1014, and note; *Mills Em. Dom.* §§ 149, 150-158, 204 *a*, and cases; *Lewis Em. Dom.* §§ 465-473. In the case of *State v. Charleston*, 12 Rich. (S. Car.) Law, 702, the power of the legislature of that State to authorize local assessments to pay for local improvements was very fully considered by the Court of Errors. A portion of a street was widened by taking a strip of land off the lots on one side and adding it to the street; and the expense, pursuant to an act of the legislature, was ordered to be assessed upon the proprietors of houses and lots on both sides of the street. The lot owners on the opposite side of the street, whose lands were not taken for the street, but who were assessed to pay the ex-

pense, contested the constitutionality of the statute authorizing this to be done. The Court of Errors held the act to be unconstitutional. No reference is made to the decisions in other States, and although the Constitutions of *New York* and *South Carolina* are not literally alike, the reasoning of the court is not reconcilable with that in the case of *People v. Brooklyn*. Still, the latter case has been very generally followed and its reasoning approved as sound, as will be seen on an examination of the cases above cited. As we shall see in the Chapter on Taxation, *post*, the tendency of the later cases, especially with respect to local assessments for street improvements, is somewhat to restrict the doctrine of *People v. Brooklyn*. *Interest payable by the city upon awards for property taken* is not to be assessed as part of the improvement. *Matter of New York*, 40 N. Y. App. Div. 452.

¹ See chapter on Taxation and Local Assessments, *post*.

² *Garrett v. St. Louis*, 25 Mo. 505. See remarks of *Hough, J.*, in *State v. St. Louis County Court*, 62 Mo. 244. So, under a Constitution which requires that all taxation shall be equal

fronting on a street, to reimburse the amount paid the owner for land taken from him for a street, in violation of the provision of the Constitution which declares that the compensation to be paid to a party for his land, taken for public use, shall be "without deduction for benefits."¹

§ 1054 (618). **Tribunal or Body to assess Damages.** — The *tribunal* by which the amount of compensation to the land-owner is to be determined must be prescribed by positive law.² Some of the State Constitutions in terms require that the compensation shall be assessed by a *jury*, which presumptively means such a body as under the Constitution and laws of the particular State makes a lawful jury. Commissioners appointed *ex parte*, and without opportunity of challenge, are not a jury. Where the right to an assessment by a jury is specifically secured by constitutional provision, this is a right of which the property owner cannot be deprived by any act of the legislature, or by its failure to provide for an assessment in this manner. He may waive the right, but he cannot be deprived of it without his consent. Although the right to an assessment by a jury of twelve men be given by the Constitution, it has been held that the

and uniform throughout the State. New Orleans Draining Co., *In re*, 11 La. An. 338. See chapter on Taxation and Local Assessments, *post*; Washington Avenue, *In re*, 69 Pa. St. 352.

¹ Cleveland v. Wick, 18 Ohio St. 303. Assessment for benefits is not the same as deduction for benefits. *Ib.*; Mills Em. Dom. chap. xv. §§ 149-158, and Lewis Em. Dom. §§ 465-473, collect the cases on the subject of benefits as an element of compensation, and refer to the later provisions of the Constitutions of several of the States, excluding the consideration or allowance of benefits and advantages in determining the amount of money to which the owner of the land "taken" or "injured" or "damaged" is entitled. *Post*, § 1054, note, 1686.

Rogers v. St. Charles, 54 Mo. 229, presents a hard case of the application of paying a man for his property in benefits. The city desired to establish an alley, and applied to the plaintiff for a relinquishment of his title to the necessary land. He refused, because, as he said, he had already dedicated the land *in pais*. The city instituted proceedings to condemn the land, of which he had notice, and to which he paid no attention. Verdict,

that the value of his land was \$75, and the benefits \$75; costs, \$16.60. It was held that the proceedings were valid, and that the plaintiff was liable for the costs.

² Text quoted and approved; Allen v. Jones, 47 Ind. 438. See also Ames v. Lake Superior & Miss. R. Co., 21 Minn. 241. It is no objection to the constitutionality of an act providing for an assessment by commissioners that they shall be freeholders. Minneapolis v. Wilkin, 30 Minn. 140; McClure v. Red Wing, 28 Minn. 186. The proceeding is *judicial* in its nature, and should be before an impartial tribunal, subject to the rights and privileges attending judicial investigations. Rhine v. McKinney, 53 Tex. 354. The board of public works of a city, acting under the sanction of an official oath, held to be a fair and impartial tribunal to assess damages for taking property for the use of the city. State v. Oshkosh, 84 Wis. 548. Where a charter provided that the mayor should preside over the appraisers and instruct them upon all questions of law arising in the condemnation, it was held that such tribunal was not an impartial tribunal. Paris v. Tucker, 101 Tex. 99; 104 S. W. Rep. 1046.

assessment may, under legislative authority, be made in the first instance by commissioners, if, by appeal or other transfer to a common-law court, an unfettered right to an assessment by a jury under judicial direction exists or is provided.¹

¹ *Lamb v. Lane*, 4 Ohio St. 167. The able opinion of *Thurman*, C. J., and its reasoning must command general assent. The Constitution of *Ohio*, (art. 1, § 19) provides that "where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury without deduction for the benefits to any property of the owner." The court held that the word "jury," as thus used, means a tribunal of twelve men presided over by a court, and hearing the allegations, evidence, and arguments of the parties; yet they may be sent to view the premises. The court also held that an assessment may be made in the first instance by viewers, if the right of appeal be given to a court in which the damages may be assessed by a constitutional jury. *s. p.* *Shaver v. Starrett*, 4 Ohio St. 494; *Wells Co. Road, In re*, 7 Ohio St. 16; *Cairo & F. R. Co. v. Trout*, 32 Ark. 17; *Minneapolis v. Wilkin*, 30 Minn. 140. See *Callan v. Wilson*, 127 U. S. 540, noticed *ante*, § 756, and note; *infra*, § 1055, note. Construction of similar provision of Constitution of *Iowa* (art. 1, § 18), see *Des Moines v. Layman*, 21 Iowa, 153, in which it was not denied that the Constitution gave the right to have the amount determined by a jury; but it was held by the majority of the court that the party, by adopting the special mode of review pursued by him in that case, was not entitled, as of right, to an assessment by a jury.

The Constitution of *Alabama* of 1868 required that the compensation to be paid "shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law." This was held, in *Faust v. Huntsville*, 83 Ala. 279, to exclude the making of the assessment by "a jury of viewers, or commissioners." See amended Constitution of 1875, art. 14, § 7. § 1, art. 1, of the Constitution of 1846 of *New York* provided that "when private property shall be taken for any public use, the compensation to be made therefor shall be ascertained by a jury or by not less than three commissioners

appointed by a court of record, as shall be prescribed by law." It was held, in view of a long legislative usage in respect to the subject of assessing damages and the mode, that the term "jury," as used in the Constitution, did not necessarily import a tribunal consisting of twelve men, acting only upon a unanimous determination, but on the contrary was used to describe a body of jurors of different numbers, and deciding by majorities or otherwise, as the legislature in each instance directed. But in the absence of such usage, *Johnson*, J., who delivered the opinion of the court, said that, without a shadow of doubt resting on his mind, he should be of opinion that the term "jury" imports a jury of twelve men, whose verdict is to be unanimous. "Such," he continues, "must be its acceptance to every one acquainted with the history of the common law, and aware of the high estimation in which that institution, so constituted, has for so long a period been held." *Cruger v. Hudson R. R. Co.*, 12 N. Y. 190; *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47; *Campau v. Detroit*, 14 Mich. 276; *Peninsular R. Co. v. Howard*, 20 Mich. 18; *May v. Milw. & Miss. Ry. Co.*, 3 Wis. 219. As to *qualification of jurors*, see *Mt. Clemens v. Macomb District Judge*, 119 Mich. 293.

Under the Constitution of *Illinois*, the land-owner has a right to a jury to assess his damages if he demands it. *People v. Stuart*, 97 Ill. 123. Where, under the provisions of the statute, a petition is filed with the board of county commissioners for the opening of a road and they appoint a jury of six to assess the damage, the party whose property is to be taken demanding a jury of twelve, and, upon filing the report, appealing to the Circuit Court, where the damages are assessed by a jury of twelve, it was held that, although under the Constitution the party whose property was to be taken might be entitled to a jury of twelve men, yet by appealing to the Circuit Court, where a trial was had *de novo*, and where objection as to the number of jurors was not made, mere technical objections in the inferior tri-

§ 1055 (619). **Measure of Value or Damages.**—The determination of the question, — What is the *value of property* taken, or

bunal will not be considered on the record to deprive the Circuit Court of jurisdiction. Had defendant not appealed, and had he contested the validity of the proceedings of the board by an action of trespass, on the road authorities proceeding to open the road, he could have raised this question; but it was held that he had waived it in this proceeding. *Williamson v. Cass County*, 84 Ill. 361. The only question for the jury is the amount of compensation to be awarded; the reasonableness of the ordinance and the necessity of the improvement provided by it cannot be submitted to a jury. *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155. Other cases in *Illinois*, see *infra*, §§ 1055, note, 1062, note.

That a special constitutional provision, giving the right to an assessment of damages by a *jury*, presumptively means more than a mere commission, however numerous, and means a tribunal under judicial supervision and control, is made more apparent when the occasion of adopting such a provision is considered. This aspect of the subject is referred to by one of the judges in *Des Moines v. Layman*, 21 Iowa, 153, who says: "The taking of private property, without the consent of the owner, is the exercise of one of the highest powers of government. It has been much abused by the great powers which have been conferred upon municipal corporations, allowing them to judge of the necessity, and their citizens to act by a commission from the city council, or some subordinate magistrate or court, as a jury or body to fix the amount of compensation. To prevent such abuses, and to give proper security and safeguards to the property owner, it was very wisely provided in the new Constitution of the State, that private property should not be taken for public use until '*the damages shall be assessed by a jury*.' Bill of Rights, § 18. 'The right of trial by jury shall remain inviolate, but the General Assembly, may authorize a trial by a jury of a less number than twelve in the inferior courts.' *Ib.* § 9. By these provisions, the right to an assessment of his damages by a *jury* is secured by the Constitution to the defendant. No assessment of them has been made by a jury, unless the three men appointed

by the county court are to be regarded as a jury. I do not so regard them."

The Constitution of *Maryland* provides "that no private property shall be taken for public use without just compensation, as agreed upon between the parties or awarded by a *jury*, being first paid or tendered to the party entitled to such compensation." Under this the legislature may pass a law authorizing commissioners to assess the value of the property, if the law secures to the owner the right of a jury trial, *upon an appeal*, to be taken in a specified reasonable time, neglect or refusal to appeal being regarded as a waiver of the right to have the damages awarded by a jury. *Stewart v. Baltimore*, 7 Md. 500. See also *State v. Graves*, 19 Md. 351; *Lumsden v. Milwaukee*, 8 Wis. 485; *Alexander v. Baltimore*, 5 Gill (Md.), 383; *Meth. Prot. Church v. Baltimore*, 6 Gill (Md.), 391; *Morford v. Barnes*, 8 Yerg. (Tenn.) 444; *Beers v. Beers*, 4 Conn. 535; *McDonald v. Schell*, 6 Serg. & Rawle (Pa.), 240. *Sharpless v. West Chester*, 1 Grant Cas. (Pa.) 257. *Mills Em. Dom.*, § 91, and cases; *Lewis, Em. Dom.*, §§ 311, 312; *infra*, § 1055. Constitutional provision in *Minnesota*, preserving the right of trial by jury, does not extend to proceedings under the right of eminent domain. *Ames v. Lake Superior & Miss. R. Co.*, 21 Minn. 241, 293; *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155. In *Maine* it is also held that, the Constitution providing no tribunal for assessing compensation, a trial by jury is not a matter of constitutional right, and a provision in an act for determining the amount by appraisers appointed by the court instead of by a jury is within the legislative power. *Kennebec Water Dist. v. Waterville*, 96 Me. 234. As to *Missouri*, see *St. Joseph v. Geiwitz*, 148 Mo. 210, holding that there is no right to a trial by jury in Missouri, in the absence of constitutional or statutory provision therefor. Following *Clark v. Mitchell*, 64 Mo. 564, 573; *Kansas City v. Hill*, 80 Mo. 523; *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 118 Mo. 599; *Kansas City v. Vineyard*, 128 Mo. 75; *Kansas City v. Smart*, 128 Mo. 272.

Constitutional provisions requiring compensation for property "injured" or "damaged." The present Constitution of *Illinois* requires compensation to be

what is the *amount of damage* sustained by the taking? is undeniably judicial in its nature, and peculiarly adapted for decision by a jury under the direction of the court. Yet it has been held that the ordinary provision as to the right of trial by jury in civil cases has no relation to original assessments in such cases; and that in the absence of special provision in the organic law, giving the right to have a jury assess the damages, it is competent for the legislature to provide for assessments by any other just mode, and to conclude the owner as to the amount without giving him the right to be heard before a jury.¹

made for property *damaged* as well as for property taken, to be ascertained by a jury. *People v. McRoberts*, 62 Ill. 38. A like provision is made in several other of the more recent Constitutions, and its construction and effect are considered in a subsequent chapter. *Post*, §§ 1151, 1677, 1679, and notes, 1684-1686, and notes.

The Constitution of *South Dakota*, adopted in 1889 (art. vi., § 13), provides that a jury shall assess the just compensation or damages for property taken or damaged for public use, which compensation shall be paid as soon as ascertained, and before possession is taken; and that no benefit which may accrue to the owner as the result of the improvement made by any private corporation shall be considered in fixing the amount of compensation for property taken or damaged. There is a similar provision in the Constitution of *Washington*, adopted in 1889 (art. i., § 16), which requires full compensation for property injured or damaged to be paid in money, or ascertained and paid into court for the owner, irrespective of any benefits from any improvement, which compensation shall be ascertained by a jury, unless a jury be waived. It also provides that the question whether the contemplated use be really public shall be a judicial question, and determined without regard to any legislative assertion that the use is public. There are provisions similar to the above in the Constitution of *North Dakota* of 1889, art. i., § 14, and in the Constitution of *Montana* of 1889, art. iii., § 14.

¹ *Livingston v. New York*, 8 Wend. (N. Y.) 85; *Beekman v. Saratoga & S. R. Co.*, 3 Paige (N. Y.), 45; *Petition of Mt. Washington Road Co.*, 35 N. H. 134; *State v. Jersey City*, 26 N. J. L. 444; *Sedgw. Stat. & Const. Law*, 529;

Cooley Const. Lim. 563; *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558; *Hymes v. Aydelott*, 26 Ind. 431; *Heynman v. Blake*, 19 Cal. 579; *Koppikus v. State Cap. Commissioners*, 16 Cal. 248; *Dalton v. North Hampton*, 19 N. H. 362; *Matter of Buffalo*, 139 N. Y. 422, 431, citing text.

As to right of trial by jury when an appeal is authorized to a court of record. *Supra*, § 1054, note; *Evansville & C. R. Co. v. Miller*, 30 Ind. 209; *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558; *Connolly v. Griswold*, 7 Iowa, 416; *Ragatz v. Dubuque*, 4 Iowa, 349; *People v. McRoberts*, 62 Ill. 38; *Kine v. Defenbaugh*, 64 Ill. 291; *People v. Stuart*, 97 Ill. 123; *Warren v. St. Paul & Pac. R. Co.*, 18 Minn. 384; *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155. Text approved; *Kendall v. Post*, 8 Oreg. 14.

The Constitution of *Wisconsin* contained a provision (art. 11, § 2) requiring "the necessity" for the appropriation of private property to be first established by the verdict of a jury. In the charter of *Milwaukee* it was enacted that a jury of six freeholders should be appointed by the council to decide upon the necessity of taking land for streets, and the amount of compensation; and this provision of the charter was held to contravene the Constitution, since the jury so called were not required by the charter to be sworn, and since the charter gave the council power to confirm the report of the jury, and declared that such confirmation should be conclusive. *Lumsden v. Milwaukee*, 8 Wis. 485. There is a similar provision in the Constitution of 1851 of *Michigan*. *People v. Kimball*, 4 Mich. 95; *Campau v. Detroit*, 14 Mich. 276; *Horton v. Grand Haven*, 24 Mich. 465. *Supra*, § 1036.

Where authority is given by amend-

§ 1056 (620). **Commissioners to ascertain Damages; Constitutional Provision construed.** — By the Constitution of New York it is provided that the compensation “shall be ascertained *by a jury*, or by not less than *three commissioners* appointed by a court of record.” This language in respect to commissioners was considered by the Court of Appeals to imply that the commissioners were to be selected by the court, and assumes that in such selection the court will exercise judgment in making fit appointments; and it was held that a selection of appraisers by lot, and an appointment thereon by a court of record, would not be a compliance with the constitutional provision.¹ It was also decided that under this provision it is not competent for the legislature to authorize the common council of a city to appoint appraisers to ascertain the compensation to owners for property taken under the power of eminent domain.²

§ 1057 (621). **Power of City Council construed.** — The charter of a city gave it power to take private property for streets, with a proviso that *damages should be assessed by a jury* to those prejudiced. A jury acted, and assessed damages to a property owner. It was held that a subsequent resolution of the council, reciting “that upon full examination the jury could not have had a correct view of the case before them,” and appropriating a larger sum as damages, was binding upon the corporation, the court being of opinion that the corporation had the right to contract or stipulate with the land-owner as to damages without the intervention of a jury, and that this included the right to disregard their finding, and proceed to make a settlement as if they had never been summoned.³

ment to the charter of a city to proceed in the same manner as railway companies in the condemnation of property, the rules laid down for the assessment of damages in condemnation proceedings by railway companies must be looked to in ascertaining the rules applicable to the case. *San Antonio v. Sullivan*, 23 Tex. Civ. App. 658.

¹ *Cruger v. Hudson R. R. Co.*, 12 N. Y. 190. The fact that a commissioner was interested will not justify the quashing of the report of the commission, if he is appointed at the instance of the municipality, and the record does not show that the city was ignorant of his being interested, especially where the award is not excessive. *Roanoke City v. Berkowitz*, 80 Va. 616.

A new commission of the requisite

number may be appointed by the proper authority to supersede the original commission. *Schneider v. Rochester*, 90 Hun (N. Y.), 171, citing *Matter of Dover Street*, 18 Johns. (N. Y.) 506, 507. Statute of *Indiana* providing for the appointment of commissioners not unconstitutional. *Terre Haute v. Evansville & T. H. R. Co.*, 149 Ind. 174. Commissioners appointed by city council presumed to be “fair and impartial.” *Knoblauch v. Minneapolis*, 56 Minn. 321.

² *Clark v. Utica*, 18 Barb. (N. Y.) 451.

³ *Mobile v. Richardson*, 1 Stew. & P. (Ala.) 12. This case further holds that on the consent of the land-owner to the resolution, he could maintain an action for the recovery of the amount, and

§ 1058 (622). **Amount of Damages.**— Concerning the *amount of damages*, or the principles upon which compensation to the owner whose property is taken should be measured, there are no fixed rules, embracing the whole subject, universally applicable throughout the different States. In some of the States provision is made, as we have seen above, in their organic law that the compensation shall be in money, and without deduction for benefits. Similar provisions are sometimes made in the charter or statute authorizing the appropriation, and which exert a modifying influence on the rules of law, as previously held in the same State or elsewhere. In determining the *quantum* of damages, regard must also be had to any special constitutional or statutory provisions relating to the subject, and the previous course of decision in which those provisions have not unfrequently originated. In States where the subject is not expressly regulated by positive law, the books abound in cases which cannot be reconciled, respecting what is and what is not proper to be taken into consideration, in the way of benefits on the one hand, and of injuries on the other, to the proprietor whose property is taken for some public work or improvement. The ultimate inquiry is not a complex one; it is simply, What is the damage which the owner will sustain in consequence of the proposed appropriation of his property? But the elements which enter into this inquiry, when the matter is left at large to the courts without legislative rule, are far from being easy of apprehension and application. Cases, however, in which the appropriation by municipal agencies is for streets, are not apt to present as many difficulties as are met with when the appropriation is for railway or other like purposes.

§ 1059 (623). **Elements of Compensation; Adaptability for Particular Uses.**— The *adaptability for particular uses* of the lands

that the resolution was an admission, *prima facie* binding on the corporation, of the right of the owner to the land appropriated. *Ib.* In *Massachusetts*, an agreement by which a city undertakes with the owners of land taken for a street to submit the assessment of damages and betterments to arbitration is *ultra vires* and *void*, and the city cannot maintain an action to enforce an award made under such a submission. *Somerville v. Dickerman*, 127 Mass. 272; *Boylston Market Assoc. v. Boston*, 113 Mass. 528; *Harvard College v. Boston*, 104 Mass. 470; *Brimmer v. Boston*, 102 Mass. 19. See, as to arbitration, *Mills Em. Dom.* § 92. County

commissioners can only exercise such powers as are expressly granted or are incidentally necessary for the purpose of carrying the same into effect. *Stewart v. Otoe County*, 2 Neb. 177; *Sioux City & P. R. Co., v. Washington County*, 3 Neb. 30; *McCann v. Otoe County*, 9 Neb. 324. They can only locate public roads and erect bridges thereon in the manner provided by law. Thus, where they made a contract to buy a private bridge, and the parties selected arbitrators to appraise the same and they made an award, it was held that the award was a nullity. *McCann v. Otoe County*, 9 Neb. 324.

sought to be condemned, if this confers upon them an additional value, is an element to be taken into the account in estimating the compensation to which the owner is entitled.¹ In adjudging this point the Supreme Court of the United States clearly expresses the general principles of law regulating the ascertainment of the *quantum* of compensation or damages. "In determining the value of land appropriated for public purposes the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded

¹ *Mississippi & Rum Riv. Boom Co. v. Patterson*, 98 U. S. 403; aff'g 3 Dillon C. C. 465. Here three islands in the Mississippi River, peculiarly adapted for the purpose of a boom, were condemned; their value aside from boom purposes was only \$300, but in view of their adaptability for such purposes their value was \$5,500. Their court held the owner entitled to the latter value. Mr. Justice *Field*, in the course of his judgment, says: "The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in several cases. Thus, in *Furman Street, In re*, 17 Wend. (N. Y.) 649, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the Supreme Court of *New York* said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him;

but that the proper inquiry was, What is the value of the property for the most advantageous uses to which it may be applied? In *Goodin v. Cinc. & W. Canal Co.*, 18 Ohio St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of *Ohio* held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. And in *Young v. Harrison*, 17 Ga. 30, where land necessary for an abutment for a bridge was appropriated, the Supreme Court of *Georgia* held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner." The doctrine of the text approved in *Santa Ana v. Harlin*, 99 Cal. 538.

rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.”¹

§ 1060. **Elements of Compensation for Lands taken.** — The compensation to which the owner of lands taken for a public use is entitled, is the market value in money fairly determined as between persons buying and selling under conditions which do not result in the sacrifice of the property or in the exaction of an enhanced price by reason of exceptional circumstances.² In determining the market value of the property taken any use to which it may be profitably applied, either presently or in the immediate future, may be considered, not separately, but as an incident in determining the market value.³ But the elements to be considered must be confined strictly

¹ *Mississippi & R. Rivers Boom Co. v. Patterson*, 98 U. S. 403; *supra*, per *Field*, J. Proof of a former dedication by the owner is not admissible for the purpose of fixing the amount of compensation. *San Jose v. Reed*, 65 Cal. 241. *Infra*, § 1060.

² *Shoemaker v. United States*, 147 U. S. 282, 304; *San Diego Land & T. Co. v. Neale*, 78 Cal. 63; *Santa Ana v. Harlin*, 99 Cal. 538; *Santa Ana v. Brunner*, 132 Cal. 234; *Tedens v. Chicago Sanitary Dist.*, 149 Ill. 87; *Phillips v. Scales Mound*, 195 Ill. 353; *Chicago v. Jackson*, 196 Ill. 496; *Bennett v. Marion*, 106 Iowa, 628; *Ranek v. Cedar Rapids*, 134 Iowa, 563; *Kennebec Water Dist. v. Waterville*, 97 Me. 185; *Edmands v. Boston*, 108 Mass. 535; *Burt v. Wigglesworth*, 117 Mass. 302; *Lawrence v. Boston*, 119 Mass. 126; *Beale v. Boston*, 166 Mass. 53; *Detroit v. Beecher*, 75 Mich. 454; *Kansas City v. Bacon*, 157 Mo. 450; *Lowe v. Omaha*, 33 Neb. 587; *Cummings v. Williamsport*, 84 Pa. 472; *Alloway v. Nashville*, 88 Tenn. 510; *Alexian v. Oshkosh*, 95 Wis. 221.

The vacation of a street, the use of which has been granted to a railroad, does not render a city liable to an owner of a lot, which does not adjoin the street, and whose damage is the same as that sustained by all other property owners though greater in degree. *East St. Louis v. O'Flynn*, 119 Ill. 200. In *Alabama* the measure of damages caused by lowering a sidewalk

is the difference between the market value of the lot before and after the lowering, — the diminution in value produced thereby. *Montgomery v. Townsend*, 80 Ala. 489. *Post*, § 1062, and note. *Post*, chap. on Streets.

³ *Chase v. Worcester*, 108 Mass. 60; *Edmands v. Boston*, 108 Mass. 535; *Gardner v. Brookline*, 127 Mass. 358; *Maynard v. Northampton*, 157 Mass. 218; *Fales v. Easthampton*, 162 Mass. 422; *Warden v. Philadelphia*, 167 Pa. St. 523; *Alloway v. Nashville*, 88 Tenn. 510; *McKinney v. Nashville*, 102 Tenn. 131; *Harwood v. West Randolph*, 64 Vt. 41; *Alexian v. Oshkosh*, 95 Wis. 221; *supra*, § 1059. The owner is entitled to prove the highest and best use for which the property is adapted, and its value for such use. *West Chicago St. R. Co. v. Chicago*, 172 Ill. 198. The measure of compensation is the value of property as it stood at the time of appropriation and the owner may show that the property had for many years been used for a special business which has increased its value. *Ranek v. Cedar Rapids*, 134 Iowa, 563. A strip of land one foot wide and three hundred and fifty-four feet long lay between a public street and lands owned by others. It was held that although the land might be of no value in actual use to the owner, the jury should consider its relation to other lands and determine the value of the strip in connection therewith. *In re Seattle*, 47 Wash.

to such as affect the present value, and *fanciful and speculative uses* must be excluded from consideration.¹

603; 92 Pac. Rep. 423. In determining the value of land taken, all that is technically part of the land must be included, *e. g.*, *fixtures*. *Matter of New York City*, 39 N. Y. App. Div. 589, 596. See also *Schuchardt v. New York*, 53 N. Y. 202, 208.

In *New York* it is held that if an entry is made upon premises against the express opposition of the owner, before the institution of condemnation proceedings, the land-owner is entitled to have the value of the structures placed upon his premises by the municipality without authority of law before the institution of condemnation proceedings considered in arriving at a determination of the compensation which ought justly to be made to him by reason of the taking of his lands. *St. Johnsville v. Smith*, 184 N. Y. 341, rev'g 90 N. Y. App. Div. 618. See also *Long Island R. Co., In re*, 6 T. & C. (N. Y.) 298; *New York, W. S. & B. R. Co. v. Gennet*, 37 Hun (N. Y.), 317; *United States v. Land in Monterey County*, 47 Cal. 515; *Graham v. Con-*

nersville & N. J. R. Co., 36 Ind. 463. But on the other hand it has been held that when the entry is made by the municipality under an apparent title and improvements are made relying upon that title, the true owner of the property, upon the failure of the title of the municipality, is not entitled to recover compensation for the value of the improvements placed upon the lands by the municipality. *Searl v. Lake County School Dist.*, 133 U. S. 553. See also *McClarren v. Jefferson School Township*, 169 Ind. 140; 82 N. E. Rep. 73; *Aldridge v. Stillwater Board of Education*, 15 Okla. 354. The conflicting views of certain authors (Mills, *Eminent Domain*, 2d ed., § 148; Lewis, *Eminent Domain*, 2d ed., § 507; Randolph, *Eminent Domain*, p. 222) are referred to by the New York Court of Appeals in *St. Johnsville v. Smith*, 184 N. Y. 341, 348, *supra*.

When tenants lease property for a term of years but expressly subject to the contingency that the landlord may

¹ *Kerr v. South Park Com'rs*, 117 U. S. 379; *Shoemaker v. United States*, 147 U. S. 282; *United States v. Lands in Jamestown*, 112 Fed. Rep. 622; *Clark v. Saybrook*, 21 Conn. 313; *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457; *Burke v. Chicago Sanitary Dist.*, 152 Ill. 125; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155, 173; *Spohr v. Chicago*, 206 Ill. 441, 450; *Fairbanks v. Fitchburg*, 110 Mass. 224; *Taft v. Commonwealth*, 158 Mass. 526; *Bockoven v. Lincoln*, 13 S. Dak. 317; *Alexian v. Oshkosh*, 95 Wis. 221. The jury are not to take into consideration what the land may be worth at some remote and future time. *Alexian v. Oshkosh*, 95 Wis. 221. Special value of lands to the owners based on relationship and the location of the lots as a sort of family settlement cannot be considered. *Decatur v. Vaughan*, 233 Ill. 50.

The value of lands, it has been held, is not to be enhanced because of the necessities of the public use. *San Diego Land & T. Co. v. Neale*, 88 Cal. 50; *Chicago Sanitary Dist. v. Loughran*, 160 Ill. 362; *McCormick v. Baltimore*, 45 Md. 512; *Gardner v. Brookline*, 127

Mass. 358; *Moulton v. Newburyport Water Co.*, 137 Mass. 163; *Alloway v. Nashville*, 88 Tenn. 510. In *Massachusetts* it is held that the market value of land to which the owner is entitled as compensation is *not to be increased* by the fact that the land has been *taken for the particular purpose*. *Moulton v. Newburyport Water Co.*, 137 Mass. 163, 167; *Benton v. Brookline*, 151 Mass. 250; *May v. Boston*, 158 Mass. 21; *Bowditch v. Boston*, 164 Mass. 107; *Mowry v. Boston*, 173 Mass. 425; *Sargent v. Merrimac*, 196 Mass. 171. A statutory provision that the damage for land taken for a street shall be fixed at the value thereof before the laying out, alteration, or widening of the street, means that the damages are not to be enhanced by an increase of value that results from the laying out or other change. *Boston Chamber of Commerce v. Boston*, 195 Mass. 338. But in *Ranck v. Cedar Rapids*, 134 Iowa, 563, it was held that a general advance in the value of the property in the neighborhood may be shown, although it is caused by the improvement in question.

§ 1061 (624). **Rules to measure Damages; General and Special Benefits.** — The author must content himself with a statement of those rules or general principles he believes to be the best supported by reason, and which embrace the cases ordinarily arising in connection with the exercise of the right of eminent domain by municipalities, whose chief occasion for the power is to open and establish streets and ways. The rules here laid down are, of course, subject to modification by any special constitutional provision or legislative enactment varying them. I. If the proposed improvement takes *all* of the land of the owner, the case, as to the amount of compensation, is comparatively easy of solution. He is entitled to the fair and full market or pecuniary value of the property at the time it is appropriated, and to no more. This statement of the rule excludes from consideration all such elements as that the owner does not desire to sell, or that the property is endeared to him by association

by condemnation proceedings by the city be deprived of the property, they are not entitled to have the value of their unexpired terms ascertained and deducted from the total award to the landlord in such proceedings. The happening of the contingency terminates their estate or interest in the property. *Matter of New York City*, 168 N. Y. 254, aff'g 62 N. Y. App. Div. 271. *Wharf property.* Compensation to be determined by its location, the improvements made thereon and its present prospective earning capacity. *Matter of Mayor of New York*, 74 N. Y. App. Div. 343.

When land taken for a public way is already burdened with a private right of way and an incipient dedication to the public, the owner is entitled to no more than nominal damages. *Bartlett v. Bangor*, 67 Me. 460. Land was dedicated by deed for a private way, and houses were built and lots sold abutting on the way. Upon the laying out of a public street over the private way, the only compensation to which the owner of the soil is entitled is the value of the additional easement in the public resulting from the laying out of the street; in other words, the value of the land included in the private way is not to be computed as if it were property free from encumbrance, but only as affected by the taking of an easement for the public in addition to the easement for a private way. This is the rule, although by statute the owner of the soil

and the owner of easements in the private way may be authorized to join in a petition for the assessment of damages when the jury is required to assess the damages as to an entire estate and as if it were the sole property of one owner in fee simple. *Boston Chamber of Commerce v. Boston*, 195 Mass. 338.

Taking of water rights. The difference in the market value of the property with the water rights and without them. *Syracuse v. Stacey*, 45 N. Y. App. Div. 249.

Measure of compensation to *lessor and to lessee.* *Matter of New York City (Delancey St.)*, 120 N. Y. App. Div. 700; *Dyer v. Wightman*, 66 Pa. St. 425. A purchaser of land through which a public sewer had been previously built, without right, can recover damages in respect to it, only for such injuries as have resulted to the land since his purchase. *Alexander v. District of Columbia*, 3 Mackey, 192. In *Vermont*, it is held that commissioners to appraise damages for taking land for a sewer can make award only for the actual taking of the land, and cannot include consequential damages, — as for a nuisance caused by the discharge of sewage. *Stewart v. Rutland*, 58 Vt. 12. Where sheds had been lawfully erected upon a pier condemned under proceedings by a city the owner of the pier was held entitled to compensation based upon the value of the pier with the sheds upon it. *In re Pier 15, East River*, 95 N. Y. App. Div. 501.

and the like.¹ But it includes, and justly so, the full value at the time it is taken, no matter what may have caused that value, and although it may have shared with other property in the benefits of the proposed improvement. The transaction is a compulsory purchase, the compulsion, however, coming from the public, and the amount to which the owner is entitled is not simply the value of the property at forced sale, but such sum as the property is worth in the market, if persons desiring to purchase were found who were willing to pay its just and full value, and no more.² II. If, however, as most commonly happens, *part* only of the property is to be taken more embarrassing questions are apt to arise, in determining which regard must be had to the condition as to the shape, use, and convenience in which the residue of the property will be left,³ and how its value will be affected by that which is taken for the proposed improvement.⁴ And here usually arises the difficult inquiry,

¹ Furman Street, *In re*, 17 Wend. (N. Y.) 649, 650; William and Anthony Streets, *In re*, 19 Wend. (N. Y.) 678; *per Potter, J.*, in *Stafford v. Providence*, 10 R. I. 567; *Kerr v. South Park Com'rs*, 117 U. S. 379, approving the rule stated in *Cook v. South Park Com'rs*, 61 Ill. 115; *Green v. Chicago*, 97 Ill. 370.

² *Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 495; *Driver v. Western Union R. Co.*, 32 Wis. 569; *Patterson v. Miss. & R. Rivers Boom Co.*, 3 Dillon C. C. 465, 467, affirmed by the Supreme Court, 98 U. S. 103; *Cooley Const. Lim.* 565; *Giesy v. Cinc., W. & C. R. R. Co.*, 4 Ohio St. 308. In *Stafford v. Providence*, 10 R. I. 567, the text was quoted, and the doctrine there laid down was applied to the condemnation of lands for a *water reservoir* for the city, in a case, where, after the location and partial construction of the improvement, it was decided to take the land in question; and it was held that its value was to be estimated as it was at the time it was condemned, and not at the time of the location of the improvement. In *Benedict v. New York*, 98 Fed. Rep. 789, it was held that the value of property taken for an aqueduct for the purpose of a water supply was to be estimated at the time the property is taken and not at the time when the map required is filed. It is the duty of the State in the conduct of the inquest by which the compensation is ascertained to see that it is just, not merely to the individual whose property

is taken, but to the public which is to pay it. *Searl v. School Dist. No. 2*, 133 U. S. 553. As to allowance of interest, taxes and assessments between time of appropriation and date when award should be paid and the deduction of the value of the use and occupation for that period. *Matter of Mayor of New York*, 40 N. Y. App. Div. 281; *Matter of Riverside Park*, 59 N. Y. App. Div. 603; *Matter of Department of Public Parks*, 53 Hun (N. Y.), 280.

³ *Nahant v. United States*, 136 Fed. Rep. 273, 284, quoting text.

⁴ "Just compensation" consists in making the owner good by an equivalent in money, and includes not only the value of the land appropriated, but the diminished value of the residue. *Bigelow v. West Wis. R. Co.*, 27 Wis. 478, 487. The owner is entitled to compensation for the injury to the *whole property*, and not merely for that to the separate lots over which the railroad is to be built. *Welch v. Milw. & St. P. Ry. Co.*, 27 Wis. 108; *Driver v. Western Union R. Co.*, 32 Wis. 569. In *Iowa*, the property owner is entitled to value of the property taken and damages to the remainder, but the damages cannot include damages resulting from the improper construction of the improvement. *Richardson v. Centreville*, 137 Iowa, 253; 114 N. W. Rep. 1071. In taking part of a lot for a school house, the owner is entitled to damages for consequential injuries to the remainder resulting from the proximity of the

What benefits and what injuries are proper to be regarded as affecting the question of damages? Now, benefits and injuries are of two kinds: 1. General or public, being such as are not peculiar to the particular proprietor, part of whose property is taken, but those benefits which he shares and those injuries which he sustains in common with the community or locality at large. 2. Special or local, being those peculiar to the particular land-owner, part of whose property is appropriated, and which are not common to the community or locality at large, — such, on the one hand, as rendering his adjoining lands more useful and convenient to him, or otherwise giving them a peculiar increase in value; and, on the other, rendering them less useful or convenient, or otherwise in a peculiar way diminishing their value. The former class of benefits or injuries — namely, those which are general, and not special — have, according to the almost uniform course of decision, no place in the inquiry of damages, and cannot be considered for the purpose of reducing the amount, being too indirect and contingent; but injuries which specially affect the proprietor, or benefits which are specially conferred upon his adjacent property, part of which is taken, are to be considered, unless, by the Constitution of the State or legislative enactment, *all* benefits, special as well as general, are to be excluded.¹

school building. *Haggard v. Algona Independent School Dist.*, 113 Iowa, 486.

The cost of fencing, grading, paving, etc., are matters proper for consideration in determining whether the opening of a street has been an injury to property, but they are not to be allowed as separate and independent claims. *Geissinger v. Hellertown*, 133 Pa. 522; *Dawson v. Pittsburgh*, 159 Pa. 317; *Reyenthaler v. Philadelphia*, 160 Pa. 195, 198. The words in the act relating to eminent domain, "which may damage property not actually taken," relate to contiguous lands of the same owner, a part of which only are taken, so that where the party seeking condemnation has not embraced all the owner's contiguous lands not actually taken, but damaged, the owner may file a cross petition and have the damages to the other lands assessed. But even in that case, the damages must be direct and physical, and result from the taking of a portion of his land. *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74. See *supra*, §§ 1015–1018.

The rule that a proprietor is entitled to recover the damage to the remaining

portion on his lands arising from the taking of a part thereof only entitles the owner to damages to the remainder of the particular tract taken. If he is the owner of tracts which, although adjoining, are held and used separately and independently, he cannot recover compensation for the damage which such adjoining tracts sustain. *Sharp v. United States*, 191 U. S. 341; *Currie v. Waverly & N. Y. B. R. Co.*, 52 N. J. L. 381, 392. Where an owner's property has been divided into separate lots, the owner cannot, under a petition to condemn part of one lot for an alley, be compelled to treat the remaining part and the adjoining lot not mentioned in the pleadings, as one entire tract. *Ligare v. Chicago*, 157 Ill. 637.

¹ *Meachem v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291; *Dickenson v. Fitchburg*, 13 Gray (Mass.), 546; *Upton v. South Reading R. Co.*, 8 Cush. (Mass.) 600; *Robbins v. Milw. & H. R. Co.*, 6 Wis. 636; *Farwell v. Cambridge*, 11 Gray (Mass.), 413; *Dwight v. Hampden Co. Com'rs*, 11 Cush. (Mass.) 201; *Howard v. Providence*, 6 R. I. 514; *Chattanooga v. Geiler*, 13 Lea, 611; *Lehigh Valley Coal Co. v. Chicago*, 26

§ 1062 (625). **Same Subject; General Rule stated.** — Applying these principles, *a proper and practical general rule* is to first ascertain

Fed. Rep. 415; *Arbrush v. Oakdale*, 28 Minn. 61; *Kansas City v. Ward*, 134 Mo. 172; *Houston v. Bartels*, 36 Tex. Civ. App. 498. Where an owner sues for wrongful taking and damages to buildings and abandons the claim for wrongful taking, evidence of special benefit to his property by the improvement is immaterial. *Lamb v. Elizabeth City*, 131 N. Car. 241.

A learned jurist and experienced and able judge thus expresses his views on this subject: "When only a portion of a parcel of land is appropriated, just compensation may, perhaps, depend upon the effect which the appropriation may have on the owner's interest in the remainder to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition in which it may leave the remainder in respect to convenience of use. If, for instance, a public way is laid out through a tract of land which before was not accessible, and if, in consequence, it is given a front, or two fronts, upon the street, which furnish valuable and marketable sites for building lots, it may be that the value of that which remains is made, in consequence of taking a part, vastly greater than the whole was before, and that the owner is benefited instead of damaged by the appropriation. Indeed, the great majority of streets in cities and villages are dedicated to the public by the owners of lands, without any other compensation, or expectation of compensation, than the increase in market value which is expected to be given to such lands thereby; and this is very often the case with land for other public improvements which are supposed to be of peculiar value to the locality in which they are made. But where, on the other hand, a railroad is laid out across a man's premises, running between his house and his outbuildings, necessitating, perhaps, the removal of some of them, or upon such a grade as to render deep cuttings or high embankments necessary, and thereby greatly increasing the inconveniences attending the management and use of the land, as well as the risks of accidental injuries, it will often happen that the pecuniary loss which he would suffer by the appropriation of the right

of way would greatly exceed the value of the land taken, and to pay him that value only would be to make very inadequate compensation." *Cooley Const. Lim.* 565. See also *Green v. Chicago*, 97 Ill. 370.

In *Lewis on Eminent Domain* (2d ed.), §§ 465-471, the condition of the authorities on the question of benefits is thus stated: (1) States holding that benefits cannot be set off at all (Mississippi); (2) States holding that special benefits may be set off against the remainder, but not against the part taken (Maryland, Nebraska, Tennessee, Virginia, West Virginia, Wisconsin); (3) States holding that benefits, both general and special, may be set off against the remainder, but not against the part taken (Georgia, Louisiana, Kentucky, Texas); (4) States holding that special benefits may be set off against the part taken and the remainder (Connecticut, Kansas, Maine, Minnesota, Missouri, New Hampshire, North Carolina, Oregon, Pennsylvania, Virginia, District of Columbia). (5) States holding that benefits, both general and special, may be set off against the part taken and the value of the remainder (Alabama, California, Delaware, Illinois, Indiana, New York, Ohio, Oregon, South Carolina).

It has, however, been pointed out that whatever may have been the earlier decisions in *Illinois*, that State cannot now be placed in the fifth class because the later cases hold that under the Constitution of that State the owner must be paid the full value of land taken in money without regard to the benefits he may receive. *Carpenter v. Jennings*, 77 Ill. 250; *Chaplin v. Wheatland Highway Com'rs*, 129 Ill. 651; *Schroeder v. Joliet*, 189 Ill. 48.

Under the *Fifth amendment to the Constitution of the United States* which declares "nor shall private property be taken for public use without just compensation," Congress may direct that when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration by way of measuring the

the then fair market value of the entire premises, part of which is proposed to be taken, *not necessarily irrespective of such improve-*

whole or either part of sum due him, any special and direct benefits capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken. *Bauman v. Ross*, 167 U. S. 548.

Benefits and consequential damages. The Court of Appeals of New York has repudiated the above classification of that State by Mr. Lewis, and held that the question was still an open one; that in the cases cited in support of the above mentioned conclusions of the author (Mr. Lewis) the owner was awarded the full value of the land, the attack being made on the provision for setting off an assessment of benefits against the award; that these cases involved a blending of two powers, viz., eminent domain and taxation, which led to the confusion as to the effect of the decisions of the State of New York; and the Court of Appeals further held that in no case should an award be made for less than the value of the property actually taken by condemnation, irrespective of the question of benefits. *Matter of City of New York*, 190 N. Y. 350, 360.

In so ruling, however, the Court of Appeals of New York after thorough argument and consideration expressly stated that it *did not assert that benefits may not be set off against consequential damages to the part of the lands not taken*, but on the contrary said that this would generally accomplish an equitable result. It is also to be observed that where the property taken is an intangible right, such as the easement, or right in the nature of an easement of light, air and access, appurtenant to abutting property taken or impaired by the erection of an elevated railroad, the New York courts have held that inasmuch as the easement in itself is intangible and considered in the abstract is only of nominal value, the amount of compensation to be made for the taking or impairment is to be determined by the damage to the abutting land, something that can only be determined by giving effect to both the injury and the benefit. *Newman v. Metropolitan Elevated R. Co.*, 118 N. Y. 618; *Bohm v. Metropolitan Elevated R. Co.*, 129 N. Y. 576, 588.

In the case last cited, *Peckham J.*, now on the Supreme bench of the

United States, after reviewing the authorities, said, "It seems to me plain from this review of the law that the real injury (if any) suffered by the landowner in any particular case lies in the effect produced upon his abutting land by the wrongful interference of defendants with these easements of light, air and access to such land. And where they are interfered with and in legal effect taken to any extent, it is not possible to think of them as of any value in and of themselves separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left and to which they were appurtenant. This is a consequential damage. It is not the light or the air that is valuable separated from the land adjoining. With regard to the subject under discussion, there is and can be no value in a given quantity of air, or space, or light in the public street except as it may be used in connection with and as appurtenant to the abutting land. When a person interferes with such light, air or access and takes it, he takes nothing which is alone and intrinsically valuable, but only as its loss affects the adjoining land. This loss, while purely consequential, is nevertheless a liability which the person proposing to take the property is bound to discharge. . . . A theoretical course of reasoning may be adopted by which it could be claimed, as plaintiff's counsel urges, that the value of these easements in and of themselves is represented by the amount of depreciation in value to the adjoining land their taking would occasion, with no reference to the agency by which such taking was accomplished. In fact such value would be arrived at by reference to what was a purely consequential damage to land. If the taking by the railroad actually had the effect of enhancing the value of the remaining land, the inquiry as to the amount of loss that might otherwise have been occasioned (if there had not happened to be the actual benefit), would be the purest guess and speculation in the world and even when arrived at would be but proof of what might have happened, if something else had not occurred which prevented it and caused the contrary to happen.

ment, but irrespective of the causes which have contributed to that value; then ascertain the like value of the premises in the condition in which they will be after the part is taken, without deduction for any general benefits common to the public, which will result from the proposed improvement, but, unless specially excluded by positive law, deducting special and peculiar benefits as above defined; and the difference in value, be it more or less than the value of the part taken, will constitute the measure of compensation.¹ Even without

To permit a recovery of this conjectural and wholly theoretical amount of damage which was never sustained, would be to legalize a mere raid upon the treasury of defendants."

After citing the *Newman* case, *supra*, and referring to the fact that the statutes provided that the amount of compensation should be determined without allowance or deduction on account of any real or supposed benefits, Mr. Justice *Peckham* proceeded: "The case of *Newman* decides that this provision does not mean that in examining the question whether injury has resulted to the abutting owner's remaining lands by reason of the taking of a portion of the easements spoken of, the court cannot regard the fact that, so far from injury, the land remaining had been specially enhanced in value by reason of the taking. On the contrary it decides that such fact, of special enhancement in value, is material, and may and must be considered upon the question of damage. It is not offsetting injury against benefits. It is discovering whether in reality there has been any injury to the remaining land. To prove that the land has been specially benefited may be proof that it has not been diminished in value. . . . If instead of loss or injury that land has been specially benefited by the taking by the railroad company, then no damage has been sustained by the land-owner." With these views, sound, equitable and just alike to the abutting property owner and to the public, the author ventures to express his entire concurrence.

It is the settled law in *Nebraska* that, in case of damages to abutting property, special benefits may be set off, while general benefits may not. *Wagner v. Gage County*, 3 Neb. 237; *Schaller v. Omaha*, 23 Neb. 325; *Dayton v. Lincoln*, 39 Neb. 74; 57 N. W. Rep. 754. And therefore an instruction that if the premises have

not suffered a diminution in their market value and were not damaged, the jury should find for the defendant was held erroneous as not excluding consideration of general benefits. *Dayton v. Lincoln*, 39 Neb. 74. In *Texas* it has been held that benefits may be set off against consequential injury to property not taken. *Burton Lumber Co. v. Houston*, 45 Tex. Civ. App. 363; 101 S. W. Rep. 822.

The phrase in an act allowing "any benefit" to be considered in estimating damages to the land-owner, construed and limited. *Weir v. St. P. S. & T. F. R. Co.*, 18 Minn. 169. Where the value of lots is less than the amount assessed upon them for a public improvement, their enhanced value is nothing to the owner; and the benefits to him being no greater than to any other citizen, the assessment is unconstitutional. *Zoeller v. Kellogg*, 4 Mo. App. 163. Such unconstitutionality is not affected by the fact that the municipal authority to assess is not referable to the right of eminent domain, but inheres in the taxing power alone. *Id.* In assessing damages to a land-owner for land taken to widen a street, the jury may consider an agreement made by him with the city, just before institution of the proceeding, and not for compromise or to avoid litigation, to take a certain sum for the strip of land required. *Springfield v. Schmook*, 68 Mo. 394; *Miss. River Br. Co. v. Ring*, 58 Mo. 491. In such proceeding, consequential damages are not to be regarded. *Springfield v. Schmook*, *supra*.

¹ See *Sater v. Burlington & Mt. P. Pl. R. Co.*, 1 Iowa, 393, decided under the Constitution of 1846. The rule, as there laid down, does not fully accord with that stated in the text, since it requires the marketable value of the premises proposed to be taken to be ascertained irrespective of the proposed improvement, and does not distinguish between general and special benefits.

an express provision of law requiring that there shall be no deduction for benefits, it seems to the author unjust to require that the value of

By the *Iowa* Constitution of 1857, *benefits are excluded*. *Deaton v. Polk* County, 9 Iowa, 594; *Israel v. Jewett*, 29 Iowa, 475. *Supra*, § 1061, note. Other like constitutional provisions, see *supra*, §§ 1014, 1052; *Mills Em. Dom.* §§ 149-158, 204 a; *Lewis Em. Dom.* § 472. *Pennsylvania* rule is similar to the one in *Sater v. Mt. P. Pl. R. Co.*, *supra*. *Watson v. Pittsburgh & C. R. Co.*, 37 Pa. St. 469; *Pennsylvania R. Co. v. Heister*, 8 Pa. St. 445; *Hornstein v. Atl. & Gt. W. R.*, 51 Pa. St. 87; *Harrisburg & Pot. R. Co. v. Moore*, 4 W. N. C. 37; *Philadelphia v. Linnard*, 97 Pa. St. 242; *Larkin v. Scranton*, 162 Pa. 289.

As to *general and special benefits*. *Little Miami R. Co. v. Collett*, 6 Ohio St. 182; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *State v. Digby*, 5 Blackf. (Ind.) 543; *Robbins v. Milw. & H. R. Co.*, 6 Wis. 636; *Hornstein v. Atl. & Gt. W. R. R. Co.*, 51 Pa. St. 87; *Woodfolk v. Nashville & C. R. Co.*, 2 Swan (Tenn.), 422; *McIntire v. State*, 5 Blackf. (Ind.) 384; *Indiana Cent. R. Co. v. Hunter* 8 Ind. 74; *Vanblaricum v. State*, 7 Blackf. (Ind.) 209; *McMahon v. Cincinnati & C. S. L. R. Co.*, 5 Ind. 413; *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300; *Pacific R. Co. v. Chrystal*, 25 Mo. 544; *Newby v. Platte County*, 25 Mo. 258; *Sutton's Heirs v. Louisville*, 5 Dana (Ky.), 28; *Jacob v. Louisville*, 9 Dana (Ky.), 114; *Arnold v. Cov. & Cinc. Br. Co.*, 1 Duvall (Ky.), 372; *Robinson v. Robinson*, *ib.* 162; *Shipley v. Balt. & P. R. Co.*, 34 Md. 336; *Hickman v. Kansas City*, 119 Mo. 110.

In *Mississippi* even *incidental benefits* cannot be set off against incidental damages. *New Orleans, J. & Gt. N. R. Co. v. Moye*, 39 Miss. 374. In *Georgia* *benefits are excluded*. *Savannah v. Hart-ridge*, 37 Ga. 113. Rule in *Minnesota* when land is taken by railway company, *Curtis v. St. Paul, S. & T. F. R. Co.*, 20 Minn. 28, and cases cited. Rule in *Missouri* is, the reasonable value of the land taken. *Jamison v. Springfield*, 53 Mo. 224. The rule announced in *Newby v. Platte County*, 25 Mo. 258, that one whose land is condemned for a street is not entitled to be paid the value of the land, and damages to the remainder irrespective of benefits is adhered to in *St. Joseph v. Geiwitz*, 148 Mo. 210.

The benefit to be deducted is the direct and peculiar benefit, which would result in particular to the owner's land not taken, and not the general benefit which the land would derive in common with that of others. *Hickman v. Kansas City*, 120 Mo. 110. *California*, no benefits. *Ventura County v. Thompson*, 51 Cal. 577. Rule in *Kansas*: For the purpose of reducing damages, all *conveniences and benefits accruing* cannot be considered, but only such as are a direct and special benefit to the owner and his land, and such as are the direct, certain, and proximate result of the establishment of the road, not benefits received by him in common with the whole community. *Roberts v. Brown Co. Com'rs*, 21 Kan. 247; *Pottawatomie Co. Com'rs v. Sullivan*, 17 Kan. 58.

In *Massachusetts*, upon an assessment of damages for land taken to widen a street, a benefit to be deducted may be direct and special, although others' estates on the same street, similarly situated, are similarly benefited. *Cross v. Plymouth County*, 125 Mass. 557. On a petition for damages to the abutters from raising the grade of the street, benefits derived from the situation of the petitioner's lands as to the street are direct and special, and may be set off, although common to all the property on the street. *Donovan v. Springfield*, 12 Mass. 371. Benefits classified. *Upham v. Worcester*, 113 Mass. 97.

The opinion of *Ranney, J.*, in *Giesy v. Cinc. W. & C. R. Co.*, 4 Ohio St. 308, contains an able exposition of the *principles upon which damages should be assessed* under the Constitution of *Ohio*, which contains a provision that the "compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." In the course of his opinion he says: "Whether property is appropriated directly by the public or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken, — as much as he might fairly expect to be able to sell it to others for, if it was not taken; and this amount is not to be increased from the necessity of the public or the corporation to have it, on the one hand, nor diminished from any necessity of the owner to dispose of it on the other. It

the land shall be ascertained irrespective of those general benefits which are common to all land in the vicinity, and which arise out of the proposed improvement. And the rule held by some courts, that these benefits shall be excluded in ascertaining the value of the whole land in the first instance, and then allowing to be deducted from this sum the value of the remaining portion after the improvement is made, is still more indefensible, and it was the general conviction of the injustice of such a rule that has led to so many constitutional provisions and legislative enactments prohibiting the land-owner from being charged with benefits. But for benefits, direct and special to him, he should be charged in making the

is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian, and without any regard to the external causes that may have contributed to make up its present value. The jury are not required to consider how much, nor permitted to make any use of the fact that it may have been increased in value by the proposal or construction of the work for which it is taken. To allow this to be done would not only be unjust, but would effect a partial revival of the very abuse which it was a leading purpose of these constitutional provisions to correct. It would be unjust, because it establishes for a corporation what is done for no one else, — a sort of right in the property of others to the reflected benefits of its improvement, itself submitting to no reciprocity by affording others a compensation for the effect of their improvements upon the property of the corporation. And it is doubly unjust, where, as must very often happen, the increase in value accrued to the benefit of a former owner, and has been bought and paid for by the present holder, from whom the property is taken at a diminished price." In a proceeding to condemn a right of way for a railroad through a tract of land, the jury should assess the compensation due the owner for the land to be appropriated, irrespective of benefits, and also his damages by reason of the diminished value of the remainder of the tract, in consequence of such appropriation. In ascertaining these amounts, the jury are to take into consideration the real value of the land taken, and the diminished value to the remainder, and may for that purpose take into account, not only the purposes to which the land has been or is applied, but any other beneficial

purpose to which it may be applied, which would affect the amount of compensation of damages. *Cincinnati & S. R. Co. v. Longworth's Ex.*, 30 Ohio St. 108. So, in *Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 495, the Supreme Court of *New Jersey* expresses its opinion to be, that in estimating the value of land taken for the purpose of a public improvement the present value of the lands, not at a forced sale, but at a sale which a prudent holder would make if he had the power to choose his own time and terms, is to be given.

In the case of *Paul v. Newark*, 6 Am. L. R. 576, at the *Essex* (N. J.) Supreme Court circuit, *Depue, J.*, held that a house *wholly within the line of the proposed street* must (if the owner so wishes) be taken and paid for in full by the city, and the city cannot compel him to move it by merely paying costs of removal and restoration, even although the owner has immediately adjacent land, sufficient to accommodate the house. When statutes provide for taking "lands," the word is used in its broad signification, and includes all things affixed to lands. In *Meyer v. Newark*, 6 Am. L. Rev. 576, where only a part (about one half) of a house was within the lines of proposed street, the question was left for review before the court *in banc*, whether the city was compelled to take the whole, or merely to pay for the damages incident to the destruction of the half of the house. The court, however, strongly intimated that in cases where the house was not entirely destroyed, it was only necessary to pay damages sufficient to compensate the owner, and the whole need not be taken or paid for. *Ib.*; 6 Am. Law Review, 576, from which the above is extracted. Compensation for *buildings* upon the

estimate of the amount to which he is justly entitled, unless, by the Constitution or statute, even such benefits are not to be considered.¹

lands taken. *Schuchardt v. New York*, 53 N. Y. 202; *Portland v. Lee Sam*, 7 Oreg. 397; *Portland v. Kamm*, 10 Oreg. 383.

The following cases support the rule that in order that benefits may be deducted they must be special and not general benefits. *Chicago v. Le Moynes*, 119 Fed. Rep. 662; *Chicago v. Jackson*, 196 Ill. 469; *Chicago v. Lanergan*, 196 Ill. 518; *Geneva v. Peterson*, 21 Ill. App. 454; *Herrmann v. East St. Louis*, 58 Ill. App. 166; *Cole v. Boston*, 181 Mass. 374; *Homer v. Duluth*, 70 Minn. 378; *Hickman v. Kansas City*, 120 Mo. 110.

¹ "The question of damages is to be determined with reference to special benefits to property not taken. *Hyde Park v. Dunham*, 85 Ill. 569. Any mere general and public benefit, or increase of value received by the land, in common with other lands in the neighborhood, is not to be taken into consideration in estimating compensation. *Page v. Chicago, M. & St. P. Ry. Co.*, 70 Ill. 324." *Per Magruder, J.*, in *Hyde Park v. Washington Ice Co.*, 117 Ill. 233. *Supra*, §§ 1053, 1054, and notes. In estimating the damage done to private property by a public improvement, evidence to show that the improvement, when completed, was a nuisance and a continuing damage to the property is not admissible; the owner has a separate right of action therefor. *Badger v. Boston*, 130 Mass. 170 (constructing a public urinal). See also *Eames v. New Eng. Worsted Co.*, 11 Met. 570; *Staple v. Spring*, 10 Mass. 72. *Measure of damages for land taken for public park by right of eminent domain*: Evidence is not admissible to show prices at which lands adjoining the proposed park were sold after the boundaries of the park had been determined. *Kerr v. South Park Com'rs*, 117 U. S. 379, approving rule of damages in *Cook v. South Park Com'rs*, 61 Ill. 115, by which the value of the land is to be estimated as of the date of the

condemnation. It is competent for the legislature by a special act to provide that in condemnation proceedings all benefits to the owner shall be considered. Such act is merely a change of remedy, and under such an act it is error to instruct the jury in condemnation proceedings that the benefits assessed must be only those which are special to the owners and not such as he secures in common with other persons. The legislature in conferring upon the corporation the exercise of the right of eminent domain can in its discretion require all the benefits or a specified part of the whole or forbid any of them to be assessed as offsets against the damages. This is a matter which rests in its discretion, in which neither party has a vested right and as to which the legislature can always change its mind before rights are settled and vested by a verdict and judgment, and therefore it is immaterial that the special act was passed after the condemnation proceedings were begun. *Miller v. Asheville*, 112 N. Car. 759. A claim by the land-owner for damages is independent of the city's claim for assessment of benefits, and in an action for the former the city is not entitled to set off its claim without pleading. *Roper v. New Britain*, 70 Conn. 459. Special benefits accruing to the particular property may be set off against the damage done to land not taken. *Washington Ice Co. v. Chicago*, 147 Ill. 327. Commissioners in street opening proceedings not entitled to take into consideration the question of benefits, they not being authorized to levy any assessment for benefits, but they properly gave as damages the difference between the value of the thing as damaged and its value in its original condition, where a strip of land had been taken for the purpose of widening a roadway. *Matter of Riverside Avenue*, 83 Hun (N. Y.), 50.

CHAPTER XXIII

DEDICATION

	Section		Section
Dedication founded in Public Convenience	1070	Acceptance by Municipal Authorities	1087
Statutory Dedication	1071	Partial Acceptance of Dedication	1088
Statutory Dedication; Character of Estate vested in Municipality	1072	Time of Acceptance	1089
Common-Law Dedication; Rationale and Requisites	1073	Dedication by Platting and Sale; Necessity of Acceptance by Public	1090
Same Subject; General Features	1074	Revocation of Dedication	1091
Dedications subject to Condition or Reservation	1075	Acceptance; Revocation	1092
Common-Law Dedication; Estate or Interest of Public	1076	Province of Court and Jury; Burden of Proof	1093
Alluvium and Accretions	1077	Parks and Public Squares	1094
Dedication must be made by the Owner	1078	Same Subject; Dedication	1095
Intention Essential	1079	Park Uses	1096
Intent to Dedicate Presumed from user for Prescriptive Period	1080	Use of Public Squares	1097
User as affecting Question of Intent	1081	Enclosure and Ornamentation of Public Squares	1098
Same Subject; Widening Street Dedication by Platting and Sale	1082	Use of Public Square by County	1099
Extent of Interest acquired by Purchaser under Sale according to Plat	1084	Dedication for other Public or Charitable Purposes	1100
Plat as Evidence of Intention	1085	Use of Dedicated Land for Wharves	1101
Acceptance by Public Necessary	1086	Alienation of Dedicated Lands; Change of Use	1102
		Same Subject; Legislative Authority	1103
		Same Subject	1104
		Civil Law Doctrine; Alienation in Louisiana	1105
		Reverter; Misuser; Remedy	1106
		Concluding Observations	1107

§ 1070 (627). **Dedication founded in Public Convenience.**— That *property may be dedicated to public use* is a well-established principle of our jurisprudence. At common law a definite and certain grantee is necessary to take lands by grant or conveyance, and hence a grant or conveyance to the general public could not take effect.¹ The law meets this difficulty by the *doctrine of dedication*, which recognizes the rights of the public thus acquired by estopping the dedicator from disputing them. The principle is founded in public convenience, and has been sanctioned by long

¹ *Ante*, § 974; *infra*, § 1074.

experience. Indeed, without such a principle, it would be difficult, if not impracticable, for society to enjoy those advantages which belong to a state of advanced civilization, and which are essential to its accommodation. The importance of this doctrine may not always be appreciated, but we are in a great degree dependent on it for highways and streets, and for the grounds appropriated as places of amusement or of public business which are found in all our towns, and especially in our populous cities.¹ The subject is, therefore, one which falls within the scope of the present work, and we have endeavored to present its leading doctrines with care and adequate fulness.

§ 1071 (628). **Statutory Dedications.**—Dedications of land to public uses are divisible into two classes: 1. *Statutory Dedications*; 2. *Common-Law Dedications*. Statutory dedications are made, and, it has been decided, can be made only by pursuing substantially the course prescribed by the particular statute.² Thus if the statute requires that the map or plat describing the streets, alleys, commons, or other public grounds, shall be *acknowledged* before it is recorded, an acknowledgment is essential to a valid

¹ *Per McLean, J.*, in *New Orleans v. United States*, 10 Pet. (U. S.) 662, 712. *Infra*, § 1074. As to the forums and public places in Ancient Rome, see *ante*, chap. i. § 4.

Dedication is "the act of devoting or giving property for some proper object, and in such a manner as to conclude the owner." *Beardsley, J.*, *Hunter v. Sandy Hill Trs.*, 6 Hill (N. Y.), 407, 411. See also *People v. Marin County*, 103 Cal. 223, 227; *San Antonio v. Sullivan*, 23 Tex. Civ. App. 619. See *Dovaston v. Payne*, 2 Smith Lead. Cas. 142, and notes, for a general view of the law of dedication. There is an excellent view of the subject in Angell on Highways, chap. iii. See also chapters on Property and Eminent Domain, *ante*, and chapters on Streets, *post*.

In *First German Reformed Church v. Summit County*, 23 Ohio Cir. Ct. 553, it is said that there is a *distinction between dedication* to public use and a grant to a municipality. Municipalities are authorized to hold lands as individuals for the purposes for which they need them in their corporate capacity, and they may, when not prohibited by law, convey lands thus

held for their corporate purposes in the same manner as individuals. In the case of a dedication to public use, the public, as an organized body, has no right to appropriate it or any part of it to its individual use; for it has no right, as a corporate body, of property therein. Its rights are passive and not active and whatever right there is in the property by way of easement is really vested in the public and the officers representing the public authorities manage it and control it merely as trustees for the public for whose use it is dedicated. See, further, as to the distinction between a grant and a dedication to public use, *Mahoning County v. Young*, 59 Fed. Rep. 96; 16 U. S. App. 253, 262.

² *John Mouat Lumber Co. v. Denver*, 21 Colo. 1; *Leadville v. Coronada Mining Co.*, 37 Colo. 234; s. c. 29 Colo. 17; *Grandville v. Jenison*, 84 Mich. 54, 66, citing text; *St. Joseph v. Schulz*, 132 Mich. 213, citing text. If an essential provision of the statute as to the width of an alley is not complied with in the plat, there is no valid statutory dedication. *Watson v. Carver*, 27 App. D. C. 555.

and effective dedication under the statute.¹ The effect of a dedication under the statute is often declared. Thus, by express provision or necessary implication, the statute frequently has the effect of *vesting* in the municipality *the fee* of property dedicated according to its provisions and not a mere easement.² Similarly,

¹ *Wisby v. Boute*, 19 Ohio St. 238; *Fulton v. Mehrenfield*, 8 Ohio St. 440, questioning the *grounds* of prior decision in *Morris v. Bowers*, *Wright* (Ohio), 750; *Williams v. First Presb. Soc. in Cinc.*, 1 Ohio St. 478; *Winona v. Huff*, 11 Minn. 119; *Baker v. St. Paul*, 8 Minn. 491; *Schurmeier v. St. Paul & Pac. R. Co.*, 10 Minn. 82, *aff'd* in Supreme Court, 7 Wall (U. S.) 272; *State v. Hill*, 10 Ind. 219; *Hays v. State*, 8 Ind. 425; *Noyes v. Ward*, 19 Conn. 250; *Des Moines v. Hall*, 24 Iowa, 234. See *Ragan v. McCoy* (requisites of acknowledgment), 29 Mo. 356; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Baker v. Johnston*, 21 Mich. 319; *Alton v. Fischback*, 181 Ill. 396; *Chicago v. Smith*, 204 Ill. 356; *Owen v. Brookport*, 208 Ill. 35; *Nodine v. Union*, 42 Oreg. 613.

If the plat as recorded, pursuant to a statute requiring it, contains enough to show that it was intended by the owner to be a dedication under the statute, it would seem to the author to be right, notwithstanding a defective acknowledgment, or the like, to hold the proprietor estopped to make the objection that he did not comply with the statute. See *Hurley v. Miss. & R.R. Boom Co.*, 34 Minn. 143; *Gebhardt v. Reeves*, 75 Ill. 301. Other considerations would apply where statutory requirements for the benefit of the public are not observed by the dedicator.

Authentication of town plats and maps, nature of evidence necessary, &c., effect of unrecorded map, &c., see *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469; *Biddle's Lessee v. Shippen*, 1 Dallas, 19; *Franey v. Miller*, 11 Pa. St. 435; *Commonwealth v. Wood*, 18 Pa. St. 93; *Baird v. Rice*, 63 Pa. St. 489; *Ashley v. Toledo*, 13 Ohio Cir. Ct. 1; *Winona v. Huff*, 11 Minn. 119; *Ragan v. McCoy*, 29 Mo. 356; *Chicago, B. & Q. R. Co. v. Banker*, 44 Ill. 26; *Gebhardt v. Reeves*, 75 Ill. 301; *United States v. Chicago*, 7 How. 185; *Gosselin v. Chicago*, 103 Ill. 623 (effect of acknowledgment by an attorney in

fact). *Wright v. Oberlin*, 23 Ohio Cir. Ct. 509. *Not sufficient*: *Rusk v. Berlin*, 173 Ill. 634; *Blair v. Carr*, 162 Ill. 362. *Ante*, § 355, note; *post*, § 1083, note. *Acknowledgment by agent* held ineffectual to constitute statutory dedication. *Russell v. Lincoln*, 200 Ill. 511; *Alton v. Fishback*, 181 Ill. 396. Insufficient acknowledgment under statute. *Davenport & R. I. B. R. & Terminal Co. v. Johnson*, 188 Ill. 472. Requirement that plat be recorded. *Strong v. Darling*, 9 Ohio, 201; *Pangborn v. Westlake*, 36 Iowa, 546, and cases cited by *Cole, J.*; *Rock Island & P. R. Co. v. Johnson*, 204 Ill. 488; *St. Joseph v. Schulz*, 132 Mich. 213. The legislature may by *curative act* validate plats which are defectively acknowledged. *Johnson v. Parker*, 51 Ark. 419; *Stuttgart v. John*, 85 Ark. 520; *Parriott v. Hampton*, 134 Iowa, 157; *Williams v. Milwaukee Industrial Expos. Assoc.*, 79 Wis. 524. Index, *Curative Acts*.

² *Denver v. Clements*, 3 Colo. 484; *Manley v. Gibson*, 13 Ill. 312; *Campbell v. Kansas City*, 102 Mo. 326; *Snoddy v. Bolen*, 122 Mo. 479; *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631; *Grandville v. Jenison*, 84 Mich. 54, 65.

Colorado. Under a statute, which provides that the title shall vest in the city in trust for the uses expressed in the plat, the city only acquires a *qualified fee*, the reversionary interest remaining to the grantor and passing to the grantees of the abutting lots, and the fee of the street reverting on vacation to the latter. *Denver C. R. Co. v. Nestor*, 10 Colo. 403; *Olin v. Denver & R. G. R. Co.*, 25 Colo. 177. See also *Leadville v. Bohn Min. Co.*, 37 Colo. 248; *Leadville v. Coronado Min. Co.*, 29 Colo. 17; *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122; 95 Pac. Rep. 343; *Bothwell v. Denver Union Stockyard Co.*, 39 Colo. 221.

Illinois. If a plat or map is made in accordance with the statute and properly acknowledged and recorded to operate as a statutory dedication,

if it be expressly provided that a plat made and recorded in compliance with the statute shall be deemed to be sufficient conveyance

the fee of the streets or lands dedicated to public use vests in the municipality in trust for the public. *United States v. Illinois Cent. R. Co.*, 154 U. S. 225, 236; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730, 758; *Canal Trs. v. Haven*, 11 Ill. 554; *Hunter v. Middleton*, 13 Ill. 50; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Gosselin v. Chicago*, 103 Ill. 623; *Matthiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411; *Maywood Co. v. Maywood*, 118 Ill. 61; *Union Coal Co. v. La Salle*, 136 Ill. 119; *Jordan v. Chenoa*, 166 Ill. 530; *Clark v. McCormick*, 174 Ill. 164, 171; *Augusta v. Tyner*, 197 Ill. 242; *Russell v. Lincoln*, 200 Ill. 511; *Owen v. Brookport*, 208 Ill. 35, 39. But in this state, acceptance is necessary to make a complete statutory dedication, and until acceptance, the fee does not vest in the municipality. *Peoria v. Johnson*, 56 Ill. 45, 49; *Littler v. Lincoln*, 106 Ill. 353, 368; *Winnetka v. Prouty*, 107 Ill. 218; *Hamilton v. Chicago, B. & Q. R. Co.*, 124 Ill. 235; *Auburn v. Goodwin*, 128 Ill. 57; *Jordan v. Chenoa*, 166 Ill. 530; *Hewes v. Crete*, 175 Ill. 348; *Woodburn v. Sterling*, 184 Ill. 208; *Russell v. Chicago & M. El. R. Co.*, 205 Ill. 155, 165; *Owen v. Brookport*, 208 Ill. 35, 41; *Venice v. Madison County Ferry Co.*, 216 Ill. 345; *Reichert Milling Co. v. Freeburg*, 217 Ill. 384; *Swedish Evangelist Lutheran Church v. Jackson*, 229 Ill. 506; *Edwardsville v. Barnsback*, 66 Ill. App. 381. If a statutory dedication of streets and alleys is tendered before there is a municipality incorporated and empowered to accept or reject the offer, the fee to the streets and alleys shown on the plat remains in abeyance until a municipality shall have corporate existence. *Riverside v. MacLain*, 210 Ill. 308; *Venice v. Madison County Ferry Co.*, 216 Ill. 345, 350. But even in that event, the acceptance must be made within a reasonable time and the owner may recall the dedication if not so accepted. *Venice v. Madison County Ferry Co.*, 216 Ill. 345, 350. If the plat is not made, acknowledged and recorded as required by statute, it operates as a common law dedication only, and the title to the streets vests in the adjoining owners subject to the

easement of the public. *Clark v. McCormick*, 174 Ill. 164; *Thompson v. Maloney*, 199 Ill. 276, 282; *Russell v. Lincoln*, 200 Ill. 511; *Owen v. Brookport*, 208 Ill. 35, 39; *Ingraham v. Brown*, 231 Ill. 256, 258.

Indiana. By the making and recording of a town plat, under the statutes on that subject, the designation of streets, lanes, and alleys on the plat gives to the public only an easement therein for such use as the public have a right to make of them; but the fee simple remains in the proprietor. *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178.

Iowa. Under the statutes of this state the acknowledgment and recording of a plat are equivalent to a deed of a street designated thereon in fee simple for the public use. *Minneapolis & St. L. R. Co. v. Britt*, 105 Iowa, 198; *Backman v. Oscaloosa*, 130 Iowa, 600. See also *Blennerhasset v. Forest City*, 117 Iowa, 680; *Burroughs v. Cherokee*, 134 Iowa, 429. But to have this effect the description in the plat must be as definite as in the case of a conveyance. Ordinarily the plat with its notes and acknowledgment must speak for itself. *Coe v. Cedar Rapids*, 120 Iowa, 541.

Kansas. Under the statutes the execution and recording of a plat of a city or town conveys to the county the fee of such parcels of land as are therein expressed, named, or intended for public use, in trust and for the uses therein named, expressed or intended, and for no other use or purpose, and a subsequent conveyance of land thus dedicated to public uses by the proprietor of the city, town, or addition, to the county does not destroy the trust created by the execution and recording of the plat. *Franklin County v. Lathrop*, 9 Kan. 453; *Harden v. Metz*, 62 Kan. 867. Under the Town Site Act of Kansas, the fee of streets, &c., dedicated to public use by an owner, vests in the county absolutely, subject to the control of the city as another agent of the public. *Wood v. National Water Works Co.*, 33 Kan. 590.

Michigan. The effect of a statutory dedication, unlike a dedication at common law, is to vest a fee of the lands

to vest the fee in the municipality, or if other words be used, either expressly or by necessary implication, creating a beneficial estate or interest in the municipality, it has been held that the necessity of any *assent or acceptance* on the part of the public is *dispensed with*, differing in this respect from a common-law dedication.¹ It differs, also, in the mode of operation, since by the language above quoted the estate vests in the public by *conveyance* or *grant*,

designated in the plat as dedicated to public use in the municipality for the uses and purposes intended. *Grandville v. Jenison*, 84 Mich. 54, 65.

In *Minnesota*, it is held that under a statutory dedication the *fee simple* to land dedicated for streets, squares, &c., *does not pass*, but only such an estate or interest as the purposes of the trust require. *Schurmeier v. St. Paul & Pac. R. Co.*, 10 Minn. 104; *aff'd*, 7 Wall. (U. S.) 272.

Missouri. A valid statutory dedication operates to vest the fee in the municipality and dispenses with the necessity of an acceptance on the part of the public. *Brown v. Carthage*, 128 Mo. 10; *Buschman v. St. Louis*, 121 Mo. 523; *California v. Howard*, 78 Mo. 88; *Reid v. Edina Board of Education*, 73 Mo. 295.

Nebraska. Under a statutory dedication the fee simple of streets and alleys is *vested in the public* in trust for the use for which they were dedicated. *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631.

Ohio. In this state the effect of the statutory provision is not to vest in the municipality a fee simple absolute in the dedicated streets, but *only a determinable or qualified fee*, and what is granted to the city is held in trust for the uses intended only. *Callen v. Columbus Edison El. L. Co.*, 66 Ohio St. 166. See also *Armstrong v. St. Mary's*, 21 Ohio Cir. Ct. 16; *Mahoning County v. Young*, 59 Fed. Rep. 96.

Washington. A statutory dedication has the force of a quit claim deed and acceptance by the municipality is not necessary. *Thonney v. Rice*, 43 Wash. 708.

¹ *Archer v. Salinas City*, 93 Cal. 43; *Bothwell v. Denver Union Stockyards Co.*, 39 Colo. 221; *Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540; *Indianapolis v. Kingsbury*, 101 Ind. 200; *People v. Jones*, 6 Mich. 176; *Baker v. St. Paul*, 8 Minn. 491, 493; *Hanson v. Eastman*, 21 Minn. 509;

Ragan v. McCoy, 29 Mo. 356; *Becker v. St. Charles*, 37 Mo. 13; *Reid v. Edina Board of Education*, 73 Mo. 295. *California v. Howard*, 78 Mo. 88; *Buschmann v. St. Louis*, 121 Mo. 523; *Brown v. Carthage*, 128 Mo. 10; *Brown v. Manning*, 6 Ohio, 298, 304; *Fulton v. Mehrenfield*, 8 Ohio St. 440; *Wisby v. Boute*, 19 Ohio St. 238; *Meacham v. Seattle*, 45 Wash. 380; *Thonney v. Rice*, 43 Wash. 708; *Yates v. Judd*, 18 Wis. 118; *Mytton v. Duck*, 26 Up. Can. Q. B. 61; *Harr. Munic. Man.* (5th ed.) 481.

Iowa. Under a statutory dedication there must be an acceptance by the city to vest title in it and to charge it with liability. *Burroughs v. Cherokee*, 134 Iowa, 429.

Wisconsin. In the case of a plat made according to the statute, acceptance is in time if made before the offer to dedicate is withdrawn and when the time has arrived requiring the actual use of the lands for the public convenience. *Ashland v. Chicago & N. W. R. Co.*, 105 Wis. 398, 402. In the case of a dedication in accordance with the statute, the right of the municipal authorities to accept the dedicated streets cannot be lost by any *mere non-user or non-exercise*, however long continued. *Reilly v. Racine*, 51 Wis. 526; *State v. Leaver*, 62 Wis. 387; *Chase v. Oshkosh*, 81 Wis. 313, 317; *Maire v. Kruse*, 85 Wis. 302; *Racine v. Chicago & N. W. R. Co.*, 92 Wis. 118; *Reuter v. Lawe*, 94 Wis. 300, 304; *Madison v. Mayers*, 97 Wis. 399, 412. But the right to accept the dedication will be lost if long-continued non-user is joined to circumstances which create an equitable estoppel against the city, *e. g.*, an express refusal of the city to open the street, the filling of low ground at considerable expense, and the erection of valuable buildings on the dedicated land. *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449. See also *Reuter v. Lawe*, 94 Wis. 300.

whereas, at common law, a dedication to public uses, in cases where there is no express grant to a grantee upon consideration, operates by way of an *estoppel in pais* of the owner, rather than by grant or the transfer of an interest in the land.¹ It should be remarked, however, that an incomplete or defective statutory dedication will, when *accepted by the public*, or when rights are acquired under it by *third persons*, operate in favor of the public and of such persons respectively as a common-law dedication by the owner.²

¹ *Per Swan, J.*, *Fulton v. Mehrenfield*, 8 Ohio St. p. 440, *supra*; *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431; *Pawlet v. Clark*, 9 Cranch, 292; *Hunter v. Sandy Hill Trs.*, 6 Hill (N. Y.), 407; *Curtis v. Keesler*, 14 Barb. (N. Y.) 521; *Brown v. Manning*, 6 Ohio, 298, 303, and cases cited; *Cincinnati's Lessees v. Hamilton Co. Comm'rs, &c.*, 7 Ohio, Pt. 1, 88; *Ib.* 217; *Schurmeier v. St. Paul & Pac. R. R. Co.*, 10 Minn. 82, 194; *Cook v. Harris*, 61 N. Y. 448; *Matthiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411, where the effect of a statutory dedication is fully considered; *Reid v. Edina Board of Education*, 73 Mo. 295; *Alden Coal Co. v. Challis*, 200 Ill. 222; *Pittsburg C. C. & St. L. R. Co. v. Crown Point*, 150 Ind. 536; *San Antonio v. Sullivan*, 23 Tex. Civ. App. 619; *Corsicana v. Anderson*, 33 Tex. Civ. App. 596; *Smith v. Beloit*, 122 Wis. 396, citing text. See *Cowley v. Spokane*, 99 Fed. Rep. 840; *infra*, § 1083 and note. A plat in accordance with statute was filed and the right was reserved on the face of the plat to enclose the streets, &c., and use them for ordinary purposes until they should be required by the public. The streets were so enclosed and used for twenty-three years. It was held that under the circumstances and particularly in view of the reserved right to use the streets until required, there was no abandonment of the dedication. *Thoney v. Rice*, 43 Wash. 708.

² *Kruger v. Constable*, 116 Fed. Rep. 722; *Stuttgart v. John*, 85 Ark. 520; *People v. Marin County*, 103 Cal. 223, 229; *Leadville v. Coronada Mining Co.*, 29 Colo. 17, 30; s. c. 37 Colo. 234; *Manly v. Gibson*, 13 Ill. 312; *Princeville v. Auten*, 77 Ill. 325 (public square); *Maywood Co. v. Maywood*, 118 Ill. 61; *Gould v. Howe*, 131 Ill. 490; *Earl v. Chicago*, 136 Ill. 277; *Vermont v. Miller*, 161 Ill. 210; *Marsh*

v. Fairbury, 163 Ill. 401; *Rusk v. Berlin*, 173 Ill. 634; *Clark v. McCormick*, 174 Ill. 164; *Chicago Sanitary Dist. v. Adam*, 179 Ill. 406, 418; *Woodburn v. Sterling*, 184 Ill. 208; *Chillicothe v. Burr*, 185 Ill. 322; *Augusta v. Tyner*, 197 Ill. 242; *Russell v. Lincoln*, 200 Ill. 511, 515; *Rock Island & P. R. Co. v. Johnson*, 204 Ill. 488; *Owen v. Brookport*, 208 Ill. 35; *Saunders v. Chicago*, 212 Ill. 206, 216; *Nelson v. Randolph*, 222 Ill. 531; *Spalding v. Macomb & W. I. R. Co.*, 225 Ill. 585; *Hudson v. Miller*, 97 Ill. App. 74; *Giffen v. Olathe*, 44 Kan. 342, 348, citing text; *Bartlett v. Bangor*, 67 Me. 460; *Baker v. Johnston*, 21 Mich. 319; *Ruddiman v. Taylor*, 95 Mich. 547; *Hurley v. Miss. & R. R. Boom Co.*, 34 Minn. 143; *Nagel v. Dean*, 94 Minn. 25; *Heitz v. St. Louis*, 110 Mo. 618, 624, citing text; *Vicksburg v. Marshall*, 59 Miss. 573; *Smith v. Buffalo*, 90 Hun (N. Y.), 118, citing text; *Fulton v. Mehrenfield*, 8 Ohio St. 440; *Seattle v. Hill*, 23 Wash. 92, citing text; *Smith v. Beloit*, 122 Wis. 396.

An *unsigned and unacknowledged plat, recorded and acted on*, held to be effectual as a common-law dedication. *Field v. Carr*, 59 Ill. 198. But in *Indiana* it has been held that a plat not signed by the owner and not acknowledged as required by law is not entitled to record; and if it be recorded, the record is a nullity. *Taylor v. Fort Wayne*, 47 Ind. 281. Where the requirements of the statute have not been complied with the subsequent conduct of the donor of the city cannot operate to make the dedication a statutory dedication and although the intention to dedicate is clearly manifested the dedication will amount to only a *common-law dedication*. *Leadville v. Coronada Min. Co.*, 37 Colo. 234, 240, modifying s. c. 29 Colo. 17.

§ 1072 (629). **Statutory Dedication; Character of Estate vested in Municipality.** — In some jurisdictions it has been held that when a *statutory dedication* vests the fee in the municipality, it *operates to deprive the owner of every estate or interest* in the lands which he may have. Thus, it has been held that in the case of a statutory dedication which by operation of law vests the fee of the street in the municipality, the city has title to any coal or other minerals which may be found beneath the surface, and may by virtue of this title recover damages against persons who, by trespass upon its property, have removed the minerals.¹ But although the effect of a statutory dedication may be to grant the fee of the streets to the corporation in trust for the public uses, yet, unless prohibited by statute, the proprietor, in laying out a town or addition, *may grant the easement simply*, and reserve the minerals therein.² But these

¹ Union Coal Co. v. La Salle, 34 Ill. App. 93, aff'd 136 Ill. 119; Des Moines v. Hall, 24 Iowa, 234; Hawesville v. Hawes' Heirs, 6 Bush (Ky.), 232. In Des Moines v. Hall, 24 Iowa, 234, 241, construing the Iowa statute, it was held (Cole, J., dissenting) that the laying off and recording a town plat or an addition thereto, under the code, had the effect to vest in the corporation the *fee simple title* to, and exclusive right of dominion over the streets and alleys thus dedicated to the public use; and in such case the original proprietor has no right to the *subterranean deposits of coal* within the limits of such streets, and the corporation may maintain an action against him for coal mined and taken by him from beneath the same. In Matthiessen & H. Zinc Co. v. La Salle, 117 Ill. 411, it was held that when the fee of a street has been vested in a city by a statutory dedication, a person owning abutting lots has not the right to make a subterranean passage from one to another through the underlying soil of the street, although no injury may result to the street as such. The passage which was involved in this case was sought to be made and maintained for the purpose of enabling the property owner to mine coal. The municipality may also, as an incident to its title in fee simple to the streets *make appropriate contracts* with others for mining and taking coal from beneath the dedicated streets, provided such contracts do not interfere with the free use of the streets and do not

in point of time exceed the legal existence of the city or the legal existence of the street. Union Coal Co. v. La Salle, 34 Ill. App. 93, aff'd 136 Ill. 119. But *under a common-law dedication* the right to coal and other minerals in a street is in the owner. Des Moines v. Hall, 24 Iowa, 234, 243. When streets have been dedicated pursuant to statute, the city *can impose conditions* upon the right to excavate areas under the sidewalks. Davis v. Clinton, 50 Iowa, 585.

² Dubuque v. Benson, 23 Iowa, 248. Words on the plat "The streets are dedicated for *street purposes*, and *those only*," held to give the public only an easement, and that subterranean mines were reserved. Dubuque v. Benson, 23 Iowa, 248, *supra*. Lands were dedicated by plat which expressly reserved all valuable minerals under the streets together with the right to mine the same. It was held that upon a conveyance of lots by number and reference to the plat, the minerals reserved passed to the abutting lots to the centre of the street, if the conveyance made no mention of them. The general rule as to the effect of conveyances by reference to a plat was held to operate to convey the reserved minerals. Snoddy v. Bolan, 122 Mo. 479; Tousley v. Galena Min. & Smelting Co., 24 Kan. 328. A *reservation* in a plat of "trees and rocks" on the surface does not impair the force and effect of a statutory dedication. Brown v. Carthage, 128 Mo. 10.

views are not uniformly accepted and it has in some cases been held that although the statutory dedication may be declared to vest in the city the fee of the streets, it is not thereby necessarily implied that the estate vested in the municipality is an absolute estate for all purposes; but rather that the property or estate vested in the municipality is *such only as is necessary for street purposes*, and is in trust for public uses, and not for purposes of profit and emolument.¹

¹ In *Leadville v. Bohn Min. Co.*, 37 Colo. 248, a statute provided that all avenues, &c., designated on a plat should be deemed to be public property, and that the fee should be vested in the city or town. It was held that the effect of this statute was to vest in the city only such estate or interest as was reasonably necessary to enable it to utilize the surface and so much of the ground underneath as might be required for laying gas pipes, building sewers and other municipal purposes, and that a statutory dedication did not vest in the city any estate or interest in the *ores* that existed beneath the streets and avenues.

This decision seems to conform to the views of the *English courts* under statutes "*vesting streets*" in municipalities or local authorities. In *Coverdale v. Charlton*, L. R. 4 Q. B. Div. 104, it was held that the surveyors of highways of a parish were under the statute entitled to let the pasturage upon certain highways. The decision of the case depended upon the interpretation or meaning of the following provision of an act of parliament. "All streets shall vest in and be under the control of the original authority." After deciding that the words "vest in" mean to give a property in, *Brett*, L. J., says: "But when we have decided that the words 'vest in' mean to give a property in, a further question would be, in what does it give the property? That must depend upon the subject to which those words relate and that is not land, but street; the foregoing does not say that the land 'shall vest in' but that 'the street shall vest in.' . . . 'Street' must mean then the surface, it means the whole surface and so much of the depth as is or can be used not unfairly for the ordinary purposes of a street. It comprises a depth which enables the original authority to do that which is done

in every street, namely to raise the street and to lay down sewers; for at the present day there can be no street in a town without sewers, and also for the purpose of laying down gas and water pipes. 'Street' therefore in my opinion includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mine." *Bramwell*, L. J., says, "'Street' comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets; and to that extent they had a property in it." In *Tunbridge Wells v. Baird* [1896], App. Cas. 434, aff'g [1894], 2 Q. B. 867, the predecessors in title of the plaintiffs were the owners of the freehold of a street. By statute the streets were vested in the local authorities. By another statute the local authorities were authorized to erect and maintain "in any street or public place or on land belonging to them or under their control" lavatories for the use of the public. It was held that the local authorities had no power to excavate the soil and make lavatories below the surface of the street vested in them under the first statute. *Lord Herschell* said: "It seems to me that the vesting of the street vests in the original authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." In *Wednesbury v. Lodge Holes Colliery Co.*, 1 K. B. 78, rev'g 2 K. B. 823, the defendants were the owners of a coal mine extending under a highway which was vested by statute in the plaintiffs,

§ 1073 (630). **Common-Law Dedication: Rationale and Requisites.** — As to *common-law dedications*, the right to make which is not usually taken away or abridged by statutory regulations respecting town-plats,¹ the subject may be advantageously presented by referring to the leading case of the City of Cincinnati *v. White*,² decided by the Supreme Court of the United States, which has been extensively followed by the State tribunals, and is everywhere recognized as a sound exposition of the peculiar doctrines of the law respecting the rights which may be parted with by the owner and acquired by the public under the doctrine of dedication. In that case it appeared that in 1789 the original proprietors of Cincinnati designated on the plan of the town the land between Front Street and the Ohio River as a common, for the use and benefit of the town forever. A few years afterwards a claim was set up to this common by a person who had procured a deed from the trustee in whom the fee of the land was vested, and who had entered upon the common and claimed the right of possession. The proof of the dedication (marking on the plat, accompanied by public use) being made out to the satisfaction of the court, it sustained the rights claimed by

the borough authorities. The mines and quarries were not vested in the plaintiffs, but were reserved to the mine owners. By lawfully working the mine defendants let down the surface of the highway which plaintiffs restored to its former level. In an action to recover damages for the injury to the highway it was held that the plaintiffs, in carrying out their statutory obligation to maintain the highway and in restoring it, were not restricted to making a road as commodious to the public as the original road, but were entitled to restore the highway to its original level, and that the cost of so doing was the measure of damages recoverable from the defendants.

In *Ontario*, it is provided that every public road, street, bridge, or other highway in a city, town, or village shall be vested in the municipality subject to any rights in the soil reserved by the person who laid out such road, street, bridge, or highway. The soil and freehold of other highways and roads are vested in the Crown. In cases of private dedication it has been held that these words will vest in the municipality a complete title not only to the highway, but also to the soil and

freehold of the land. *Roche v. Ryan*, 22 Ont. Rep. 107, 109, *per Street, J.* But the property thus vested in the municipality "is a qualified property to be held and exercised for the benefit of the whole body of the corporation. . . . They may be said to hold the freehold; but . . . it is only as trustees for the public." *De la Chevroliere v. Montreal*, L. R. 12 App. Cas. 149; *per Lord Fitzgerald*. See *Biggar, Municipal Man.* (Canada), 1900, pp. 817, 820, 822. The councils of cities and towns are authorized to pass ordinances "for accepting and taking charge of landed property, within or without the city or town, dedicated for a public park, garden or walk for the use of the inhabitants of the city or town." *Biggar, Municipal Man.* (Canada. 1900), 707, 708.

¹ *Abbott v. Cottage City*, 143 Mass. 521; *Sanborn v. Minneapolis*, 35 Minn. 314; *Browne v. Bowdoinham*, 71 Me. 144; *Grandville v. Jennison*, 84 Mich. 54, 66, citing text.

² *Cincinnati v. White*, 6 Pet. (U. S.) 431. See *Noyes v. Ward*, 19 Conn. 250; *Manly v. Gibson*, 13 Ill. 312; *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, citing and approving text.

the city. At the time the plan was adopted by the proprietors, and this ground was marked on the plat as a common, they did not, in fact, possess the equitable (or legal) title to the space dedicated, but they shortly afterwards purchased the equitable title; and it was held (their assent to the dedication continuing) that under the purchase the prior dedication was good.¹

§ 1074 (631). **Same Subject; General Features.** — In its opinion in the case just mentioned, the Supreme Court asserts or assents to the following principles: 1. That it is not essential to a dedication that the legal title should pass from the owner.² 2. Nor is it essential that there should be any grantee of the use or easement *in esse* to take the fee, such cases being exceptions to the general rule requiring a grantee.³ 3. Nor is a deed or writing necessary to constitute

¹ *Per McLean, J.*, in *New Orleans v. United States*, 10 Pet. (U. S.) 662; *Coffin v. Portland* (dedication "public levee"), 11 Saw. C. C. R. 600; s. c. 27 Fed. Rep. 412; *infra*, § 1094 *et seq.* Where the municipal corporation is in possession of land under an alleged dedication, equity will not, at the instance of the original proprietor, enjoin the corporation from interfering with such proprietor, and thus put the latter in possession. The latter has an adequate remedy at law. *Chicago v. Wright*, 69 Ill. 318.

² *Lade v. Shepherd*, 2 Stra. 1004; *Beatty v. Kurtz* (dedication of lot on plan "for the Lutheran Church"), 2 Pet. (U. S.) 566; *New Orleans v. United States*, 10 Pet. (U. S.) 662; *Dubuque v. Maloney*, 9 Iowa, 450; *Kelsey v. King*, 33 How. (N. Y.) Pr. 39. Whether the bare title to streets is in the adjoining proprietor or in the city, is regarded as substantially immaterial in many respects, as to the extent of the rights. *Barney v. Keokuk*, 94 U. S. 324; s. c. below, 4 Dillon, 593; *Story v. N. Y. El. R. Co.*, 90 N. Y. 122; *Lahr v. Metrop. El. Ry. Co.*, 104 N. Y. 268 (qualified nature of fee in public); *Ib.* p. 291; *Backus v. Detroit*, 49 Mich. 110; *infra*, §§ 1076, note, 1149.

³ *Pawlet v. Clark*, 9 Cranch (U. S.) 292; *New Orleans v. United States*, 10 Pet. (U. S.) 661, 713, where *McLean, J.*, says, "It is not essential that this right of use should be vested in a corporate body; it may exist in the public, and

have no other limitation than the wants of the community at large." See also *McConnel v. Lexington Trs.*, 12 Wheat. (U. S.) 582; *Doe v. Jones*, 11 Ala. 63; *Vick v. Vicksburg*, 1 How. (Miss.) 379; *Antones v. Eslava's Heirs*, 9 Port. (Ala.) 527; *Winona v. Huff*, 11 Minn. 119. Dedications to the public of streets, commons, &c., may, on the corporation being erected, pass to it by operation of law. *Savannah v. Steamboat Co. of Ga.*, R. M. Charlt. (Ga.) R. 342; *infra*, § 1087, note; *Doe v. Jones*, 11 Ala. 63; *Klinkener v. M'Keesport Sch. Dir.*, 11 Pa. St. 444; *Pella Christian Church v. Scholte*, 24 Iowa, 283, 293; *Ill. & Mich. Canal Trs. v. Havens*, 11 Ill. 554; *Waugh v. Leech*, 28 Ill. 488; *San Leandro v. Le Breton*, 72 Cal. 170; more fully noticed, *post*, § 1087, note; *Wood v. National Water Works Co.*, 33 Kan. 590; *Llano v. Llano County*, 5 Tex. Civ. App. 132, citing text. If no donee or trustee be named the dedication is valid, and the legislature, as well as chancery, may directly appoint trustees who may recover in ejectment. *Bryant's Lessee v. McCandless*, 7 Ohio, Pt. 2, 135. Where a plat has been made and filed and lands have been sold with reference thereto, a dedication effected thereby may be asserted by a town subsequently incorporated which annexes such addition to its corporate limits. The change of trustee does not defeat the dedication. *Rhodes v. Brightwood*, 145 Ind. 21.

a valid dedication; it may be by parol.¹ 4. No specific length of possession is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment.²

¹ *Barclay v. Howell's Lessee*, 6 Pet. 498; *Skeen v. Lynch*, 1 Rob. (Va.) 186; *Dummer v. Jersey City*, 20 N. J. L. 86; *Vick v. Vicksburg*, 1 How. (Miss.) 379; *State v. Catlin*, 3 Vt. 530; *McKee v. St. Louis*, 17 Mo. 184; *Hunter v. Sandy Hill Trs.*, 6 Hill (N. Y.), 407; *Cook v. Harris*, 61 N. Y. 448; *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 454; *Dover Trs. v. Fox*, 9 B. Mon. (Ky.) 200; *Macon v. Franklin*, 12 Ga. 239; *Steel v. Sullivan*, 70 Ala. 589; *Holmes v. Cleveland C. & C. R. Co.*, 93 Fed. Rep. 100; *Forney v. Calhoun County*, 84 Ala. 215; *Woodburn v. Sterling*, 184 Ill. 208; *State v. Lochte*, 45 La. Ann. 1405, citing text; *Whyte v. St. Louis*, 153 Mo. 80; *Sweatman v. Deadwood*, 9 S. Dak. 380; *Bellar v. Beaumont* (Tex. Civ. App.), 55 S. W. Rep. 410; *Buntin v. Danville*, 93 Va. 200.

Where there has been no public use of a street the owner may dedicate his land for such use by acts and declarations without a deed. In such a case these acts and declarations must be deliberate, unequivocal, and decided, manifesting a positive and unmistakable intention to permanently abandon his property to such public use. *Pierpoint v. Harrisville*, 9 W. Va. 215; *Boughner v. Clarksburg*, 15 W. Va. 394. A party taking under a partition in which streets were dedicated is estopped to deny dedication. *Wisby v. Boule*, 19 Ohio St. 238; *London & San Francisco Bank v. Oakland*, 90 Fed. Rep. 691; s. c. below, 86 Fed. Rep. 30.

"To make a good dedication either under the statute, or at common law, requires a definite and certain description of that which is proposed to be dedicated, and an acceptance by the public before the withdrawal or abandonment of the offer to dedicate." *Winnetka v. Prouty*, 107 Ill. 218; citing *Little v. Lincoln*, 106 Ill. 353; *First Ev. Church Trustees v. Walsh*, 57 Ill. 363; *Edwardsville v. Barnsback*, 66 Ill. App. 381. But as to revocability of statutory dedication after map is recorded, see *infra*, § 1091, note; *supra*, § 1071. Oral declarations of owner,

Woodburn v. Sterling, 184 Ill. 208. The proof of a parol dedication must be clear and conclusive. *Spurrier v. Bland*, 20 Ky. Law Rep. 1340, 49; *S. W. Rep.* 467.

² *Jarvis v. Dean*, 3 Bing. 447; *State v. Catlin*, 3 Vt. 530; *Barclay v. Howell's Lessee*, 6 Pet. 498; *Saulet v. New Orleans* (square), 10 La. An. 81, *per Ogden, J.*; *Smith v. Flora*, 64 Ill. 93; *Arrowsmith v. New Orleans*, 24 La. An. 194; *Noyes v. Ward*, 19 Conn. 250, 268; 2 Greenl. Ev. § 662; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *State v. Marble*, 4 Ired. (N. Car.) L. 318; *Columbus v. Dahn*, 36 Ind. 330; *Evansville v. Evans*, 37 Ind. 229; *Fisher v. Beard*, 32 Iowa, 346; *Evans v. Blankenship*, 4 Ariz. 307; *Fairbury Agric. Board v. Holly*, 169 Ill. 9; *Wormley v. Wormley*, 207 Ill. 411; *German Bank v. Brose*, 32 Ind. App. 77, citing text; *Waters v. Philadelphia*, 208 Pa. St. 189; *Kirkman v. Nashville* (Tenn. Ch. App.), 55 S. W. Rep. 1072; *Johnson City v. Wolfe*, 103 Tenn. 277, quoting text; *Bates v. Beloit*, 103 Wis. 90, citing text. The doctrine of the text approved. *Chicago v. Wright*, 69 Ill. 318; *Field v. Carr*, 59 Ill. 198.

Lands, "after being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication." *Per Thompson, J.*, in *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 437; *Morgan v. Chicago & A. R. Co.*, 96 U. S. 716. As to irrevocability of dedication, after other rights have attached, see *Macon v. Franklin*, 12 Ga. 239; *Haynes v. Thomas*, 7 Ind. 38; *Indianapolis v. Croas*, 7 Ind. 9, 12; *Ragan v. McCoy*, 29 Mo. 356; *State v. Catlin*, 3 Vt. 530; *Weisbrod v. Chicago & N. W. R. Co.*, 18 Wis. 35; *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469; *Lee v. Lake*, 14 Mich. 12. And see the instructive opinion of *Campbell, J.*, in *Baker v. Johnston*, 21 Mich. 319; *Peoria v. Johnston*, 56 Ill. 45; *Pierpoint v.*

§ 1075. **Dedications subject to Condition or Reservation.** — A dedication may be made for a limited or specified purpose.¹ The public right in lands dedicated is always *taken subject to the burdens* naturally inherent in the lands. There is no obligation upon the dedicator to improve them or adapt them to the public use.² A dedication may also be made subject to pre-existing rights and privileges.³

Harrisville, 9 W. Va. 215; Boughner v. Clarksburg, 15 W. Va. 394; and 2 Herman on Estoppel, "Dedication," §§ 1140-1149, where many cases are cited.

In *California* it is one of the essential elements of a good dedication that it shall be irrevocable, and that the land shall be effectually dedicated for the public use which is designated, provided the public see fit to use it for that purpose. A reservation of the right to revoke the dedication defeats the dedication. *San Francisco v. Canavan*, 42 Cal. 541.

¹ *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13; *State v. Society for Useful Manufactures*, 44 N. J. L. 502, 506; *Young v. Landis*, 73 N. J. L. 266; *Lent v. Tilyou*, 106 N. Y. App. Div. 189, 194; *Poole v. Huskinson*, 11 M. & W. 827. The uses cannot be restricted or changed by the owner after acceptance by the public. *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13.

Public foot ways may be created by dedication. *Tyler v. Sturdy*, 108 Mass. 196, citing *Thrower's Case*, 1 Vent. 208; *Queen v. Saintiff*, Holt, 129; s. c. 6 Mod. R. 255; *Queen v. Cluworth*, 6 Mod. 163; s. c. 1 Salk. 358, Holt, 339; *Rex v. Burgess*, 2 Burr. 908; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Hemphill v. Boston*, 8 Cush. (Mass.) 195; *Danforth v. Durell*, 8 Allen (Mass.) 242; *Chadwick v. McCausland*, 47 Me. 342; *Nudd v. Hobbs*, 17 N. H. 524; *Gowen v. Philadelphia Exchange Co.*, 5 W. & S. (Pa.) 141.

The owner of a tract of land laid the same out into blocks and lots, dedicating a strip of ground in front of the lots to the public for a street, reserving a space between the lots and street dedicated for *courtyards only*. The city authorities cannot appropriate the portion dedicated as a street to the purpose of a roadway merely, and deprive the owners of lots on one side of the street of a sidewalk between the courtyards and the roadway proper. *Carter v. Chicago*, 57 Ill. 283.

² "Land dedicated and accepted for public use as a way, has universally been considered, with respect to its condition within the lines of the way, as taken by the public *cum onere*. It devolves on the public to adapt it to public use, and to guard the safety of public passage. If a natural ravine, or even an artificial excavation crosses it, or a ledge of rocks intercepts passage, no one pretends that the landowner is to bridge the ravine, fill up the excavation, or remove the ledge, or be liable for maintaining an obstruction in the highway." *Per Magie, J.*, in *State v. Soc. for Useful Manufactures*, 44 N. J. L. 502, 506. See also *Cornwell v. Metropolitan Com'rs of Sewers*, 10 Exch. 771. The person who dedicates a bridge to public use is under no obligation to repair it and maintain it in a fit condition for public travel. *Oney v. West Buena Vista Land Co.*, 104 Va. 580. Where an erection or excavation exists upon land, and the land on which it exists or to which it is contiguous is dedicated to the public, it is dedicated subject to the inconvenience or risk arising from the existing state of things. *Fisher v. Prowse*, 2 Best & S. 770; *Robbins v. Jones*, 15 C. B. n. s. 221; *Le Neve v. Mile End Old Town*, 8 E. & B. 1054; *State v. Society for Useful Manufactures*, 44 N. J. L. 502.

³ *Davis v. Bonaparte*, 137 Iowa, 196; 114 N. W. Rep. 896. A highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of adjoining land for the purpose of depositing goods thereon. *Morant v. Chamberlin*, 6 H. & N. 541. See also *Le Neve v. Mile End Old Town*, 8 E. & B. 1054. There may be a dedication to the public of a right of way, such as a *footpath* across a field, subject to the right of the owner of the soil to plough it up in due course of husbandry, and destroy all trace of it for the time. *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Arnold v. Blaker*, L. R. 6 Q. B. 433; *Arnold v. Holbrook*, L. R. 8 Q. B. 96.

If there be no statutory provision to the contrary, a dedication may also be made by the owner *upon condition*.¹ But the right of the owner to enforce the condition may be *waived* by permitting the municipality to expend money in adapting the lands to public use in a manner inconsistent with the condition.² And the conditions imposed must always *be consistent with the purpose* to which the lands are dedicated, and with the control thereof by the proper

¹ Howard v. Rogers, 4 Har. & J. (Md.) 278; White v. Flannigan, 1 Md. 525; South Baltimore Harbor & Imp. Co. v. Smith, 85 Md. 537; Long v. Battle Creek, 39 Mich. 323; St. Louis v. Meier, 77 Mo. 13; Avis v. Vineland, 56 N. J. L. 474, 478; Niagara Falls Suspension Bridge Co. v. Bachman, 66 N. Y. 261; Cohoes v. Delaware & H. Canal Co., 134 N. Y. 397; Boughner v. Clarksburg, 15 W. Va. 394.

In St. Louis v. Meier, 77 Mo. 13, one Kingsland, an owner of land in a city, filed a plat showing streets and alleys "dedicated to public use, *provided* the owners north and south of the subdivision will dedicate the same streets and alleys through their respective tracts without expense to the owners of the lots of the above subdivision." The adjacent owners having made no dedication as contemplated by Kingsland, the city proceeded to condemn their land for streets, treating Kingsland's dedication as complete, and not including the streets and alleys on his plat in the proceedings. It was held that the dedication was conditional, and should "take effect according to its terms or not at all;" but the city could acquire title to the streets and alleys appearing upon the plat by proceedings for condemnation.

Where a citizen offers on certain conditions to open a street across his land for the public use, the acceptance of the offer by the proper authorities is a sufficient declaration of its necessity as a public improvement, if such declaration is needed. Long v. Battle Creek, 39 Mich. 323. So where a proposition made to a municipal corporation as to matters within the scope of its powers is accepted with modifications which the proponent assents to, he is as much bound by them as if they had been in his original proposition. *Ib.* Where the *dedication is on condition*, the terms of the dedication must be complied with, and the public take it subject thereto. Fisher v. Prowse,

2 Best & S. 771; Boughner v. Clarksburg, 15 W. Va. 394; Pierpoint v. Harrisville, 9 W. Va. 215; St. Louis v. Meier, 77 Mo. 13; Palmer v. Jones (C. A.), 2 Ont. Law Rep. 632; Holly Grove v. Smith, 63 Ark. 5.

Upon a map made and filed was a statement and reservation as to a portion of the streets and alleys to the effect that the proprietors *reserved a discretionary power to direct* how much and what part of said streets should be used for canals and races and what part appropriated to public use. It was held that the reservation was effectual and that before the public could acquire any rights or take any easement under the qualified dedication, the assent and donation of the proprietors was required. Niagara Falls Suspension Bridge Co. v. Bachman, 66 N. Y. 261. A strip of land outside a highway was dedicated, *subject to certain regulations* as to its being kept in grass and as to the *maintenance of shade trees*. It was held that the conditions upon which the dedication was effected could not be changed by the municipality, otherwise than by the exercise of the power of eminent domain. Young v. Landis, 73 N. J. L. 266. See also Avis v. Vineland, 56 N. J. L. 474. A dedication for highway purposes may be made subject to the *reserved right* to devote a part thereof to *railroad purposes*. Noblesville v. Lake Erie & W. R. Co., 130 Ind. 1; Ayres v. Pennsylvania R. Co., 48 N. J. L. 44; s. c. 50 N. J. L. 660; Ayres v. Pennsylvania R. Co., 52 N. J. L. 405; Tallon v. Hoboken, 59 N. J. L. 383; s. c. 60 N. J. L. 212, 217; Oklahoma City & T. R. Co. v. Dunham, 39 Tex. Civ. App. 575. But see State v. Spokane Street R. Co., 19 Wash. 518, 532. Compare Jones v. Carter, 45 Tex. Civ. App. 450; 101 S. W. Rep. 514.

² Forney v. Calhoun County, 84 Ala. 215; s. c. 86 Ala. 463; Port Huron v. Chadwick, 52 Mich. 320; Dickerson v. Detroit, 99 Mich. 498.

public authorities.¹ Thus, the proprietor cannot confer upon a county or extraneous corporation the control of streets in a city, and deprive the proper municipal corporation of the control given to it by law.² If an *invalid* condition is annexed to the dedication, it has been held that *the condition only is void*, and that the grant or dedication is not affected thereby.³

§ 1076 (633). **Common-Law Dedication: Estate or Interest of Public.** — Where the land is dedicated by the proprietor "for the use of the public," this has been considered to show, in the absence of statute to the contrary, an intention to give a mere *easement and not the fee*. In such case the owner of the land, whether dedicated

¹ A condition in the dedication of lands for a street that the owners of abutting lands shall be *exempt from charges for the improvement* of the streets unless a majority of them shall assent thereto in writing is invalid. *Richards v. Cincinnati*, 31 Ohio St. 506. Where lands were dedicated by platting and by sale with reference thereto, and stipulations were inserted in the deeds *reserving* to the grantor *any damages recovered from the municipality* in case the fee of the street should thereafter be condemned by public use, it was held that the reservation was void as inconsistent with and repugnant to the nature of the estate or interest granted in the dedicated streets and alleys, and as tending to destroy the dedication. *Riddle v. Charlestown*, 43 W. Va. 796. But in *Perth Amboy Trust Co. v. Perth Amboy*, 75 N. J. L. 291; 68 Atl. Rep. 84, it was held that a condition in a deed dedicating land for an approach to a bridge *that the expenses of making the public street should be borne by the city*, and not by abutting property was valid, and if the dedication was accepted by the city, released the abutting property. *Reservations* in a dedicatory deed conveying to a city streets, alleys, and public grounds shown on a plat giving the grantor an exclusive right to use the dedicated lands for *street railroad purposes*, and for the erection of *lights, sewers, gas and water pipes and telephone lines* free from municipal control held to be void as against public policy. *Jones v. Carter*, 45 Tex. Civ. App. 450; 101 S. W. Rep. 514.

Duration of Dedication. In *An-*

tones v. Eslava, 9 Port. (Ala.) 527, it was held that a dedication may be for a *limited period* only; but it is to be observed that in this case the dedication was by the King of Spain and the limited duration might properly be justified on the ground that the limited dedication was by the sovereign power. *Dicta* are to be found in England to the effect that there cannot be a dedication of limited duration. See *Dawes v. Hawkins*, 8 C. B., N. S. 848; *Regina v. Lordsmere*, 15 Q. B. 689, 700, *per Coleridge, J.* But a limited dedication may be authorized by statute. *Regina v. Lordsmere*, 15 Q. B. 689. In California, it has been held that a dedication *must be irrevocable* in its nature, and that a reservation of the right to revoke the dedication is inconsistent with the purposes of the dedication. *San Francisco v. Canavan*, 42 Cal. 541, 553. In *Rex v. Northampton*, 2 Maule & S. 262, it was held that, by user, a bridge might become a public way *at limited times*, as when it was dangerous to use a ford to cross a river. In *Hughes v. Bingham*, 135 N. Y. 347, it was held that a town, having power to accept a conveyance for highway purposes, may accept a conveyance of a way for public use during a *limited portion of the year, e. g., the winter*.

² *Des Moines v. Hall*, 24 Iowa, 234, 241.

³ *Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1; *Richards v. Cincinnati*, 31 Ohio St. 506; *State v. Spokane Street R. Co.*, 19 Wash. 518; *Riddle v. Charlestown*, 43 W. Va. 796. See also *Dickerson v. Detroit*, 99 Mich. 498.

for the use of a highway, or street, or square, or common, retains, if there be no controlling statute, the exclusive right in the soil for every purpose of use or profit not inconsistent with the public easement, and may maintain appropriate actions for any encroachment upon it.¹

¹ *Stephenson v. Chattanooga*, 20 Fed. Rep. 586; *Perry v. New Orleans*, M. & C. R. Co., 55 Ala. 413, approving text; *Denver v. Clements*, 3 Colo. 484; *Olin v. Denver & R. G. R. Co.*, 25 Colo. 177; *Leadville v. Coronada Mining Co.*, 37 Colo. 234; s. c. 29 Colo. 17; *Robbins v. White*, 52 Fla. 613; *Clark v. McCormick*, 174 Ill. 164; *Thompson v. Maloney*, 199 Ill. 276, 282; *Russell v. Lincoln*, 200 Ill. 511; *Chicago v. Smith*, 204 Ill. 356, aff'd 107 Ill. App. 270; *Owen v. Brookport*, 208 Ill. 35, 39; *Nelson v. Randolph*, 222 Ill. 531; *Ingraham v. Brown*, 231 Ill. 256, 258; *Indianapolis v. Kingsbury*, 101 Ind. 200; *Freedom v. Norris*, 128 Ind. 377; *Dubuque v. Maloney*, 9 Iowa, 450; *Des Moines v. Hall*, 24 Iowa, 234; *Schneider v. Jacob*, 86 Ky. 101; *Jacob v. Woolfolk*, 90 Ky. 426; *Baltimore v. Northern Cent. R. Co.*, 88 Md. 427; *Perley v. Chandler*, 6 Mass. 454; *White v. Godfrey*, 97 Mass. 472; *Bliss v. Ball*, 99 Mass. 597; *Attorney General v. Abbott*, 154 Mass. 323; *Boston v. Richardson*, 13 Allen (Mass.), 152, 153; *Grandville v. Jenison*, 84 Mich. 54, 65; *Patrick v. Kalamazoo Y. M. C. A.*, 120 Mich. 185, 192; *Brakken v. Minneapolis & St. L. R. Co.*, 29 Minn. 41; *Ellsworth v. Lord*, 40 Minn. 337; *Baker v. St. Louis*, 75 Mo. 671; *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13; *Van Duyn v. Knox Hat Mfg. Co.*, 71 N. J. Eq. 375; 64 Atl. Rep. 149; *Wright v. Mount Vernon*, 44 N. Y. App. Div. 574, aff'd 167 N. Y. 541; *Mitchell v. Einstein*, 42 N. Y. Misc. 358; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Hamilton County v. Rape*, 101 Tenn. 222; *State v. Taylor*, 107 Tenn. 455; *Pomeroy v. Mills*, 3 Vt. 279; *Abbott v. Mills*, 3 Vt. 521; *Lade v. Shepherd*, 2 Stra. 1004; *Goodtitle v. Alker*, 1 Burr. 133; *Harrison v. Parker*, 6 East, 154; *St. Mary's v. Jacobs*, L. R. 7 Q. B. 53.

It has been said that it is doubtful whether a common-law dedication, without the aid of an express conveyance, ever passes the fee, and that cases which appear to support the proposition turn upon statutes. *Patrick v. Kalamazoo Y. M. C. A.*, 120 Mich. 185.

The owner who dedicates to the public use as a highway a portion of his land parts with no other right than the right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith. *St. Mary's v. Jacobs*, L. R. 7 Q. B. C. 53. A common-law dedication of a right of way does not give the municipality the right to remove private sewers constructed by the owner. *Wright v. Mt. Vernon*, 44 N. Y. App. Div. 574, aff'd 167 N. Y. 541. See also *Diamond v. Smith*, 27 Tex. Civ. App. 558. When a common-law dedication has been effected by platting lands and selling lots with reference thereto, a purchaser of a lot cannot lay water pipes in the dedicated street for his own use from a private water supply, and the city cannot grant him such right for private purposes. *Van Duyn v. Knox Hat Mfg. Co.*, 71 N. J. Eq. 375; 64 Atl. Rep. 149. *Effect of fee being in city corporation.* *People v. Kerr*, 27 N. Y. 188; *Clinton v. Cedar Rap. & Mo. R. R. Co.*, 24 Iowa, 455; *Gebhardt v. Reeves*, 75 Ill. 301; *Moliter v. Sheldon*, 37 Kan. 246. *Supra*, § 1074, note; *post*, § 1149. See chaps. xxiv. and xxv. on Streets, where the subject is more fully considered.

As respects streets, some explanation of the doctrine as stated in the text, if not limitations upon it, is suggested in the chapters on Streets. The public rights in streets are greater than in a country highway, and the dedication must in the case of streets be intended to give to the public the right to all legitimate uses thereof for the public convenience and accommodation. Note remarks of *McLean, J.*, in *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 512. The fee of a highway at common law remains in the owner of the land. *Every v. Smith*, 26 L. J. Exch. 344; *Lade v. Shepherd*, 2 Stra. 1004; *Borrowman v. Mitchell*, 3 Up. Can. Q. B. 135; *Dawes v. Hawkins*, 4 Law T. N. s. 288; *Queen v. Plunkett*, 21 Up. Can. Q. B. 536; *Harr. Munic. Man.* (5th ed.) 480. *Supra*, § 1072, note. Notwithstanding a dedication under a statute may pass the fee to the streets and alleys, yet if these are dedicated by a

§ 1077 (634). **Alluvium and Accretions.** — If land dedicated to a city for public use is bounded by a river, the city has all the rights and privileges of a riparian proprietor as respects *alluvial formations* or additions; these partake of the same character and are subject to the same use as the soil to which they become united.¹ This proposition, it is believed, is affirmed by the decisions without exception. The ground of the right is that the stream is the boundary, and the riparian proprietor is entitled to the alluvial accretions made by natural changes in a shifting stream which constitutes the boundary

different mode from that prescribed by the statute, the fee remains in the adjacent proprietor as at common law, subject to the public easement. *Supra*, § 1071, and note; *Manly v. Gibson*, 13 Ill. 312; *Dubuque v. Benson*, 23 Iowa, 248. See *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178; *San Francisco v. Spring V. W. W.*, 48 Cal. 493; *Gebhardt v. Reeves*, 75 Ill. 301.

A dedication to the use of *specified persons* is not a dedication to the public. *Talbot v. Richmond & D. R. R. Co.*, 31 Gratt. (Va.) 685; *Illinois Ins. Co. v. Littlefield*, 67 Ill. 368; *Chicago v. Borden*, 190 Ill. 430. A dedication of a tract of land to public use is not impaired because only a part has been actually put to public use, and the residue temporarily leased to private individuals; the whole remains so dedicated. *Plaquemines Par. Pol. Jury v. Foulhouze*, 30 La. An. 64.

Unconsummated proceedings by a municipality to condemn land as a street, or taxing land for city and county purposes, do not conclude the public from afterwards claiming that the land had been effectually dedicated and the dedication accepted by the public. *Lemon v. Hayden*, 13 Wis. 159; *Chicago v. Wright*, 69 Ill. 318. In the last cited case, *McAllister, J.*, in delivering the opinion of the court, says the several acts of the corporate authorities cannot be regarded as amounting to a conclusive negative of the inference of acceptance by the public, because the citizens of the State generally have an equal right with those of the municipality in the appropriate enjoyment of the dedication [of lands for streets]. Estoppel by reason of taxation, see *ante*, chapter on Corporate Property. Where a street was opened by the owner and accepted and improved by

the city, it was held that the owner could not *resume possession*, on the ground that an oral promise to him made by the proper city officer to drain the street and the adjoining land had not been fulfilled; and that his only remedy was for a breach of condition. *Port Huron v. Chadwick*, 52 Mich. 320; *supra*, § 1072, note.

¹ *New Orleans v. United States*, 10 Pet. (U. S.) 662; *Cook v. Burlington*, 30 Iowa, 94; *Godfrey v. Alton*, 12 Ill. 29; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699; *Holmes v. Cleveland, C. & C. R. Co.*, 93 Fed. 100; *ante*, § 268. Dedication of streets bordering on navigable water extends, if there be no limitation, to the water, and, in *Alabama*, to low-water mark, and accretions belong to the public. *Doe v. Jones*, 11 Ala. 63. The Supreme Court of the United States has decided that the title to lands bordering on navigable streams, when derived from the general government, "stops at the stream." *St. Paul & Pac. R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272, 289; *Barney v. Keokuk*, 94 U. S. 324; s. c. below, 4 Dillon, 593. At the "margin of the stream." *Yates v. Milwaukee*, 10 Wall. (U. S.) 497, 504, *per Miller, J.* This last case refers to and comments on *Yates v. Judd*, 18 Wis. 118; *Martin v. Evansville*, 32 Ind. 85; *Elgin v. Beckwith*, 119 Ill. 367; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730; *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90. See *Wharves, ante*, chap. viii.; also chap. xxi. on Corporate Property, *ante*. By reclamation of portions of a public park which have been submerged after dedication, a city re-asserts its title thereto as it stood at the time of the dedication and holds the land subject to the original terms of the trust. *Chicago v. Ward*, 169 Ill. 392.

of his lands. Such accretions are his because they are within the description of his original grant on the stream as a boundary.¹ Where the shore owner, through whose lands a street comes to the shore, fills in in front of his lands, and also in front of the *terminus* of the street, the public is entitled to the extension of the street the same as if the land filled in were an alluvion.² But where the *State is the owner of the lands under water below the shore line, a street or public use in such lands cannot be dedicated or created therein by the private riparian proprietor; and hence a dedication by such proprietor of streets terminating on the water does not have the effect to preclude the State from making a grant of such lands under water opposite the end of such street to others, with the right to reclaim the land; and the State in making a grant thereof by legislative act may exclude, and if such be its plain purpose the grant will be construed to exclude, any right of the public to insist that the lands when reclaimed by the grantee are subject to the uses of a street, or other public purpose, declared by the private riparian dedicator, inconsistent with such legislative grant by the State, which in such case is not only a conveyance of the land under water, but is also a law which repeals all inconsistent laws and extinguishes all inconsistent public easements, if any such exist in the lands under water thus granted by the State.* Applying these principles under the legislation of New Jersey applicable to the case in hand it was held by the Supreme Court of the United States, that the city of Hoboken could not recover of the State's grantees lands which they had filled in under such legislative grant and conveyance below high-water mark in front of such streets. Under such an act and conveyance, the court decided that the title of the grantee differed in every respect from that of a riparian owner to alluvial accretions

¹ *Hoboken v. Penn. R. Co.*, 124 U. S. 656, 690, *per Matthews, J.*; *Barney v. Keokuk*, 94 U. S. 324, 340. If in such case a street or common lies along the stream, and intervenes between it and lots fronting on such street or common, no riparian rights exist in favor of such lot owners. *Potomac Steamboat Co. v. Upper Pot., &c. Co.*, 109 U. S. 672. This general proposition was agreed to by the dissenting judges, who only disputed its application to the facts of that case. *Ib.* pp. 698, 699. *Pre-emptive rights of riparian proprietors under legislation of New York in respect of grants of land under water to the city of New York, and by it to others, see*

New York v. Hart, 95 N. Y. 443, 452, 456.

² *Jersey City v. Morris Canal & B. Co.*, 12 N. J. Eq., 547, 558, *per Whelpley, J.*; *Barney v. Keokuk*, 94 U. S. 324, *supra*. See also *People v. Lambier*, 5 Denio, 9; *Henshaw v. Hunting*, 1 Gray (Mass.), 203; *Cook v. Burlington*, 30 Iowa, 94. See also *Steers v. Brooklyn*, 101 N. Y. 51. *Dedication of streets, &c. under tide-water.* *Morris Canal & B. Co. v. Jersey City*, 12 N. J. Eq., 252; *s. c.* on appeal, *Ib.* 547; *Jersey City v. Dummer*, 20 N. J. L. 106; *Seabright & Allgor*, 69 N. J. L. 641; *Henshaw v. Hunting*, 1 Gray (Mass.), 203.

made by the changes in a shifting stream, which constituted the boundary of his lands.¹

§ 1078 (635). **Dedication must be made by the Owner.**—The dedication must be *by the owner* of the land, or of an estate therein.² A dedication may be made *by a corporation* of lands owned by it,

¹ *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656. The case was distinguished from that of *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 540, where the subject underwent very full examination; also from *Jersey City v. Morris Canal & B. Co.*, 12 N. J. Eq. 547; *Seabright & Allgor*, 69 N. J. L. 641, and other cases,—holding that a dedicated street terminating at the waters of a navigable river is continued to the new water front obtained by filling in in front of the shore by the owner of the land over which the street was dedicated. Such cases rest on the principle that the essence of the gift or dedication is the means of access to the public waters of the river, which can only be preserved by maintaining unbroken the connection of the street with the navigable river; which principle was held not to apply under the facts and legislation appearing in *Hoboken v. Penn. R. R. Co.*, *supra*. See *Morris Canal & B. Co. v. Central R. Co.*, 16 N. J. Eq. 419, 431; *Stevens v. Paterson & N. R. Co.*, 34 N. J. L. 532, 553; *New York, L. E. & W. R. Co. v. Yard*, 43 N. J. L. 121; *s. c. Ib.* 632; *Lockwood v. N. Y. & N. H. R. Co.*, 37 Conn. 391; *Campbell v. Laclede Gasl. Co.*, 84 Mo. 352, 372; *Benson v. Morrow*, 61 Mo. 345; *Steers v. Brooklyn*, 101 N. Y. 51; *Barney v. Keokuk*, 94 U. S. 324; *Potomac Steamboat Co. v. Up. Pot. Steamboat Co.*, 109 U. S. 672.

Wharves: Where streets bordering or terminating on navigable waters have been established, whether by condemnation or dedication, and whether the fee is in the city or in the adjoining proprietor, the city under the power to establish and regulate wharves, may cause public wharves to be constructed at the ends thereof, and, unless it is otherwise agreed or provided, may receive the wharfrage from the same; and this is no invasion of the rights of the owner of property abutting on such street and on the navigable water. *McMurray v. Baltimore*, 54 Md. 103, approving *Dugan v. Baltimore* 5 Gill & J. 353; *Haight v. Keokuk*, 4

Iowa, 199; *Barney v. Keokuk*, 94 U. S. 324; *Rowan's Ex. v. Portland*, 8 B. Mon. 232; *Newport v. Taylor's Ex.*, 16 B. Mon. 699; *Barney v. Baltimore*, 1 Hughes C. C. 118; *Coffin v. Portland*, 11 Saw. C. C. R. 600; *s. c.* 27 Fed. Rep. 412. Compare *Portland & W. V. R. Co. v. Portland*, 14 Oreg. 188. See further on the subject of Wharves, *ante*, §§ 261–274; *post*, § 1101.

² *Irwin v. Dixon*, 9 How. (U. S.) 10; *Lownsdale v. Portland*, *Deady*, 139; *Hoole v. Attorney-General*, 22 Ala. 190; *Johnson v. Dadeville*, 127 Ala. 244; *California Nav. & Imp. Co. v. Union Trans. Co.*, 126 Cal. 433, 441, citing text; *Bruce v. Seaboard A. L. R. Co.*, 52 Fla. 461; *Baugan v. Mann*, 59 Ill. 492; *Edwardsville v. Barnsback*, 66 Ill. App. 381; *Lawrenceburgh v. Wesler*, 10 Ind. App. 153; *Hawthorn v. Meyers*, 18 Ky. Law Rep. 608; 37 S. W. Rep. 593; *State v. Morgan's Louisiana & T. R. & S. S. Co.*, 111 La. 120; *Lee v. Lake*, 14 Mich. 12; *St. Louis & S. F. R. Co. v. Gordon*, 157 Mo. 71; *Longworth v. Sedevic*, 165 Mo. 221; *Lewis v. Lincoln*, 55 Neb. 1; *Buffalo v. Delaware, L. & W. R. Co.*, 68 N. Y. App. Div. 488; *Klug v. Jeffers*, 88 N. Y. App. Div. 246, citing text; *Leland v. Portland*, 2 Oreg. 46; *Lawe v. Kaukauna*, 70 Wis. 306. An absolute and final dedication of lands to a public use can only be made *by the owner of an absolute fee*. *Ward v. Davis*, 3 Sandf. (N. Y.) 502, 513. See also *Buffalo v. Delaware L. & W. R. Co.*, 68 N. Y. App. Div. 488, 501, *aff'd* 178 N. Y. 561; *Biggar's Mun. Manual* (Canada, 1900), 811. *Equitable owner may dedicate* and trustee holding the mere naked legal title is bound to respect it. *Williams v. First Presb. Church*, 1 Ohio St. 478; *Baker v. St. Paul*, 8 Minn. 491; *Hannibal v. Draper*, 15 Mo. 634; *Ragan v. McCoy*, 29 Mo. 356, 366; *Johnstone v. Scott*, 11 Mich. 232; *Doe v. Attica*, 7 Ind. 641; *Dover Trs. v. Fox*, 9 B. Mon. (Ky.) 200; *Banks v. Ogden*, 2 Wall. (U. S.) 57; *Sergeant's Heirs v. Ind. State Bank*, 4 McLean, 339; 12 How. 371. Person claiming title adversely to persons in

provided it be in such form as will bind it in a corporate capacity.¹ A city or other municipal or public corporation may, unless restricted by charter or statute, dedicate to public use land of which it is the

possession cannot dedicate. *Bruce v. Seaboard A. L. R. Co.*, 52 Fla. 461.

Administrator cannot dedicate lands belonging to the decedent, *Logansport v. Dunn*, 8 Ind. 378; even under a power to sell real property to pay decedent's debts. *Davis v. Bonaparte*, 137 Iowa, 196; 114 N. W. Rep. 896. *By executor.* *Earle v. New Brunswick*, 38 N. J. L. 47; *Hohokus Township v. Erie R. Co.*, 65 N. J. L. 353. Cannot dedicate land unless empowered to do so by will or order of court. *Kaime v. Harty*, 4 Mo. App. 357. Presumption from long use by public against married woman. *Schenley v. Commonwealth*, 36 Pa. St. 29. *Dedication by married woman.* *Todd v. Pittsburg, Ft. W. & C. R. Co.*, 19 Ohio St. 514; *Johnson City v. Wolfe*, 103 Tenn. 277. A husband cannot dedicate his wife's land. *Indianapolis v. Patterson*, 112 Ind. 344; *Marshall v. Anderson*, 78 Mo. 85 (his curtesy not affected thereby). *Infra*, § 1083, note. In *California*, a husband

cannot dedicate homestead lands without his wife's consent. *San Francisco v. Grote*, 120 Cal. 59. *Widow not dowerable* in property dedicated to public uses. *Gwynne v. Cincinnati* (bill for dower in market-house), 3 Ohio, 25; *Moore v. New York*, 8 N. Y. 110. In *Louisiana* a certificate of renunciation by the donor's wife is not necessary. *Lawrence v. Jeff. Par. Pol. Jury*, 35 La. An. 601; *Mankato v. Meagher*, 17 Minn. 265. *By receivers* authorized to sell land. *Broumel v. White*, 87 Md. 521.

By agent of owner. *United States v. Chicago*, 7 How. (U. S.) 185; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498. Evidence of oral dedication by unauthorized agent inadmissible. *Kansas City v. Banks* (Kan. App.), 61 Pac. Rep. 333. *An agent laid out a town plat* with "public square;" the proprietors denied his authority; but it was held, that having conveyed property by adopting his numbers, re-

¹ *San Francisco v. Calderwood*, 31 Cal. 585; *Green v. Canaan*, 29 Conn. 157; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261; *Grand Surrey Canal Co. v. Hall*, 1 Man. & Gr. 392.

A railroad company can dedicate land for a public highway; *Northern Pacific R. Co. v. Spokane*, 29 U. S. App. 81; *People v. Eel River & E. R. Co.*, 98 Cal. 665; *Southern Pacific Co. v. Pomona*, 144 Cal. 339; *Williams v. New York & N. H. R. Co.*, 39 Conn. 509; *St. Louis & S. F. R. Co. v. Gordon*, 157 Mo. 71; *Central R. Co. v. Bayonne*, 52 N. J. L. 503; provided the dedication does not materially interfere with the purposes of the corporation. *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396; *Loomis v. Connecticut R. & L. Co.*, 78 Conn. 156. The intention of railroad company to dedicate to the public use as a highway land held by it in fee will not, in the absence of fraud or conduct which misleads others, be inferred from facts showing a use by the public necessary to, or consistent with, the public use for which the railroad holds the property. *Williams v. New York & N. H. R. Co.*, 39 Conn. 509; *Loomis v. Connecticut R. & L. Co.*, 78 Conn. 156; *Chicago v. Chicago*,

R. I. & P. R. Co., 152 Ill. 561. Dedication of railroad right of way for street crossing held to be established by construction of the necessary guards and improvements and by the use of the crossing as a part of the street. *Michigan Central R. Co. v. Hammond, W. & E. C. El. R. Co.*, 42 Ind. App. 66; 83 N. E. Rep. 650.

Donations of lots by a town site company to a university located just outside of the town is not *ultra vires* the powers of the company. *Lamar County v. Clements*, 49 Tex. 347, 349. The dedication by a corporation must be made by the authority, express or implied, of the board of directors. *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396; *West Point v. Bland*, 106 Va. 792. See also *West End v. Eaves*, 152 Ala. 334; 44 So. Rep. 588. A corporation as well as an individual may dedicate a portion of its land as a highway, by its acts, without any formal resolution of dedication by the board of directors. *People v. Eel River & E. R. Co.*, 98 Cal. 665, 670; *Sussman v. San Luis Obispo County*, 126 Cal. 536. Dedication by agent of railroad company. *Southern Pacific Co. v. Pomona*, 144 Cal. 339.

proprietor.¹ The *government of the United States*, in disposing of lands vested in it pursuant to law, may make an effectual dedication to public use.² A dedication by a *State* may be made with the same effect as if made by an individual.³

ferring to the "recorded town plat," and "public square," *his act was ratified*, and these facts were sufficient proof of his authority. *Brown v. Manning*, 6 Ohio, 298.

An owner cannot dedicate land so as to affect the title of a *mortgagee* or of purchasers at a sale under the mortgage. *Moore v. Little Rock*, 42 Ark. 66; *McShane v. Moberly*, 79 Mo. 41; *Smith v. Heath*, 102 Ill. 130; *People v. Herbel*, 96 Ill. 384; *Alton v. Fishback*, 181 Ill. 396; *Gregory v. Ann Arbor*, 127 Mich. 454; *Newport News & O. P. R. & El. Co. v. Lake*, 101 Va. 334. The owner of an equity of redemption cannot make a valid dedication, and where an owner has conveyed land in trust to secure a debt and subsequently conveyed it to a third person, the latter cannot dedicate the land. *Gate City v. Richmond*, 97 Va. 337. *Remainderman* not bound by acts of the owner of a particular estate unless his assent can be shown or implied. 2 *Smith Lead. Cas.* 95; *Detroit v. Det. & Milw. R. Co.*, 23 Mich. 173.

The grantee of an easement of "a way subject to a gate" has such title to the way as to authorize him, whatever his intention, to dedicate it to the public. *South Berwick v. County Com'rs*, 98 Me. 108. The owner may adopt a map or plan made by another. *London & S. F. Bank v. Oakland*, 90 Fed. Rep. 691, citing text. A map or plan made by one after conveyance of the property may be adopted by his grantee so as to effect a dedication. *Longworth v. Sedevic*, 165 Mo. 221. See also *Cowley v. Spokane*, 99 Fed. Rep. 840. Map or plat made by vendor alone after agreement to sell held to be ineffectual to constitute dedication. *South Baltimore Harbor Imp. Co. v. Smith*, 85 Md. 537. The owner of a fee cannot by dedication affect the interest of his grantor in a private way reserved in the deed of the latter to the dedicator. *Sarcoux v. Wild*, 64 Mo. App. 403. Subsequent owners of blocks divided by a strip of land reserved by their grantor for his private use, cannot, by treating the strip as public property, vest any rights in the public therein without the knowledge

or acquiescence of their grantor or his successors in the strip. *Mitchell v. Denver*, 33 Colo. 37. In a case where a plat included land *not owned by the dedicator*, it was held that the real owner could not be presumed to have dedicated the part owned by him, from the fact that he had paid taxes assessed by the city after it had formally accepted the plat. *Armstrong v. Topeka*, 36 Kan. 432. As to dedication by one or two joint owners, *Spurrier v. Bland*, 20 Ky. Law Rep. 1340; 49 S. W. Rep. 467.

¹ *Boston v. Leecraw*, 17 How. (U. S.) 426; *Holladay v. San Francisco*, 124 Cal. 352; *San Francisco v. Sharp*, 125 Cal. 534; *Macon v. Franklin*, 12 Ga. 239; *Story v. New York El. R. Co.*, 90 N. Y. 122, 145; *Wright v. Victoria*, 4 Tex. 375; *State v. Woodward*, 23 Vt. 92. Dedication by *school commissioners* under authority of statute, *Roberts v. Mathews*, 137 Ala. 523.

² *United States v. Illinois Cent. R. Co.*, 154 U. S. 225, 237; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730, 758; s. c. 146 U. S. 387, 462. If the government of the United States plats lands, records the plat and sells lots with reference thereto, its interest and control over the streets, alleys, and commons designated thereon, ceases with the record of the plat and the sale of the adjoining lots. The proprietary interest of the United States passed, in the lots sold, to the respective vendees, subject to the jurisdiction of the local government, and the control over the streets, alleys, and grounds passed by operation of the state law to the corporate authorities of the municipality. *United States v. Illinois Cent. R. Co.*, 154 U. S. 225, 237. Dedication by *Cherokee Nation*, see *Davenport v. Buffington*, 97 Fed. Rep. 234. If land is dedicated to public use before the issue of a patent by the *United States*, the subsequent issue of the patent to such dedicator will not defeat the dedication, but the patentee will hold the legal title in trust for the public. *Reid v. Edina Bd. of Ed.*, 73 Mo. 295; *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 440.

³ *Snowden v. Loree*, 122 Fed. Rep.

If a town, or city, owning land in fee, suffer it to remain unenclosed, place a survey of the same on record, describing it as the "town common," and then permit an uninterrupted use of it by the public for a series of years, this will amount to an irrevocable dedication of the land to the public, and the subsequent grantee of the corporation would obtain no title.¹ But if the title in fee to a piece of land be in the municipal corporation, although it was purchased by it for a market, and constantly used for that purpose for forty years, the land is not thereby dedicated for market purposes, but the market may be changed or abandoned, and the taxpayers or others cannot object, since the power to establish and regulate markets is a continuing one, and the land thus used for market purposes may be sold by the corporation.²

§ 1079 (636). **Intention Essential.** — An *intent on the part of the owner to dedicate* is absolutely essential, and unless such intention can be found in the facts and circumstances of the particular case, no dedication exists.³ But the intention to which courts give heed

493; Matthiessen & H. Zinc Co. v. La Salle, 117 Ill. 411; Terre Haute & I. R. Co. v. Scott, 74 Ind. 29; Reilly v. Racine, 51 Wis. 526. When the state dedicates land to public use, its act implies an acceptance by the public, and the dedication is complete without any other acceptance. Reilly v. Racine, 51 Wis. 526. What constitutes a dedication by a state, see Pacific Gas Imp. Co. v. Ellert, 64 Fed. Rep. 421. If lands are purchased by the state for a public purpose, *e. g.*, as a prison site, subject to the easement of a public highway, the easement of the public in the highway is not thereby merged in the title of the state or otherwise destroyed. People v. Marin County, 103 Cal. 223, 232.

¹ State v. Woodward (indictment for enclosing public common), 23 Vt. 92.

² Gall v. Cincinnati, 18 Ohio St. 563. See also Boston v. Lecraw, 17 How. (U. S.) 426, cited *ante*, § 268, note; *infra*, § 1079, note. A city held not estopped from claiming land which has been dedicated for the public use and used for that purpose, by the fact that it has afterwards included it in an ordinance and in proceedings for condemnation. Moses v. St. Louis Sectional Dock Co., 84 Mo. 242.

³ Gage v. Mobile & O. R. Co., 84 Ala. 224; Avondale Land Co. v. Avondale, 111 Ala. 523; Hill v. Houk, 155 Ala. 448; 46 So. Rep. 562; Smith

v. San Luis Obispo County, 95 Cal. 463; San Francisco v. Grote, 120 Cal. 59; Eureka v. McKay, 123 Cal. 666; Niles v. Los Angeles, 125 Cal. 572; California Nav. & Imp. Co. v. Union Trans. Co., 126 Cal. 433, 431, citing text; Myers v. Oceanside, 7 Cal. App. 87; 93 Pac. Rep. 686; Mitchell v. Denver, 33 Colo. 37; Swift v. Lithonia, 101 Ga. 706, quoting text; Healey v. Atlanta, 125 Ga. 736; Waggaman v. North Peoria, 155 Ill. 545; Stacey v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546; Ingraham v. Brown, 231 Ill. 256; Dickerman v. Marion, 122 Ill. App. 154; Steinauer v. Tell City, 146 Ind. 490; Evansville & T. H. R. Co. v. Ft. Branch, 149 Ind. 276; Pittsburgh, C. C. & St. L. Ry. Co. v. Crownpoint, 150 Ind. 536; Gillespie v. Duling, 41 Ind. App. 217; 83 N. E. Rep. 728; Cambridge v. Cook, 97 Iowa, 599; Youngerman v. Polk County, 110 Iowa, 731; Mt. Vernon v. Young, 124 Iowa, 517; Davis v. Bonaparte, 137 Iowa, 196; 114 N. W. Rep. 896; Owensboro v. Muster, 23 Ky. Law Rep. 1164; 64 S. W. Rep. 840; Tinges v. Baltimore, 51 Md. 600; Baltimore v. White, 62 Md. 362; Baltimore v. Fear, 82 Md. 246; Neal v. Hopkins, 87 Md. 19; Hurley v. West St. Paul, 83 Minn. 401; Benson v. St. Paul, M. & M. R. Co., 73 Minn. 481; Boye v. Albert Lea, 93 Minn. 121; Perkins v. Fielding, 119 Mo. 149;

is not an intention hidden in the mind of the land-owner, but an intention *manifested by his acts*. It is the intention which finds expression in conduct, and not that which is secreted in the heart of the owner, that the law regards.¹ Dedications have been established in *every conceivable way* by which the intention of the party can be manifested.² Where a *plat is made* and recorded and

Baker v. Squire, 143 Mo. 92; Collier's Estate v. Western Paving & Supply Co., 180 Mo. 362, quoting text; Omaha v. Hawver, 49 Neb. 1; Niagara Falls Suspension Bridge Co. v. Bachman, 66 N. Y. 261; Rozell v. Andrews, 103 N. Y. 150; Flack v. Green Island, 122 N. Y. 107; Klug v. Jeffers, 88 N. Y. App. Div. 246, citing text; Mark v. West Troy, 76 Hun (N. Y.), 162; Newton v. Dunkirk, 121 N. Y. App. Div. 296; Milliken v. Denny, 141 N. Car. 224; Tise v. Whitaker-Harvey Co., 146 N. Car. 375; Cincinnati & M. V. R. Co. v. Roseville, 76 Ohio St. 108; Cherry v. Howe, 17 Ohio Cir. Ct. 246; Lewis v. Portland, 25 Oreg. 133; Johnson City v. Wolfe, 103 Tenn. 277; State v. Hamilton, 109 Tenn. 276; Hewitt v. Pulaski (Tenn. Ch. App.), 36 S. W. Rep. 878, citing text; Morristown v. Cain (Tenn. Ch. App.), 44 S. W. Rep. 471; Ayers v. Fellrath, 5 Tex. Civ. App. 557; International & G. N. R. Co. v. Cuneo (Tex. Civ. App.), 108 S. W. Rep. 714; West Point v. Bland, 106 Va. 792; Miller v. Aracoma, 30 W. Va. 606; Hast v. Piedmont & C. R. Co., 52 W. Va. 396; Seattle v. Hill, 23 Wash. 92; Randall v. Rovelstad, 105 Wis. 410.

"The doctrine of all the authorities is, that the *intention to dedicate land to the public use* is of the very essence of the act; but this intention may be proved as a fact or inferred from circumstances." *Per Potts, J., Smith v. State*, 23 N. J. L. 712, 725; *Lee v. Lake*, 14 Mich. 12; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; *Mayo v. Murchie*, 3 Munf. (Va.) 358. The *laying of a sewer* in a public street is not a dedication of the sewer to public use in the absence of an intention of the owner to so dedicate it. *Oak Cliff Sewerage Co. v. Marsalis*, 30 Tex. Civ. App. 42.

¹ *Oettinger v. District of Columbia*, 18 App. D. C. 375; *Seidschlag v. Antioch*, 207 Ill. 280, 284; *Indianapolis v. Kingsbury*, 101 Ind. 200, 213; *Rhodes v. Brightwood*, 145 Ind. 21, 25; *Pittsburgh, C. C. & St. L. R. Co. v.*

Noftsgar, 148 Ind. 101, s. c. 26 Ind. App. 614; *German Bank v. Brose*, 32 Ind. App. 77; *Raymond v. Wichita*, 70 Kan. 523.

"Such an issue [of dedication] necessarily involves the *intent and acts of the owner* and the *intent and acts of the acceptor*. The evidence of such intent may rest in writing or oral declarations, or in the acts of the parties concerned. Where such intents are not evidenced by acts, the mere intent of one or even both the parties signifies nothing. The intent of the respective parties must be followed by appropriate and characteristic acts upon the part of each party. The intent of the owner to give must be followed by an abandonment of his exclusive enjoyment of the thing, and the intent to accept the thing must be followed by the use and appropriation of it." *Flack v. Village of Green Island*, 122 N. Y. 107, 113.

"To constitute a valid dedication there must have been an actual intention on the part of the owner, clearly indicated by unequivocal acts or conduct, to dedicate the land to the public for use as an alley, and there must have been an acceptance by the public of the land dedicated." *Mitchell, J., Shellhouse v. State* (criminal information for obstructing public alley), 110 Ind. 509, 513. See also *Gwynn v. Homan*, 15 Ind. 201; *Columbus v. Dahn*, 36 Ind. 330; *Lamar County v. Clements*, 49 Tex. 347; *Denver v. Clements*, 3 Colo. 484; *McGehee v. Woodville*, 59 Miss. 648.

² *Hill v. Houk*, 155 Ala. 448; 46 So. Rep. 562; *People v. Marin County*, 103 Cal. 223, 228; *Los Angeles v. Kysor*, 125 Cal. 463; *Sussman v. San Luis Obispo County*, 126 Cal. 536; *Waugh v. Leech*, 28 Ill. 488, *per Breese, J.*; *Alvord v. Ashley*, 17 Ill. 363; *Union v. People*, 17 Ill. 416; *Waltman v. Rund*, 103 Ill. 366; *Maywood Co. v. Maywood*, 118 Ill. 61; *Clark v. McCormick*, 174 Ill. 164; *Carter v. Barkley*, 137 Iowa, 510; 115 N. W. Rep. 21; *Naylor v. Harrisonville*, 207 Mo. 341; *West Point v. Bland*, 106

*lots are sold with reference thereto, the requisite intention is generally indisputable.*¹ The intention *may also be established by parol evi-*

Va. 792; Lynchburg Traction & L. Co. v. Guill, 107 Va. 86.

A *unilateral declaration of the owner* is sufficient and a regular contract is not necessary. Westmount v. Warminton, 9 Rap. Jud. Que. B. R. 101. May be shown by acts *in pais*. Aiken T. C. v. Lythgoe, 7 Rich. Law (S. Car.) 435; Angell on Highways, § 132; Princeville v. Auten, 77 Ill. 325; Ill. Ins. Co. v. Littlefield, 67 Ill. 368; Quinn v. Anderson, 70 Cal. 454. Forney v. Calhoun County, 84 Ala. 215, 216; Waters v. Philadelphia, 208 Pa. 189. *Proof of dedication* and of acts which will estop original proprietor or his grantee, with notice, from resuming the lands set apart to the public. Consult Commonwealth v. Alburger, 1 Whart. (Pa.) 469; State v. Wilkinson, 2 Vt. 480; Abbott v. Mills, 3 Vt. 521; Pomeroy v. Mills, *Id.* 279; State v. Catlin, *Id.* 530; State v. Woodward, 23 Vt. 92; London & S. F. Bank v. Oakland, 90 Fed. Rep. 691; s. c. 86 Fed. Rep. 30, citing text.

An owner who clears open a passage through his land and neither marks by any visible distinction nor excludes persons from passing through his land by positive prohibition, shall be presumed to have dedicated it to the public. Rex v. Lloyd, 1 Camp. 260. But an obstruction, such as a gate-post or chains, may be looked upon as evincing a contrary intention. Roberts v. Karr, 1 Camp. 262 *n*; Lethbridge v. Winter, *Id.* 263 *n*; Woodyer v. Hadden, 5 Taunt. 125; Rex v. St. Benedict Par., 4 B. & Ald. 447; Rex v. Leake, 5 B. & Ad. 469; Marquis of Stafford v. Coyney, 7 B. & C. 259; Barraclough v. Johnson, 8 A. & E. 99; Poole v. Huskinson, 11 M. & W. 827; Pryor v. Pryor, 26 L. T. n. s. 758; Healey v. Batley, L. R. 19 Eq. 375; Commonwealth v. Newbury, 2 Pick. (Mass.) 51; Proctor v. Lewiston, 25 Ill. 153. But it is not conclusive. Johnston v. Boyle, 8 Up. Can. Q. B. 142; Davies v. Stephens, 7 C. & P. 570; Beveridge v. Creelman, 42 Up. Can. Q. B. 29. A deed executed by the owner of the land abutting on a lane in which the limits of the lane were given may be referred to for the purpose of ascertaining the width of the lane. Queen v. Donaldson, 24 Up. Can. C. P. 148.

A report of commissioners, award-

ing no compensation to one whose land had been taken, was confirmed, the street opened in 1871 without his objection, and a fence placed by him on the street line. He could not in 1878 disturb the report. The land is presumed to have been dedicated to public use. State v. Jersey City, 40 N. J. L. 483. A judgment in a suit between the land-owner and the municipal corporation, when the latter pleads a right of way granted or dedication to the public made by the former, is conclusive upon that question in a subsequent action between the same parties; and evidence *aliunde* the record in the first suit is, if necessary, admissible to show what was therein really put in issue and controverted. Hickerson v. Mexico (trespass), 58 Mo. 61; San Francisco v. Holliday, 76 Cal. 18.

¹ McGourin v. De Funiak Springs, 51 Fla. 502; Nelson v. Randolph, 222 Ill. 531; Flournoy v. Breard, 116 La. 224; Conkling v. Mackinaw City, 120 Mich. 67, 74, citing text; Flack v. Green Island, 122 N. Y. 107, 114, quoting text; McVee v. Watertown, 92 Hun (N. Y.), 306, 309, citing text; Newton v. Dunkirk, 121 N. Y. App. Div. 296, 298, quoting text; Weida v. Hanover, 30 Pa. Super. Ct. 424.

The *making and recording of a town plat* is evidence of the highest character of the dedication of the streets and alleys marked upon it. Waugh v. Leech, 28 Ill. 488; Godfrey v. Alton, 12 Ill. 29; Belleville v. Stookey, 23 Ill. 441. Where A. had land platted and before the plat was acknowledged and recorded sold another tract, including a part of a street shown on the plat, to B., it was held that the act of B., in conveying a part of his land by a description which referred to A.'s plat, then on file, and in having it surveyed so as to be bounded by a street laid out in the plat, was sufficient evidence of the intention of B. to dedicate the street to the public. Brooks v. Topeka, 34 Kan. 277. Submission of plat to common council for approval sufficient evidence of intention. Seattle v. Hill, 23 Wash. 92. Where the plat of a city bordering on a river showed a line marked "*bridge*," this fact was held to indicate unmistakably that the owner intended to dedicate the land

dence of acts or declarations which show an assent on the part of the owner of the land that the land should be used for public purposes.¹ To deprive the proprietor of his land, the intent to dedicate must clearly and satisfactorily appear.²

for a street to the centre of the stream. *Elgin v. Beckwith*, 119 Ill. 367.

A deed conveying land and describing it as fronting or binding on an unopened street, owned by the grantor, the street being designated on a public map or private plat, is strong evidence of dedication although the map is not referred to in the conveyance, nor is shown to have been before the grantor. *Baltimore v. Frick*, 82 Md. 77.

¹ *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498; *Steele v. Sullivan*, 70 Ala. 589; *West End v. Eaves*, 152 Ala. 334; 44 So. Rep. 588; *Macon v. Franklin*, 12 Ga. 239; *Havana v. Biggs*, 58 Ill. 483; *Miller v. Jonathan Creek Highway Com'rs*, 125 Ill. App. 431; *Evans v. Evansville*, 23 Ind. 229; *Wyandotte County v. First Presb. Church*, 30 Kan. 620; *Dover Trs. v. Fox*, 9 B. Mon. (Ky.) 200; *McKee v. St. Louis*, 17 Mo. 184; *Vick v. Vicksburg*, 1 How. (Miss.) 379; *Dummer v. Jersey City*, 20 N. J. L. 86; *Hunter v. Sandy Hill*, 6 Hill (N. Y.), 407; *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 454; *Smith v. Buffalo*, 90 Hun (N. Y.), 118, citing text; *Cook v. Harris*, 61 N. Y. 448; *Gilder v. Brenham*, 67 Tex. 345; *State v. Carlin*, 3 Vt. 530; *Skeen v. Lynch*, 1 Rob. (Va.) 186; *Buchanan v. Curtis*, 25 Wis. 99.

The statute of frauds is not applicable to a dedication to public use. *Alden Coal Co. v. Challis*, 200 Ill. 222. Testimony of owner as to his intention to dedicate is admissible, but not controlling. *Lovington v. Adkins*, 232 Ill. 510; *Seidschlag v. Antioch*, 207 Ill. 280, 285. Where the owner is interested to prove a dedication, he will be held to strict proof. *Rector v. Hartt*, 8 Mo. 448. Declarations of owner made during the use of the premises by the public are evidence to show his intention as to a dedication and to characterize his alleged acts of dedication. *Davies v. Epstein*, 77 Ark. 221; *Wilder v. St. Paul*, 12 Minn. 192, 205; *Procter v.*

Lewiston, 25 Ill. 153; *Buchanan v. Curtis*, 25 Wis. 99. Declarations to bind corporation dedicatory must be by its authorized officers. *Niagara Falls Susp. Br. Co. v. Bachman*, 66 N. Y. 261. In an action for obstructing a public alley the plaintiff may show by the acts and declarations of former proprietors that their use and occupation of the alley were for temporary purposes. *McKee v. Parchment*, 69 Pa. St. 342. Declarations of deceased surveyor, at the time of making survey, were admitted as part of the *res gestæ*. *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498; referred to by *McLean, J.*, 10 Pet. (U. S.) 714; *Birmingham v. Anderson*, 40 Pa. St. 506.

Where the dedication is specific and certain, as, for example, where the words "public ground" or "public square" appear on the recorded plat, *parol testimony is not receivable* to establish or affect the intention of the donors; and, therefore, in such a case, the donors cannot show, by evidence *aliunde*, that they designed the square for a court house, and if no court house should be erected, then to resume it or appropriate it to a seminary of learning. *Brown v. Manning*, 6 Ohio, 298; *Princeville v. Auten*, 77 Ill. 325. See *Chicago v. Ward*, 169 Ill. 392. *Contra*, *Westfall v. Hunt*, 8 Ind. 174; but *quære* as to competency of the parol evidence to show the intent. See *Indianapolis v. Croas*, 7 Ind. 9; *Cincinnati's Lessee v. Hamilton Co. Com'rs*, 7 Ohio, Part 1, 88 (dedication for public uses)—contest between city and county); *Lebanon v. Warren Co. Com'rs* ("public ground," contest as to square between town and county), 9 Ohio, 80; *infra*, § 1097, note. In *Scott v. Des Moines*, 64 Iowa, 438, it was held that the words "*Market Square*" by which land was designated upon a plat did not necessarily show a dedicatory intent, nor did they conclusively show that the land was to be used for a market only; but, inasmuch as the city had always treated the land as public by omitting to tax

² *Irwin v. Dixon*, 9 How. (U. S.) 10; *Gage v. Mobile & O. R. Co.*, 84

Ala. 224; *San Francisco v. Canavan*, 42 Cal. 541; *Huffman v. Hall*, 102 Cal.

§ 1080 (637). **Intent to dedicate presumed from User for Prescriptive Period.** — *Dedication* and public ways or uses acquired or created by *prescription* have been distinguished as resting upon different foundations.¹ But although the fundamental principles of each may not coincide, *user by the public of land* as a way or for any other public use for the period which will bar actions relating to real property has been generally recognized as creating a public right *founded upon a presumed dedication*.² The intent of the owner

it, and as the dedicator had never treated it as private, it was found to have been dedicated to public use. *Supra*, § 1078. See *Darlington v. Commonwealth*, 41 Pa. St. 68. Where a block on a map was marked "court-

house," the declarations of the original owners, who made the dedication, to the effect that the block was intended for a court-house square, and not for a jail, were held to be admissible. *Harris County v. Taylor*, 58 Tex. 690.

26, 30; *Gilfillan v. Shattuck*, 142 Cal. 27; *Evans v. Welch*, 29 Colo. 355; *Mitchell v. Denver*, 33 Colo. 37; *Collins v. Macon*, 69 Ga. 542; *Georgia R. & B. Co. v. Atlanta*, 118 Ga. 486; *Grube v. Nichols*, 36 Ill. 93; *Rees v. Chicago*, 38 Ill. 322; *Harding v. Hale*, 61 Ill. 192; *Illinois Ins. Co. v. Littlefield*, 67 Ill. 368; *Fisk v. Havana*, 88 Ill. 208; *Wragg v. Penn Tp.*, 94 Ill. 11; *Chicago v. Johnson*, 98 Ill. 618; *Dickerman v. Marion*, 122 Ill. App. 154; *Logansport v. Dunn*, 8 Ind. 378; *Westfall v. Hunter*, 8 Ind. 174; *Indianapolis & B. R. Co. v. Indianapolis*, 12 Ind. 620; *Baltimore & O. S. W. R. Co. v. Seymour*, 154 Ind. 17; *Onstott v. Murray*, 22 Iowa, 466; *Wilson v. Sexon*, 27 Iowa, 15; *Manderschid v. Dubuque*, 29 Iowa, 73; *State v. Welpton*, 34 Iowa, 144; *Corey v. Ft. Dodge*, 118 Iowa, 742; *Weber v. Iowa City*, 119 Iowa, 633; *Mt. Vernon v. Young*, 124 Iowa, 517; *Exterkamp v. Covington Harbor Co.*, 104 Ky. 796; *Glenn v. Baltimore*, 67 Md. 390; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Morse v. Zeize*, 34 Minn. 35; *Pierce v. Chamberlain*, 82 Mo. 618; *Price v. Breckenridge*, 92 Mo. 378; *Whyte v. St. Louis*, 153 Mo. 80; *Baker v. Squire*, 77 Mo. App. 329; *Brown v. Stein*, 38 Neb. 596; *Toledo v. Converse*, 21 Ohio Cir. Ct. 239; *Webber v. Toledo*, 23 Ohio C. C. 237; *Lewis v. Portland*, 25 Oreg. 133; *Cotter v. Philadelphia*, 194 Pa. 496; *In re Bellefield Ave.*, 2 Pa. Sup. Ct., 148; *Pennington v. Willard*, 1 R. I. 93; *Lamar County v. Clements*, 49 Tex. 347, citing and approving text; *Culmer v. Salt Lake City*, 27 Utah, 252; *Gate City v. Richmond*, 97 Va. 337; *West*

Point v. Bland, 106 Va. 792; *Talbott v. Richmond & D. R. Co.*, 31 Gratt. (Va.) 685; *Piggott v. Goldstraw*, 84 Law T. 94.

Intention will not be presumed and must clearly appear. *Chicago v. Van Ingen*, 152 Ill. 624; *Tinges v. Baltimore*, 51 Md. 600; *Hogue v. Albina*, 20 Oreg. 182; *Athens v. Burkett* (Tenn. Ch. App.), 59 S. W. Rep. 404; *Columbia & P. S. R. Co. v. Seattle*, 33 Wash. 513; *Emmons v. Milwaukee*, 32 Wis. 434. "Where, without judicial proceeding or compensation, or solemn form of conveyance, it is sought to establish *in pais* a divestiture of the citizen's landed property in favor of the public, the proof ought to be so cogent, persuasive and full, as to leave no reasonable doubt of the existence of the owner's intent and consent." *Per Philips, C.*, in *Landis v. Hamilton*, 77 Mo. 554, citing *Irwin v. Dixion*, 9 How. (U. S.) 10, and *Brinck v. Collier*, 56 Mo. 164.

¹ See *Commonwealth v. Coupe*, 128 Mass. 63; *Attorney-General v. Vineyard Grove Co.*, 181 Mass. 507, 509.

² In *Bolger v. Foss*, 65 Cal. 250, it is said that "prescription" is not a term strictly applicable to a right acquired by the public by the use of a way for any period of time. The law allows prescription only to supply the place of grants, and in as much as the public cannot take by grant, the term "prescription" in its strict sense has no application to highways. The true doctrine would seem to be that a use by the public is evidence of a dedication just as such use by an individual is evidence of a grant to him.

The doctrine of ways by prescription

to dedicate will *be presumed* against the owner' where it appears that the easement in the street or property *has been used and enjoyed by the public* for a period corresponding with the statutory limitation of real actions.¹ And it has been held that when the right of the public to a way rests upon long continued use for the period of time for the acquisition of title to land by adverse possession, such use establishes a *conclusive presumption of consent* and so of a dedication upon the part of the property owner and at the same time negatives the idea of a mere license.² But where there is no other evidence against the owner to support the dedication but the *mere fact* of such user,³ so that the right claimed by the public is purely

is one of *analogy*. *Commonwealth v. Cole*, 26 Pa. St. 187; *Waters v. Philadelphia*, 208 Pa. 189, 192. Thus in *Pittsburg C. C. & St. L. R. Co. v. Crownpoint*, 150 Ind. 536, 548, it is said that that which is a prescriptive right as between those capable of granting and receiving title is as between the fee owner and the public, sufficient to raise the presumption of a dedication or a condemnation.

¹ *Cochrane v. Purser*, 152 Ala. 354; 44 So. Rep. 579; *Schwerdtle v. Placer County*, 108 Cal. 589; *Hartley v. Vermillion*, 141 Cal. 339; *People v. Myring*, 144 Cal. 351, 354; *Collins v. Macon*, 69 Ga. 542; *Southern R. Co. v. Combs*, 124 Ga. 1004, 1010; *Healey v. Atlanta*, 125 Ga. 736, 738; *Ross v. Thompson*, 78 Ind. 90; *State v. Bradbury*, 40 Me. 154; *State v. Wilson*, 42 Me. 9; *Kennedy v. Cumberland*, 65 Md. 514, 521; *Rube v. Sullivan*, 23 Neb. 779; *Brandt v. Olson*, 79 Neb. 612; 113 N. W. Rep. 151; *Commonwealth v. Cole*, 26 Pa. St. 187; *Schenley v. Commonwealth*, 36 Pa. St. 29, 59; *Waters v. Philadelphia*, 208 Pa. 189, 192.

² *Schwerdtle v. Placer County*, 108 Cal. 589. In *Massachusetts*, it is held that use by the public of a way for twenty years unexplained, is sufficient to establish a highway by prescription without any act of recognition by the town or city. *Commonwealth v. Coupe*, 128 Mass. 63; *White v. Foxborough*, 151 Mass. 28, 43; *Bassett v. Harwich*, 180 Mass. 585. The establishment of a way by prescription imposes upon the municipality *liability for injuries* resulting from defects therein. *Bassett v. Harwich*, 180 Mass. 585. See also *Green v. Canaan*, 29 Conn. 157; *Kennedy v. Cumberland*, 65 Md. 514, 521; *Baltimore v. Broumel*,

86 Md. 153. Where a highway or street in a municipality is created by prescription, the fee remains in the owner, and he has a right to all things connected therewith, such as trees upon or mines or quarries under the land, subject only to the right of passage by the public, and to its right to use the stone and other material in the road to keep it in repair. *Overman v. May*, 35 Iowa, 89. A way may be established by prescription notwithstanding the fact that an attempted dedication thereof as a highway has failed because of non-acceptance by the proper municipal authorities. *Bassett v. Harwich*, 180 Mass. 585; *Commonwealth v. Henchey*, 196 Mass. 300.

³ *Fitzgerald v. Saxton*, 58 Ark. 494; *Green v. Oaks*, 17 Ill. 249; *Talbott v. Grace*, 30 Ind. 389; *Keyes v. Tait*, 19 Iowa, 123; *Onstott v. Murray*, 22 Iowa, 466; *Thayer v. Boston*, 19 Pick. (Mass.) 511; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Smith v. State*, 23 N. J. L. 130, *aff'd* 23 N. J. L. 712; *Shawangunk Kill Br., In re*, 100 N. Y. 642; *Smith v. Gardner*, 12 Oreg. 221; *Remington v. Millard*, 1 R. I. 93.

The conflict in the cases is noticed, and it is held that if the public, with the knowledge of the owner of the land, even though it be unenclosed timber or prairie land, has claimed and exercised the right of using the same for a public highway for a period equal to that fixed by the statute limiting real actions, the public right is complete, unless such use be by favor or leave of the owner. *Onstott v. Murray*, 22 Iowa, 466; *Manderschid v. Dubuque*, 29 Iowa, 73. In *Pennsylvania*, the Supreme Court holds the law to be, "that the use of ground by the public as a highway for more than

prescriptive, it is essential to maintain it, that the user or enjoyment should be adverse,¹ that it is with claim of right, and uninterrupted and exclusive for the requisite length of time; but when it is said that it must be uninterrupted, this refers to the *right*, and not simply to an interruption of the *use*.² In some States also, *statutes* are to be found *declaring what user* by the public of a road shall be deemed to create a highway. When such is the case, the question whether

twenty-one years makes it a public road just as effectually as though it had originally been laid out and opened by the proper authorities." *Per Knox, J.*, *Commonwealth v. Cole*, 26 Pa. St. 187; *Thayer v. Boston*, 19 Pick. (Mass.) 511, 514, *per Shaw, C. J.* And the same principle is adopted as to sidewalks and streets. *Bush v. Johnson*, 23 Pa. St. 209.

In *Kranz v. Baltimore*, 64 Md. 491, the city had used for more than twenty years a *stream within its limits as a common sewer*, and had repaired it, as needed, both where it ran through private property and along public streets; eventually it became, throughout its length, completely arched over and covered, and was extended in the same way, as the city condemned and improved new streets. It was held that the city had acquired the right to use the stream, wherever it crossed or flowed upon streets as they were laid out over the land through which the stream ran, by virtue of its power to open and condemn streets; and that it had acquired by *adoption* such parts of the stream as were upon private property, though it had been originally arched or covered by the owners, it being presumed that such owners had dedicated their rights in the bed of the stream to the public for the purposes of a sewer, and that the city had accepted the dedication.

¹ *Schwerdtle v. Placer County*, 108 Cal. 589, 595, citing text.

² *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, citing and approving text; *Steele v. Sullivan*, 70 Ala. 589; *Smith v. Inge* (length of user), 80 Ala. 283; *Stewart v. Conley*, 122 Ala. 179; *San Francisco v. Canavan*, 42 Cal. 541; *People v. Blake*, 60 Cal. 497; *Visalia v. Jacobs*, 65 Cal. 434; *Niles v. Los Angeles*, 125 Cal. 572; *Ely v. Parsons*, 55 Conn. 83; *Ruland v. South Newmarket*, 59 N. H. 251; *Sherman v. Kane*, 86 N. Y. 57; *Stewart v. Frink*, 94 N. Car. 487; *Sheridan v. Empire City*, 45 Oreg. 296; *Frankford & S. P.*

C. P. R. Co. v. Philadelphia, 175 Pa. 120; *Washington Borough v. Steiner*, 25 Pa. Sup. Ct. 392, citing text; *Childs v. Nelson*, 69 Wis. 125; 2 Greenl. Ev., tit. Prescription, §§ 537-546.

In *Iowa*, to establish a highway by prescription, the use must be *general, uninterrupted and continuous* for the full period of the statute of limitations. Under the provisions of the Iowa statute also more than mere user must be shown; the fact of adverse possession must be established by evidence distinct from, and independent of the use, and by evidence that the party against whom the claim of adverse user and possession is made had express notice of such user and claim of possession. *State v. Mitchell*, 58 Iowa, 567, 568; *State v. Birmingham*, 74 Iowa, 407; *Gray v. Haas*, 98 Iowa, 502, 504; *Davis v. Bonaparte*, 137 Iowa, 196; 114 N. W. Rep. 896. In *Herhold v. Chicago*, 108 Ill. 467, the fact that the public had travelled over certain premises as over a public street for sixteen years, when the owner fenced it in and resumed possession, was held, in a suit brought fourteen years afterwards, not to justify an inference of dedication. And where an *alley* had been dedicated to public use, but the land comprising it had been fenced in and occupied by the adjoining lot owners for a sufficient time, such owners' claim of adverse possession was sustained, in an application for an injunction restraining the city from opening the alley. *Fort Smith v. McKibbin*, 41 Ark. 45. To same effect, *Hayward v. Manzer*, 70 Cal. 476. A dedication of land for a highway and user by the public constitute a highway, though there be no record of it as such. *Driggs v. Phillips*, 103 N. Y. 77. Where there was a dedication *in pais* and user by the public for more than twenty years, it was held that the owner could not defeat the right of the public by filing a plat of the property. *Getchell v. Benedict*, 57 Iowa, 121.

a highway has been created necessarily depends upon the construction of the statutes.¹

§ 1081 (638). **User as affecting Question of Intent.** — But where the question is as to an *intent* on the part of the owner to dedicate,

¹ *California*. The provision of a statute that "all roads shall be conceded as public highways, which have been used as such for five years, or which may hereafter be used for five years by the public as a highway" operates to dedicate to public use railroad land used by the public as a highway and repaired by the public authorities for the prescribed period. *Southern Pac. Co. v. Pomona*, 144 Cal. 339. This statute is in the nature of a statute of limitations giving to the public the right to use the road as a highway in case it has been so used for the prescribed period. *Bolger v. Foss*, 65 Cal. 250. Under the statute a public way may be created without regard to the question whether the owner of the land in permitting use by the public intended to dedicate it as a public highway. *Freshour v. Hihn*, 99 Cal. 443, 444. See also *McRose v. Bottyer*, 81 Cal. 122.

In *Michigan* there is an express statutory provision that all roads that have been used as such for ten years or more shall be deemed public highways. Under this statute user of land as a highway for the statutory period conclusively establishes the dedication of the land for that purpose. *Ellsworth v. Grand Rapids*, 27 Mich. 250, 256; *Campau v. Detroit*, 104 Mich. 560; *Stickley v. Sodus*, 131 Mich. 510.

In *New York* a statute provides "all roads not recorded which have been or shall have been used as public highways for twenty years or more shall be deemed public highways." This act does not require the user to be adverse and under such circumstances as would give an individual a right of way by prescription. But the user must be like that of highways generally; the road must not only be travelled upon, but kept in repair or taken in charge of, and adopted by the public authorities; and the fact that a portion of the public have travelled over it for more than twenty years, does not alone make it a highway. *Speir v. New Utrecht*, 121 N. Y.

420. See also as to the construction of this statute, *Lewis v. New York, L. E. & W. R. Co.*, 123 N. Y. 496, 502; *Hamilton v. Owego*, 42 N. Y. App. Div. 312; *West Union v. Richey*, 64 N. Y. App. Div. 156. *Charter provision* declaring a street or alley open to or used by the public for five years to be a street or alley for all purposes construed. *Requa v. Rochester*, 45 N. Y. 129. For construction of a statute providing that lands which have been used as highways and so considered for twenty years, and which shall be declared by the town council to be highways, shall be taken and considered as public highways. See *Goelet v. Newport Bd. of Ald.*, 14 R. I. 295.

Land may, under statute, become a public highway by deposit of a plan showing it as a highway. *McGregor v. Calcutt*, 18 Up. Can. C. P. 39; *The Queen v. Rubidge*, 25 Up. Can. Q. B. 299; and in some cases independently of any statute. *Guelph v. Canada Co.*, 4 Grant (Can.), 632, 654; *Attorney-General v. Gooderich*, 5 Grant (Can.), 402; *Attorney-General v. Toronto*, 10 Grant (Can.), 436; *O'Brien v. Trenton*, 7 Up. Can. C. P. 246; *Attorney-General v. Boulton*, 21 Grant (Can.), 598. The assumption of a highway by a road company for the purpose of macadamizing or planking it does not render the highway less a highway for the purpose of prosecution in the event of obstruction. *Queen v. Davis*, 35 Up. Can. Q. B. 107. It is not clear that the ordinary power of indictment for obstructing a highway is applicable where the highway is one which had never been opened or used. *Rex v. Allen*, 2 Up. Can. Q. B. 101; *Regina v. Great Western Ry. Co.*, 32 Up. Can. Q. B. 506; *Harr. Munic. Man.* (5th ed.) 479. Under a statute authorizing commissioners to lay out a highway upon petition stating only the points of termination and commencement, a road so laid out by them is a public highway, although it terminates upon private land with no outlet. *Sheaff v. Colwell*, 87 Ill. 189.

user by the public for a period less than that limiting real actions is important as evidence of such intention, and as one of the facts from which it may be inferred.¹ Where the *animus dedicandi* is established, no user for any definite period by the public is necessary.² "No particular time," says an English judge, "is necessary for evidence of a dedication. If the act of dedication be unequivocal, it may take place immediately. For instance, if a man build a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is *instantly* a high-

¹ *Stewart v. Conley*, 122 Ala. 179, citing text; *Schwerdtle v. Placer County*, 108 Cal. 589, 592; *Kent v. Pratt*, 73 Conn. 573, 597; *Miller v. Jonathan Creek Highway Com'rs*, 125 Ill. App. 431; *German Bank v. Brose*, 32 Ind. App. 77; *Hanger v. Des Moines*, 109 Iowa, 480; *Raymond v. Wichita*, 70 Kan. 523; *Case v. Favier*, 12 Minn. 89; *Wilder v. St. Paul*, 12 Minn. 192, 205; *Morse v. Zeize*, 34 Minn. 35, 36; *Ellsworth v. Lord*, 40 Minn. 337; *Boye v. Albert Lea*, 93 Minn. 121; *Griffin's Appeal*, 109 Pa. 150; *Waters v. Philadelphia*, 208 Pa. 189; *Mason v. Sioux Falls*, 2 S. Dak. 640; *Whittaker v. Deadwood*, 12 S. Dak. 523; *LeRoy v. Leonard* (Tenn. Ch. App.), 35 S. W. Rep. 884.

Proof by user. See *Gamble v. St. Louis*, 12 Mo. 617; *Marcy v. Taylor*, 19 Ill. 634; *Grube v. Nichols*, 36 Ill. 93; *Harding v. Hale*, 61 Ill. 192; *Manrose v. Parker*, 90 Ill. 581; *Lewis v. San Antonio*, 7 Tex. 288; *New Orleans v. United States*, 10 Pet. (U. S.) 661; 722; *Weisbrod v. Chicago & N. W. Ry. Co.*, 18 Wis. 35; *Doe v. Jones*, 11 Ala. 63; *Smith v. Inge*, 80 Ala. 283; 2 *Smith Lead. Cas.* 95; *Onstott v. Murray*, 22 Iowa, 466; *Pella Christian Church v. Scholte*, 24 Iowa, 283; *Saulet v. New Orleans*, 10 La. An. 81; *City Cem. Assoc. v. Meninger*, 14 Kan. 312; *Faust v. Huntington*, 91 Ind. 493; *Bradstreet v. Dunham*, 65 Iowa, 248; *Shea v. Ottumwa*, 67 Iowa, 39; *Griffin's Appeal*, 109 Pa. St. 150; *McKenna v. Boston*, 131 Mass. 143. The dedication of a highway may be established by use by the public for more than ten years, if during that time it is kept in repair by the road supervisor, with the acquiescence of the owner of the land. *Gerberlin v. Wunnenberg*, 51 Iowa, 125; *Onstott v. Murray*, 22 Iowa, 466; *Wilson v. Sexon*, 27 Iowa, 15; *State v. Kan. City, St. J. & C. B. R. Co.*, 45

Iowa, 139; *Manderschid v. Dubuque*, 29 Iowa, 73.

What acts will repel presumption of dedication arising from owner's knowledge of the use by the public. *Durgin v. Lowell*, 3 Allen (Mass.), 398; *Skeen v. Lynch*, 1 Rob. (Va.) 186, 194; *Roberts v. Karr*, 1 Campb. 262, note; 16. 263, note; *Schoonmaker v. Ref. Prot. Dutch Church*, 5 How. (N. Y.) Pr. 265; 2 *Smith Lead. Cas.* 176. Upon the question of dedication, *non-user* is important, but not conclusive, evidence against the public. *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498. Concurrence of all the owners interested in an alley essential to establish an abandonment of it. *McKee v. Perchment*, 69 Pa. St. 342. Effect of occupancy by alleged dedicatory. *Cook v. Hillsdale*, 7 Mich. 115; *Peoria v. Johnson*, 56 Ill. 45. *Weiss v. South Bethlehem Boro*, 136 Pa. 294. Maintenance of gates or other obstructions to public use is ordinarily strong evidence to rebut intent to dedicate. *Quinn v. Anderson*, 70 Cal. 454, and cases cited. *Huffman v. Hall*, 102 Cal. 26.

² *Irwin v. Dixon*, 9 How. (U. S.) 10; *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 398; *Hoole v. Attorney-General*, 22 Ala. 190; *Stewart v. Conley*, 122 Ala. 179; *Schwerdtle v. Placer County*, 108 Cal. 589, 593; *Boyer v. State*, 16 Ind. 451; *Evansville v. Paige*, 23 Ind. 525; *Gray v. Haas*, 98 Iowa, 502, 504; *Davis v. Bonaparte*, 137 Iowa, 196; 114 N. W. Rep. 896; *Morse v. Zeize*, 34 Minn. 35, 36; *Hunter v. Sandy Hill*, 6 Hill (N. Y.), 407; *Cook v. Harris*, 61 N. Y. 448, 454; *Matter of Hunter*, 163 N. Y. 542, 548, citing text; *Pittsburg, F. W. & C. R. Co. v. Dunn*, 56 Pa. 280; *Griffin's Appeal*, 109 Pa. 150. *State v. Wilkinson*, 2 Vt. 480.

way.”¹ But mere user by the public is by no means conclusive of the owner’s intent and always *yields to contrary proof* of a satisfactory character.² The mere fact that the owner has permitted the public to use his property is not necessarily inconsistent with the retention of dominion by the owner;³ and if the user is *consistent with the assertion of ownership*, the intent to dedicate will not be implied.⁴ An intent to dedicate will not be ascribed to the owner merely because in adapting the land to his own accommodation and convenience and in using it, he has, in conjunction therewith, permitted the public to pass over or use his premises. Such use will be regarded as *permissive merely*, and as founded upon a *revocable license*.⁵

¹ *Woodyer v. Hadden*, 5 Taunt. 125, 126, *per Chambre, J.*, 2 Smith Lead. Cas. 176. User by the public of a public path from the earliest memory of a witness aged 87 with the knowledge and consent of the owner of the path was held to be sufficient evidence of the intention of such owner to dedicate the path to the public. *Leckhampton Quarries Co. v. Ballinger*, 20 Times L. R. 559, 68 J. P. 464.

² *Griffin’s Appeal*, 109 Pa. 150.

³ *Healey v. Atlanta*, 125 Ga. 736. *Occasional use of river front by public for landing boats*, held not to operate as a dedication. *Sioux City v. Chicago & N. W. R. Co.*, 129 Iowa, 694.

⁴ *Gage v. Mobile & O. R. Co.*, 84 Ala. 224; *Los Angeles v. Kysor*, 125 Cal. 463; *Niles v. Los Angeles*, 125 Cal. 572.

⁵ *Chicago v. Borden*, 190 Ill. 430; *Shellhouse v. State*, 110 Ind. 509; *Pennsylvania Co. v. Plotz*, 125 Ind. 26, 32; *German Bank v. Brose*, 32 Ind. App. 77; *Louisville & I. R. Co. v. Bailey (Ky.)*, 109 S. W. Rep. 336; *Robertson v. Meyer*, 59 N. J. Eq. 366; *Spier v. New Utrecht*, 121 N. Y. 420, 430; *Lent v. Tilyou*, 106 N. Y. App. Div. 189, 194; *Cincinnati & M. V. R. Co. v. Roseville*, 76 Ohio St. 108; *Cherry v. Howe*, 17 Ohio Cir. Ct. 246; *Griffin’s Appeal*, 109 Pa. 150; *Frankford & S. P. C. T. R. Co. v. Philadelphia*, 175 Pa. 120; *Ferdinando v. Scranton*, 190 Pa. St. 321; *Wilson v. Acree*, 97 Tenn. 378; *Culmer v. Salt Lake City*, 27 Utah, 252; *West Point v. Bland*, 106 Va. 792; *Terry v. McClung*, 104 Va. 599. See also *Morris & E. R. Co. v. Jersey City*, 63 N. J. Eq. 45.

Permissive use of a *wharf*, in conjunction with the use thereof by the owner held not to imply intent to dedicate. *Irwin v. Dixon*, 9 How. (U. S.) 10; *Talbott v. Grace*, 30 Ind. 389; *Buffalo v. Delaware, L. & W. R. Co.* 68 N. Y. App. Div. 488, 502, *aff’d* 178 N. Y. 561; *Lewis v. Portland*, 25 Oreg. 133. The opening of a passage way over one’s land as a means of access for him and his customers to his store does not amount to a dedication to public use of the lands so thrown open, although such passage way may also be used by the public generally. Such use by the public can only be properly held to be an implied license. *Loomis v. Connecticut R. & L. Co.*, 78 Conn. 156. A space left open in private property bordering on a highway for the accommodation, not of the public, but of the owner, is not thereby dedicated to public use, but may be resumed at pleasure. *Gowen v. Philadelphia Exchange Co.*, 5 W. & S. (Pa.) 141. See also *Weiss v. South Bethlehem*, 136 Pa. 294. Permitting the public to use an *ordinary entry or flight of stairs* in a building belonging to a city or town is not a dedication. *McNeil v. Boston*, 178 Mass. 326. Where adjoining owners of land agree to reserve an alley between their premises for their own use, the facts that the same for years is open to the public use, that in several conveyances it is described as an alley, and that the owner of the soil never paid taxes on the same, will not bring the alley into existence as a public easement. *Illinois Ins. Co. v. Littlefield*, 67 Ill. 368.

§ 1082 (639). **Same Subject; Widening Street.** — A street may be widened by the dedication of a strip of land adjoining it, and such dedication may be shown by long use by the public, and acquiescence in such use by the owner. And if the street has been long used and built upon to a particular line, which line has been acquiesced in by the adjoining owners, who have built and made improvements to correspond with such line, such owners and the public acquire rights in consequence, and one or more of such owners cannot afterwards change or narrow the street by showing that the original survey made the line of the street different from that which had been long regarded, built upon, and acquiesced in as the line of the street.¹

§1083 (640). **Dedication by Platting and Sale.** — While a mere survey of land, by the owner, into lots, defining streets, squares, &c., will not, without a sale, amount to a dedication,² yet a sale of lots with reference to such plat, or describing lots as bounded by streets, will, as between the grantor and grantee, amount to an immediate and irrevocable dedication of the streets, binding upon both vendor and vendee.³ The rights of the grantee spring from

¹ *Waters v. Philadelphia*, 208 Pa. St. 189, quoting text; *Smith v. State*, 23 N. J. L. 712, aff'g s. c. *Id.* 130. In the case last cited the different owners had acquiesced in the line built upon, and treated it as the true line for forty or fifty years. The defendant, disregarding this line, built out into the street some four or five feet. He was indicted for the nuisance thus created, and convicted, the court holding the rights of the public had attached, and that it was no defence to show that the building erected was on the line of the street as originally surveyed. A road or street which becomes a public highway by user is of no established width by law; its width, as used at the time when the rights of the public become complete, is the established or legal width of the highway. *Hart v. Bloomfield Tp. Trs.*, 15 Ind. 226. See also *Epler v. Nimau*, 5 Ind. 459; *Darlington v. Commonwealth*, 41 Pa. St. 68.

² *United States v. Chicago*, 7 How. (U. S.) 185, 196; *Reed v. Birmingham*, 92 Ala. 339; *Birmingham Mineral R. Co. v. Bessemer*, 98 Ala. 274; *Holly Grove v. Smith*, 63 Ark. 5; *Dickenson v. Arkansas City Imp. Co.*, 77 Ark. 570; *First Ev. Church v. Walsh*, 57 Ill. 363; *Uvalde County v. Uvalde* (Tex.

Civ. App.), 32 S. W. Rep. 368. In *Arkansas*, by statute, an owner of land contiguous to a city of the first class, who lays it off in blocks and lots as an addition to the city, thereby dedicates the streets and alleys contained in it to the city. *Moore v. Little Rock*, 42 Ark. 66.

³ *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498, 506; *New Orleans v. United States*, 10 Pet. (U. S.) 662, 718; *Morgan v. Chicago & A. R. Co.*, 96 U. S. 716; *Rainey v. Herbert*, 3 U. S. App. 592; *Chicago, M. & St. P. R. Co. v. McArthur*, 10 U. S. App. 546; *Stephenson v. Chattanooga*, 20 Fed. Rep. 586; *Northern Pac. R. Co. v. Spokane*, 56 Fed. Rep. 915, citing text; *London & S. F. Bank v. Oakland*, 90 Fed. Rep. 691, 700, citing text; *Kruger v. Constable*, 116 Fed. Rep. 722; *Steele v. Sullivan*, 70 Ala. 589; *Thorpe v. Clanton*, 10 Ariz. 94; 85 Pac. Rep. 1061; *Breed v. Cunningham*, 2 Cal. 368; *Kittle v. Pfeiffer*, 22 Cal. 490; *Stone v. Brooks*, 35 Cal. 489; *San Leandro v. Le Breton*, 72 Cal. 170; *Prescott v. Edwards*, 117 Cal. 298; *Myers v. Kenyon*, 7 Cal. App. 112; 93 Pac. Rep. 888; *Derby v. Alling*, 40 Conn. 410; *Pierce v. Roberts*, 57 Conn. 31; *Street v. Leete*, 79 Conn. 352; *Winter*

and depend upon an implied covenant by the grantor that the lands designated as streets or ways will not be appropriated to any

v. Payne, 33 Fla. 470; *Porter v. Carpenter*, 39 Fla. 14; *Price v. Stratton*, 45 Fla. 535; *Field v. Carr*, 59 Ill. 198; *Lake View v. Le Bahn*, 120 Ill. 92; *Lee v. Mound Station*, 118 Ill. 304; *Earll v. Chicago*, 136 Ill. 277; *Field v. Barling*, 149 Ill. 556; *Clark v. McCormick*, 174 Ill. 164, 174; *McDonald v. Stark*, 176 Ill. 456; *North Chillicothe v. Burr*, 185 Ill. 322; *Woollacott v. Chicago*, 187 Ill. 504; *Eisendrath & Co. v. Chicago*, 192 Ill. 320; *Augusta v. Tyner*, 197 Ill. 242, 247; *Russell v. Lincoln*, 200 Ill. 511; *Mann v. Bergmann*, 203 Ill. 406, 409; *Chicago v. Smith*, 204 Ill. 356, aff'g 107 Ill. App. 270; *Corning v. Woolner*, 206 Ill. 190; *Owen v. Brookport*, 208 Ill. 35; *Riverside v. MacLain*, 210 Ill. 308; *Swedish Evan. Lutheran Ch. v. Jackson*, 229 Ill. 506; *Doe v. Attica*, 7 Ind. 641, 644; *Miller v. Indianapolis*, 123 Ind. 196; *Wolfe v. Sullivan*, 133 Ind. 331; *Fowler v. Linquist*, 138 Ind. 566; *Rhodes v. Brightwood*, 145 Ind. 21, 25, citing text; *Woodruff Place v. Raschig*, 147 Ind. 517; *Hall v. Breyfogle*, 162 Ind. 494; *Dubuque v. Maloney*, 9 Iowa, 450; *Cook v. Burlington*, 30 Iowa, 94; *Fisher v. Beard*, 32 Iowa, 346; *Shea v. Ottumwa*, 67 Iowa, 39; *Keokuk v. Cosgrove*, 116 Iowa, 189; *Giffen v. Olathe*, 44 Kan. 342, 349, citing text; *Augusta Trs. v. Perkins*, 8 B. Mon. (Ky.) 207; *Rowan's Ex. v. Portland*, 8 B. Mon. (Ky.) 232; *Wickliffe v. Lexington*, 11 B. Mon. (Ky.) 155; *Campbell County Court v. Newport*, 12 B. Mon. (Ky.) 538; *Newport v. Taylor's Ex.*, 16 B. Mon. (Ky.) 699; *Memphis & St. L. Packet Co. v. Gray*, 9 Bush (Ky.), 137, 146; *Schneider v. Jacob*, 86 Ky. 101; *James v. Louisville*, 19 Ky. Law Rep. 447; 40 S. W. Rep. 912; *Alexander v. Tebeau*, 24 Ky. Law Rep. 1305; 71 S. W. Rep. 437; *Arrowsmith v. New Orleans*, 24 La. An. 194; *Lafitte v. New Orleans*, 52 La. An. 2099, citing text; *Bartlett v. Bangor*, 67 Me. 460, 456, quoting text; *Danforth v. Bangor*, 85 Me. 423; *Tinges v. Baltimore*, 51 Md. 600; *Flersheim v. Baltimore*, 85 Md. 489; *Richardson v. Davis*, 91 Md. 390; *Leggett v. Detroit*, 137 Mich. 247; *Hurley v. Mississippi & R. R. Co.*, 34 Minn. 143; *Great Northern R. Co. v. St. Paul*, 61 Minn. 1; *Smith v. St. Paul*, 72 Minn. 472; *Nagel v. Dean*, 94 Minn. 25; *Vicksburg v. Marshall*, 59 Miss. 573; *Witherspoon v. Meridian*, 69 Miss. 288; *Hannibal v. Draper*, 15 Mo. 634; *Heitz v. St. Louis*, 110 Mo. 618, 626, quoting text; *McCague v. Miller*, 55 Neb. 762; *New York & L. B. R. Co. v. South Amboy*, 57 N. J. L. 252; *People's Traction Co. v. Atlantic City*, 71 N. J. L. 134; *Pope v. Union*, 18 N. J. Eq. 282; *Livingston v. New York*, 8 Wend. (N. Y.) 85; *Wyman v. New York*, 11 Wend. (N. Y.) 487; *White v. Cowar*, 4 Paige (N. Y.) 510; *Smith v. Buffalo*, 90 Hun (N. Y.), 118, citing text; *Bissell v. New York C. R. Co.*, 23 N. Y. 61; *Wiggins v. McCleary*, 49 N. Y. 346; *Flack v. Green Island*, 122 N. Y. 107, quoting text; *Newton v. Dunkirk*, 121 N. Y. App. Div. 296, 298, quoting text; *Moose v. Carson*, 104 N. Car. 431, 434; *Collins v. Asheville Land Co.*, 128 N. Car. 563; *Davis v. Morris*, 132 N. Car. 435; *Portland v. Whittle*, 3 Oreg. 126; *Hobson v. Monteith*, 15 Oreg. 251; *Meier v. Portland Cable R. Co.*, 16 Oreg. 500; *Steel v. Portland*, 23 Oreg. 176; *Nodine v. Union*, 42 Oreg. 613; *Oregon City v. Oregon & C. R. Co.*, 44 Oreg. 165; *Schenley v. Commonwealth*, 36 Pa. St. 29; *McCall v. Davis*, 56 Pa. St. 431; *Davis v. Sabita*, 63 Pa. St. 90; *McKee v. Perchment*, 69 Pa. St. 342; *Transue v. Sell*, 105 Pa. St. 604; *Pearl Street, In re*, 111 Pa. [St. 565; *Ferguson's Appeal*, 117 Pa. St. 426; *Chapin v. Brown*, 15 R. I. 579; *Union Co. v. Peckham*, 16 R. I. 64; *McKenna v. Lancaster Dist. R. Com'rs*, *Harper (S. Car.) Law*, 381; *Aiken T. C. v. Lythgoe*, 7 Rich. (S. Car.) Law 435; *Sweatman v. Bathrick*, 17 S. Dak. 139; *Wilson v. Acree*, 97 Tenn. 378; *Preston v. Navasota*, 34 Tex. 684; *Lamar v. Clements*, 49 Tex. 347; *Loustannau v. Robertson*, 21 Tex. Civ. App. 85; *Corsicana v. Anderson*, 33 Tex. Civ. App. 596; *Ralston v. Weston*, 46 W. Va. 544; *Fleischfresser v. Schmidt*, 41 Wis. 223; *Jarstadt v. Morgan*, 48 Wis. 245; *Reilly v. Racine*, 51 Wis. 526; *Donohoo v. Murray*, 62 Wis. 100; *Andrews v. Youmans*, 78 Wis. 56; *Smith v. Beloit*, 122 Wis. 396, quoting text; *Caldwell v. Galt*, 27 Ont. App. 162; *Geoffrion v. Montreal Park & I. R. Co.*, 20 Rap. Jud. Que. C. S. 559; See *infra*, § 1087, and note.

A conveyance by donation has the

other use.¹ To create this right in the grantee it is not necessary that the plat or map should have been made by the grantor. The

same effect as a sale, the underlying principle being the same. *Calhoun v. Colfax*, 105 La. 416, quoting text. Where the plat shows an *alley to be a private one*, a sale of lots by reference to the plat will not constitute a dedication of the alley to public use. *Dexter v. Tree*, 117 Ill. 532; *Chicago v. Borden*, 190 Ill. 430.

Effect of sale by plat as to the rights of the public. *Detroit v. Det. & Milw. R. R. Co.*, 23 Mich. 173; *Evans v. Evansville*, 23 Ind. 229; *Baker v. Johnston*, 21 Mich. 319; *Hawley v. Baltimore*, 33 Md. 270; *Hall v. Baltimore*, 56 Md. 187; *West Covington v. Freking*, 8 Bush (Ky.), 121; *Arrow-smith v. New Orleans*, 24 La. An. 194; *Parsons v. Atlanta Univ. Trs.*, 44 Ga. 529; *Demopolis v. Webb*, 87 Ala. 659; *Reed v. Birmingham*, 92 Ala. 339; *Corsicana v. Anderson*, 33 Tex. Civ. App. 596. As to effect of reference to other than official maps, *Smith v. Portland*, 30 Fed. Rep. 734. Reference in a deed, as a boundary, to a street as laid out, *but not opened*, while it would estop the grantor as against his grantee, is not a dedication to the public so as to deprive the grantor of the right to compensation, when the land is actually taken under the power of eminent domain. *Re Brooklyn Street*, 118 Pa. 640; *Easton Bor. v. Rinek*, 116 Pa. St. 1.

So, in *Maryland*, it is laid down, "that where a party sells property lying within the limits of the city, and in the conveyance *bounds such property by streets designated as such in the conveyance*, or on a map made by the city or by the owner of the property, such a sale implies, necessarily, a covenant that the *purchaser* shall have the use of such streets." *Moale v. Baltimore*, 5 Md. 314, 321; following *White v. Flannigan*, 1 Md. 525, 540; distinguished from *Underwood v. Stuyvesant*, 19 Johns. (N. Y.) 186; *Howard v. Rogers*, 4 Harr. & J. 278. See also *Van Witson v. Gutman*, 79 Md. 405.

Where several owners of land join in making a town plat, no one of them acquires thereby an easement distinct

from that of the public in the streets marked on the plat. *Patterson v. Duluth*, 21 Minn. 493. In *Bryant v. Estabrook*, 16 Neb. 217, a proceeding to foreclose liens for taxes, it was urged that in legal contemplation there was no such property as the lots described, because no plat or map containing or embracing them had ever been filed or recorded. It appeared that the tract had been laid out in lots, blocks, streets, and squares, for more than twenty-five years, and had been used, enjoyed, and extensively improved by the owners. The contention was rejected on the ground of public policy. *Cobb*, Ch. J., saying: "For this court to now hold that these lots have no legal existence for the reason that no plat or map of said city has ever been recorded, would be to declare all taxes ever levied upon such property for any purpose, whether collected or uncollected, now being collected, or just assessed for future collection, illegal, null, and void, would thus cut off the necessary resources of said city for years to come, and, in my opinion, be against public policy; and I do not feel justified to enter upon the discussion of authorities that might logically lead to that conclusion. Certainly it was some one's duty at one time to have recorded a plat of that part of the city where the property in question is situated; but that duty was neglected, and in this neglect individuals and the public have acquiesced for a generation. Its question at this late day in the courts cannot be entertained without the infliction upon the public of a wrong, beside which even the alleged wrong to the appellant by reason of the judgment in the court below falls into insignificance." No dedication is implied where the conveyance *bounds the property by the centre of the street*. *Hawthorn v. Meyers*, 18 Ky. Law Rep. 608; 37 S. W. Rep. 593.

Dedication where the conveyance bounds the purchasers by a street or public square, designated on a map. See *People v. Lambier*, 5 Denio (N. Y.), 9, 19; *Thirty-second Street*, *In re*, 19

¹ *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 449; *Moale v. Baltimore*, 5 Md. 314, 321; *Clendenin v. Maryland Const. Co.*, 86 Md. 80; *Story v. Ullman*,

88 Md. 244; *Canton Co. v. Baltimore*, 106 Md. 69; *Steel v. Portland*, 23 Ore. 176.

grantor may adopt a plat or map prepared by another.¹ The rights in dedicated streets acquired by a purchaser of lots by a deed referring to a plat are *private contract rights* and are not affected by the failure of the municipality to act upon the dedication.²

§ 1084. **Extent of Interest acquired by Purchaser under Sale according to Plat.** — A deed of a lot describing it by the number of the block and lot on a plat *conveys to the grantee the fee of an abutting street* to the centre thereof, subject to the rights of the grantor and his successors in title to use the same for the purposes of a way.³

Wend. (N. Y.) 128; followed in Twenty-ninth Street, *In re*, 1 Hill (N. Y.), 189; *Ib.* 191; Furman Street, *In re*, 17 Wend. (N. Y.) 649; Livingston v. New York, 8 Wend. 85; Willoughby v. Jenks, 20 Wend. (N. Y.) 96; Oswego v. Osw. Canal Co., 6 N. Y. 257; Brown v. Manning, 6 Ohio, 298; Smith v. Lock, 18 Mich. 56; Hoboken Meth. E. Church v. Hoboken, 33 N. J. L. 13; State v. Elizabeth, 37 N. J. L. 432. Where the dedication of property to the public is clearly manifested by acts and declarations of the owner, which have been acted upon by the public, the fact that the owner may have entertained a *different intention from that manifested by his acts* will not affect rights acquired under the dedication. The laying out of land into a town, exhibiting a map or plan, with streets and public squares, and selling lots with reference to such map, implies a grant or covenant for the benefit of the purchasers of lots. The streets and public squares represented by the map cannot be appropriated by the person making such grant to a use inconsistent with that represented on the map. The owner, as against his grantee, is estopped from so doing. Lamar v. Clements, 49 Tex. 347; Corsicana v. Anderson, 33 Tex. Civ. App. 596; German Bank v. Brose, 32 Ind. App. 77. But the city acquires no right until acceptance, to claim the property for a street. Galveston v. Williams, 69 Tex. 449; Gilder v. Brenham, 67 Tex. 345.

The presumption of an intent to dedicate derived from a sale of lots with reference to a plat may be *negated by statements and reservations on the plat* showing that there was no present and actual intention to dedicate. Niagara Falls Susp. Br. Co. v. Bachman, 66 N. Y. 261. While per-

sons who purchased lots described expressly as laid down on a map may have rights under the map, those who *bought before it was made* can have none. Lennig v. Ocean City Assoc., 41 N. J. Eq. 24. One who buys land at a public sale without notice, express or implied, of the dedication of a street through it, is not bound by the dedication, though others may have purchased other land with reference to it. Schuchman v. Homestead Bor., 111 Pa. St. 48. As to the effect of the *reservation of an easement across a street*, see Waterloo v. Union Mill Co., 59 Iowa, 437. Where a husband alone files a plat of his wife's land, and they afterwards join in conveying lots designated on the plat, the wife is not estopped from asserting her title to land designated as a street on the plat. Marshall v. Anderson, 78 Mo. 85. But see Corsicana v. Anderson, 33 Tex. Civ. App. 596, as to immateriality of acknowledgment by the wife of a map which was recorded with her consent. *Supra*, § 1078, note.

¹ Hope v. Shiver, 77 Ark. 177; Hoboken M. E. Church v. Hoboken, 33 N. J. L. 13, 25; Clark v. Elizabeth, 40 N. J. L. 172; Oregon City v. Oregon & C. R. Co., 44 Ore. 165; Corsicana v. Anderson, 33 Tex. Civ. App. 596; Meacham v. Seattle, 45 Wash. 380.

² Marsh v. Fairbury, 163 Ill. 401, 407; Rusk v. Berlin, 173 Ill. 634; Riverside v. McLain, 210 Ill. 308, 320.

³ Demopolis v. Webb, 87 Ala. 659; Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 579; Hamilton v. Chicago, B. & Q. R. Co., 124 Ill. 235; Davenport Bridge Co. v. Johnson, 188 Ill. 472; Thompson v. Maloney, 199 Ill. 276, 282; Russell v. Lincoln, 200 Ill. 511; Chicago v. Smith, 204 Ill. 356; Owen v. Brookport, 208 Ill. 35, 40; Hurley v. Mississippi & R. R. B. Co.,

It has been held that when the owner of lands sells lots according to a plat or plan showing streets, alleys and other public ways thereon, the right which passes to the purchaser in the streets, &c. shown on the plan, is not the mere right that he may use the streets, but that *all persons may use them*.¹ In some jurisdictions, upon the principle that the *map or plat is a unity*, and that a purchaser of a lot buys on the implied condition and understanding that all the streets and ways shown thereon will be available for public use, and not merely the street upon which his property abuts, it is held

34 Minn. 143; *Hennessey v. Murdock*, 137 N. Y. 317; *Paul v. Carver*, 26 Pa. St. 223; *Falls v. Reis*, 74 Pa. 439; *Firmstone v. Spaeter*, 150 Pa. 616; *Quicksall v. Philadelphia*, 177 Pa. 301, 304; *Woodward v. Pittsburg*, 194 Pa. 193. But under a statutory dedication which vests the fee of a street in the municipality, a deed by lot number on the plat does not convey any part of the street. *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Brown v. Taber*, 103 Iowa, 1, 5.

Boundaries of lots on streets. It has been definitely settled by the Court of Appeals in *New York*, whatever may have been the intimations or decisions in the prior cases, that *as between grantor and grantee*, the conveyance of a lot bounded upon a street in a city carries, in the absence of legislative provision to the contrary, the land to the *centre of the street*, there being no distinction in this respect between the streets of a city and country highways. And the grantee goes to the middle of the street, though the conveyance contains no reference to the street, and the depth of the lot is stated by figures which would not include any part of the street. *Bissell v. N. Y. Central R. Co.*, 23 N. Y. 61; *Hammond v. McLachlan*, 1 Sandf. (N. Y.) 323, and *Stiles v. Curtis*, 4 Day (Conn.), 328, approved. The case of *Bissell v. Railroad Co.*, *supra*, approved and followed in *Wager v. Troy Union, &c. R. Co.*, 25 N. Y. 526, and note remark on p. 533, as to fee of streets in city of New York; s. p. *Sherman v. McKeon*, 38 N. Y. 266; *Columbus & W. Ry. Co. v. Witherow*, 82 Ala. 190; *Moore v. Johnston*, 87 Ala. 220. See also, *Willoughby v. Jenks*, 20 Wend. (N. Y.) 96. Actual possession of lot shows constructive title of occupant to middle of street. *Ib.*; *John and Cherry Streets*, *In re*, 19 Wend. (N. Y.) 659; *Penn. R. Co.*

v. Pittsburgh Gr. Elev. Co., 50 Pa. St. 499; *Woodruff v. Neal*, 28 Conn. 168.

Where a person buys real estate which is described with reference to the original map or plat of the town and stated to be bounded by a certain street he is estopped to deny that the street is a public highway, having potential existence whether actually opened or not. *Demopolis v. Webb*, 87 Ala. 659; *Reed v. Birmingham*, 92 Ala. 339. If lots are sold with reference to a map on which are marked lines showing a reservation of a part of the street for railroad purposes, the purchaser buys subject to this reservation, and his title as owner of the ultimate fee to the center of the street is subordinate to the reserved right. *Evans v. Savannah & W. R. Co.*, 90 Ala. 54.

¹ *Archer v. Salinas City*, 93 Cal. 43, 49; *Derby v. Alling*, 40 Conn. 410, 432; *Zearing v. Raber*, 74 Ill. 409, 411; *Earl v. Chicago*, 136 Ill. 277, 285; *Rusk v. Berlin*, 173 Ill. 634; *Clark v. McCormick*, 174 Ill. 164, 174; *Alden Coal Co. v. Challis*, 200 Ill. 122, 232; *Corning & Co. v. Woolner*, 206 Ill. 190, 200; *Flerheim v. Baltimore*, 85 Md. 489; *Heitz v. St. Louis*, 110 Mo. 618, 624; *Whyte v. St. Louis*, 153 Mo. 80; *McGinnis v. St. Louis*, 157 Mo. 191; *McCall v. Davis*, 56 Pa. 431; *Davis v. Sabita*, 63 Pa. 90; *Transue v. Sell*, 105 Pa. 604; *In re Pearl Street*, 111 Pa. 565; *Quicksall v. Philadelphia*, 177 Pa. 301, 304; *Woodward v. Pittsburg*, 194 Pa. 193, 198; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. 318; *Osterheldt v. Philadelphia*, 195 Pa. 355; *Commonwealth v. Shoemaker*, 14 Pa. Super. Ct. 194; *Southwestern State Normal School*, 26 Pa. Super. Ct. 99, 103; *Clark v. Providence*, 10 R. I. 437; *Oswald v. Genet*, 22 Tex. 94; *Corsicana v. Zorn*, 97 Tex. 317, 319; *Lins v. Seefeld*, 126 Wis. 611.

that the purchaser of a lot acquires a right or easement in *all the streets and alleys* shown on the plat or map, and can insist that *all* these streets and alleys shall be kept open and devoted to public use.¹ Hence, when such a plat has been made and lots have been sold with reference thereto, the owner of the land by whom the plan was made cannot, without the consent of each and all of his purchasers or their grantees, vacate a part of the streets dedicated.² But this construction of the effect of a sale of property according to a map or plan prepared by the owner is rejected in some jurisdictions, and it is held that the purchaser of lots is only entitled to have that portion of the street which borders his premises kept open at both ends. This does not mean, however, that the purchaser is entitled to have the street kept open at each end no matter how remote the ends are from his property. The condition is complied with if there is *access to a cross street in each direction*. This construction is reached upon the ground that in the absence of an express grant, a grant by implication of an onerous servitude upon the land of grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed, unless such is clearly the intention of the parties.³

¹ *Zearing v. Raber*, 74 Ill. 409; *Clark v. McCormick*, 174 Ill. 164, 175; *Saunders v. Chicago*, 212 Ill. 206; *Indianapolis v. Kingsbury*, 101 Ind. 200, 212; *Wolfe v. Sullivan*, 133 Ind. 331, 334; *Hall v. Breyfogle*, 162 Ind. 494, 501; *Williams v. Poole* (Ky.), 103 S. W. Rep. 336; *Rowan's Executors v. Portland*, 8 B. Mon. (Ky.) 232; *Collins v. Ashville Land Co.*, 128 N. Car. 563; *In re Pearl Street*, 111 Pa. 565; *Quicksall v. Philadelphia*, 177 Pa. 301, 304; *Thaxter v. Turner*, 17 R. I. 799; *Chapin v. Brown*, 15 R. I. 579; *Edwards v. Moundville Land Co.*, 56 W. Va. 43; *Cook v. Totten*, 49 W. Va. 177. See also *Archer v. Salinas City*, 93 Cal. 43, 49; *Mahler v. Brumder*, 92 Wis. 477, 486; *McFarland v. Lindenkugel*, 107 Wis. 474, 478.

In *Cook v. Totten*, 49 W. Va. 177, *Dent, J.*, said: "The *unity doctrine* of the plat or plan is decidedly the most equitable, for the reason that the opening of remote streets may render the purchased lot more accessible and more valuable, by creating a more direct and easy way thereto, while the opening of comparatively near streets might be of none or little value to the lot in question."

² *Saunders v. Chicago*, 212 Ill. 206,

212. In this case *Boggs, J.*, said: "The true construction recognizes the interest and right of every lot owner in the vacation of any of the streets and alleys on the plat, and requires that the vacation of a part of the plat can only be accomplished by the joint action of the proprietor and all of the owners of lots in the plat. Lots are sold by the proprietor of the plat and bought by the purchaser in view of the system of streets and alleys shown on the plat. The value of a lot depends not only on the fact that it abuts on a street, but also on the fact that such street connects with other streets, and such other streets with still other streets. A lot has its value, in the eyes of the proprietor as seller and an intending purchaser, in a substantial degree on the plan and system of streets and alleys. No one would purchase a lot in a plat if the proprietor retained the right to vacate all the plat but the lot and the street in front of it." See also *La Bounty v. Seattle*, 46 Wash. 141.

³ *Hawley v. Baltimore*, 33 Md. 270, 280; *Baltimore v. Frick*, 82 Md. 77; *Clendenin v. Maryland Construction Co.*, 86 Md. 80, 83; *Regan v. Boston Gas Light Co.*, 137 Mass. 36, 37; *Pearson v. Allen*, 151 Mass. 79; *Reis*

§ 1085 (641). **Plat as Evidence of Intention.** — A *dedication of land for a public square was not*, under the circumstances of the case,

v. New York City, 188 N. Y. 58, aff'g 113 N. Y. App. Div. 464; *Matter of 29th Street, 1 Hill* (N. Y.), 189. *State v. Hamilton*, 109 Tenn. 276. See also *State v. Taylor*, 107 Tenn. 455.

In *Regan v. Boston Gaslight Co.*, 137 Mass. 36, lots were sold according to a plan and it was held that defendant could close a whole series of streets shown on the plan so long as he left open a way for the plaintiff to the highway in one direction and to the next side street in another. The court said: "In the absence of an express grant, a claim by implication of an onerous servitude upon the land of the grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed, unless such is clearly the intention of the parties." In *Pearson v. Allen*, 151 Mass. 79, a sale was made of property at a seaside resort according to a plan. The defendant threatened to close a street which was not required by the plaintiff for access, but was valuable as giving an ocean view. It was held that the plaintiff's easements did not extend to the street in question. *Holmes, J.*, said: "There are limits to the easements raised in this way by implication, even if there are not limits to the power of creating easements when it is attempted by express words. A reference to a plan like this, laying out a large tract, does not give every purchaser of a lot a right of way over every street laid down upon it."

In *Hawley v. Baltimore*, 33 Md. 270, 280, the court says: "The law is now too well settled to admit of any doubt that if the owner of a piece of land lays it out in lots and streets and sells lots calling to bind on such streets, he thereby dedicates the streets so laid out to public use. This rule is founded upon the doctrine of implied covenants, and the dedication will be held to be co-extensive with the right of way acquired as an easement by the purchaser. It is upon the implied covenant in the grant to him that the dedication to public use rests, and such dedication must necessarily be measured by the limits of the right he has acquired by virtue of his grant. . . . The doctrine of implied covenants will not be held to create a right of way over all the lands of a vendor which may lie, however remote, in the bed of

a street. The lands must be contiguous to the lots sold and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street, not yet opened by the public authorities, is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed and no further." In *Diamond Match Co. v. Ontonagon*, 72 Mich. 249, 259, *Champlin, J.*, says: "As between individuals so purchasing and the proprietor, they are entitled to have the streets necessary or convenient for their use and enjoyment of the property purchased by them kept open for their own and the public's use. But such proprietor is not estopped from reclaiming or shutting up any street or portion thereof delineated on his plat, where private rights are not directly affected; and as against the municipality claiming the streets, where the public have not acquired rights by user, or acceptance of the offer to dedicate, indicated by the platting, the owner is not estopped."

In *Jackson v. Birmingham Foundry & Machine Co.*, 154 Ala. 464; 45 So. Rep. 660, where lands had been platted and afterwards sales of numerous lots were made with reference to the plat so prepared, it was held that a statute which authorized a property owner to close a portion of one of the streets shown on the plat and to use the enclosed portion did not violate the constitutional provision prohibiting the taking of private property for private use without the consent of the owner, as there remained to the lot owner, who complained of the closing, a convenient and reasonable outlet to neighboring thoroughfares. *McClellan, J.*, who delivered the opinion of the court, said: "Necessarily the determination of what is a given case is a 'taking' short of an infringement upon a convenient and reasonable way of ingress and egress to the property involved, must depend upon the circumstances and conditions developed by the investigation. No hard and fast rule can be declared nor should an æsthetic taste or unreasonable desire for con-

*implied against the heirs of the grantor from its representation as a mere blank, undistinguished from, and continuous with, the streets surrounding it, upon a partition map made by such heirs, and by reference to which they conveyed lots.*¹

venience of way be allowed to expand the right of easement of access to an extent beyond that necessarily essential to a fairly convenient way to the property of the complaining owner. This rule appears to us as right and just to both the state and property owner. If the right could be limited to only those whose property abuts on the vacated section of a formerly public highway that would result palpably in a denial of the very essence of private right of property existing in the easement of access, because the vacation of the street on either side of that upon which the lot of the property owner abuts would just as effectually destroy his means of access as if that part of the street adjoining the lot was undertaken to be surrendered. But the limit, territorially speaking, of the easement or access is found when the property owner is afforded a convenient and reasonable outlet to neighboring thoroughfares that he may unobstructedly use. The whole right is implied in the term 'access'; and to afford it, neither distance within reasonable limits, nor excess of travel or the character of the way, if traversable, left open should be permitted to lead to wider requirement than we have undertaken to state generally as necessitated to avoid an infringement upon the private right of access to the owner of property abutting public streets." In *Thorpe v. Clanton*, 10 Ariz. 94, 85 Pac. Rep. 1061, the Supreme Court of Arizona rejected the view that a person purchasing lots according to plat acquired an interest in all the streets shown on the plat, and held that where a part of the streets were fenced in and closed, such purchasers could not compel the opening of the streets without showing that their property was specially damaged. See also, *Bell v. Todd*, 51 Mich. 21; *State v. Hamilton*, 109 Tenn. 276.

¹ *New York v. Stuyvesant's Heirs*, 17 N. Y. 34. Mere unnumbered triangular space in plat, bounded by streets, without user by the public or other evidence of public right, held not to establish a dedication of such space as a common. *Oswald v. Genet*, 15 Tex. 118. Compare *Hanson v. Eastman*, 21 Minn. 509.

Mode of platting, and peculiarities of lines and spaces on plats as showing an intention to dedicate, or the reverse. See *Hanson v. Eastman*, 21 Minn. 509; *Saulet v. New Orleans*, 10 La. An. 81; *Yates v. Judd*, 18 Wis. 118; *Livaudais v. Municipality*, 5 La. An. 8; *Municipality No. 2 v. Palfrey*, 7 La. An. 497; *Xiques v. Bujac*, 5 La. An. 499; *Barclay v. Howell's Lessee*, 6 Pet. 498; *Burns v. Liberty*, 131 Mo. 372; *Kentucky Refining Co. v. Selva*, 41 S. W. 288; 19 Ky. Law Rep. 1071. The street need not be named as such if the lines clearly indicate that a street is intended. *San Francisco v. Burr* (Cal.), 36 Pac. 771; *Memphis & St. L. Packet Co. v. Gray*, 9 Bush (Ky.), 137; *Barnes v. Keobuk*, 94 U. S. 324; s. c. 4 Dillon, 593; *Elgin v. Beckwith*, 119 Ill. 367; *Indianapolis v. Kingsbury*, 101 Ind. 200; *Fisher v. Carpenter*, 36 Kan. 184; *Hurley v. Miss. & R. R. B. Co.*, 34 Minn. 143 (public wharf); *California City v. Howard*, 78 Mo. 88; *Price v. Breckenridge*, 77 Mo. 447; *Holst v. Streitz*, 16 Neb. 249; holding also that, in case of variance between the plat and survey as to monuments, the lines actually run and marked on the ground will control: *Central Land Co. v. Providence*, 15 R. I. 246; *Hunt v. Chicago*, 98 Ill. 147; *Reid v. Edina Bd. of Ed.*, 73 Mo. 295; *Gregory v. Lincoln*, 13 Neb. 352; *Burbach v. Schweinler*, 56 Wis. 386. Opposite case with *both line of Water Street defined and width indicated*. *McLaughlin v. Stevens*, 18 Ohio, 94, distinguished from *Barclay v. Howell's Lessee*, *supra*; *United States v. Chicago*, 7 How. 185; *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469; *Penny Pot Landing Case*, 16 Pa. St. 79; *Commonwealth v. McDonald*, 16 Serg. & Rawle (Pa.), 390; *Cowles v. Gray*, 14 Iowa, 1; *Grant v. Davenport*, 18 Iowa, 179; *Perrin v. N. Y. Central R. Co.*, 36 N. Y. 120; *Cook v. Hillsdale*, 7 Mich. 115; *Newport v. Taylor's Ex.*, 16 B. Mon. (Ky.) 699; *Baker v. Johnston*, 21 Mich. 319; *Van Valkenburgh v. Milwaukee*, 30 Wis. 338; *Columbus v. Dahn*, 36 Ind. 330; *People v. Klumpke* (water front, San Francisco), 41 Cal. 263; *Field v. Carr*, 59 Ill. 198; *Boehler v. Des Moines*, 111 Iowa, 417, distinguishing *Cowles v.*

§ 1086. **Acceptance by Public Necessary.** — A dedication must be made *to the public at large*, and not to a limited part thereof.¹ It has been said that dedication is essentially in the nature of a gift.² But as a common law dedication is to the public at large, it is *not necessary* that there shall be *some donee or grantee* or some well defined body politic for whose benefit the dedication is made.³ Hence the fact that there is *no municipal corporation* in existence which is *authorized to take advantage* of the dedication at the time when the dedicator evidences his intention to make it, will not defeat the dedication; upon such a corporation coming into existence, whether by incorporation or by extension of the corporate limits to include the *locus*, the right to take advantage of the dedication on behalf of the public will vest therein, if the dedication has not been previously revoked or recalled.⁴ But no dedication is complete

Gray, *supra*. Construction of plat is for the court. Hanson v. Eastman, 21 Minn. 509; and see State Hist. Assoc. v. Lincoln, 14 Neb. 336. Parol evidence to explain an erasure in recorded plat of a street. Smith v. Portland, 30 Fed. Rep. 734, Sawyer, J.

¹ Attorney-General v. Abbott, 154 Mass. 323; Tupper v. Huson, 46 Wis. 646; Terice v. Barteau, 54 Wis. 99; Poole v. Huskinson, 11 M. & W. 827. There cannot be a dedication to a limited part of the public, as to a parish. Poole v. Huskinson, 11 M. & W. 827. A dedication of a street is to the public, and not to the city within which it is situated. Miller v. Indianapolis, 123 Ind. 196. See also Gillian v. Frost, 25 Tex. Civ. App. 371. By a dedication the public at large acquires rights as well as the municipality. Smith v. San Luis Obispo, 95 Cal. 463. A dedication of land at common law or under the statute, must be made to the public and not to a private person or corporation. Pittsburgh. C. C. & St. L. Co. v. Warrum, 42 Ind. App. 179; 82 N. E. Rep. 934.

² "Dedication is essentially of the nature of a gift. There can be no gift without a surrender of the subject by the one, and acceptance of it by the other." Flack v. Green Island, 122 N. Y. 107.

³ Beatty v. Kurtz, 2 Pet. (U. S.) 566; Cincinnati v. White, 6 Pet. (U. S.) 431; Pawlet v. Clark, 9 Cranch. (U. S.) 292; Nelson v. Randolph, 222 Ill. 531; Attorney-General v. Abott, 154 Mass. 323. *Ante*, chap. on Corporate Property.

⁴ Grogan v. Hayward, 6 Sawy. C. C. 498; Doe v. Jones, 11 Ala. 63; Harn v. Dadeville, 100 Ala. 199; MacIntosh v. Nome, 1 Alaska, 492; Evans v. Blankenship, 4 Ariz. 307; Carpenteria School Dist. v. Heath, 56 Cal. 478; San Leandro v. Le Breton, 72 Cal. 170; Fulton v. Dover, 8 Houst. (Del.) 78; Savannah v. Ga. Steamboat Co., R. M. Charit. (Ga.) 342; Illinois & M. Canal Co. Trs. v. Havens, 11 Ill. 554; Waugh v. Leech, 28 Ill. 488; Waggeman v. North Peoria, 160 Ill. 277; Riverside v. MacLain, 210 Ill. 308; Nelson v. Randolph, 222 Ill. 531; Rhodes v. Brightwood, 145 Ind. 21; Pella Christian Church v. Scholte, 24 Iowa, 283, 293; South Covington & C. S. R. Co. v. Newport L. & A. Turnpike Co., 110 Ky. 691; Conkling v. Mackinaw City, 120 Mich. 67; Winona v. Huff, 11 Minn. 119; Mankato v. Willard, 13 Minn. 13; Meridian v. Poole, 88 Miss. 108; Jersey City v. Morris Canal & B. Co., 12 N. J. Eq. 547; Klinkener v. McKeesport School Directors, 11 Pa. St. 444; Llano v. Llano County, 5 Tex. Civ. App. 132; Gillean v. Frost, 25 Tex. Civ. App. 371; Corsicana v. Anderson, 33 Tex. Civ. App. 596.

In the case of a statutory dedication, it is held in *Illinois* that the fee will remain in abeyance until the corporation comes into existence. In the case of a common law dedication, the fee remains of course in the owner, burdened with the right of the public to use the street. Brooklyn v. Smith, 104 Ill. 429; Marsh v. Fairbury, 163 Ill. 401; North Chillicothe v. Burr,

until *acceptance* by the public.¹ In the absence of a statutory restriction or provision to the contrary, the acceptance may be by the *public at large*, and need not be by a municipality or other municipal or corporate authorities acting on behalf of the public. The right may exist in the public and have no other limitation than

185 Ill. 322. In *Missouri* it is held that in such a case the legal title still remains in the owner of the property after the creation of the municipal corporation in the absence of some subsequent act of the owner having the effect of a transfer. *Kansas City v. Scarritt*, 169 Mo. 471; *Campbell v. Kansas*, 102 Mo. 326.

¹ *Watson v. Carver*, 27 App. D. C. 555; *Gage v. Mobile*, & O. R. Co., 84 Ala. 224; *Moore v. Johnston*, 87 Ala. 220; *Mobile v. Fowler*, 147 Ala. 403; *People v. Reed*, 81 Cal. 70, 79; *Eureka v. Croghan*, 81 Cal. 524; *Niles v. Los Angeles*, 125 Cal. 572, 577; *McLean v. Llwellyn Iron Works*, 2 Cal. App. 346; *Healey v. Atlanta*, 125 Ga. 736; *Fisk v. Havana*, 88 Ill. 208; *Littler v. Lincoln*, 106 Ill. 353, 368; *Hamilton v. Chicago*, B. & Q. R. Co., 124 Ill. 235; *Augusta v. Tyner*, 197 Ill. 242; *Russell v. Chicago & M. El. R. Co.*, 205 Ill. 155; *Venice v. Madison County Ferry Co.*, 216 Ill. 345; *Stacey v. Glen Ellyn Hotel Co.*, 223 Ill. 546; *Swedish Evangelist Lutheran Church v. Jackson*, 229 Ill. 506; *Ingraham v. Brown*, 231 Ill. 256; *Dickerman v. Marion*, 122 Ill. App. 154; *Steinauer v. Tell City*, 146 Ind. 490; *Lightcap v. North Judson*, 154 Ind. 43, 46; *Huntington v. Townsend*, 29 Ind. App. 269; *Pittsburgh, C. C. & St. L. R. Co. v. Warrum*, 42 Ind. App. 179; 82 N. E. Rep. 934; *Gillespie v. Duling*, 41 Ind. App. 217; 83 N. E. Rep. 728; *Carter v. Barkley*, 137 Iowa, 510; 115 N. W. Rep. 21; *State v. Wilson*, 42 Me. 9; *White v. Bradley*, 66 Me. 254; *Dorman v. Bates Mfg. Co.*, 82 Me. 438; *Bangor v. Maine Cent. R. Co.*, 97 Me. 151, 157; *Baltimore v. Broumel*, 86 Md. 153; *Valentine v. Hagerstown*, 86 Md. 486, 488; *People v. Jones*, 6 Mich. 176, 183; *Baker v. Johnston*, 21 Mich. 319; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Wayne County v. Miller*, 31 Mich. 447; *Cass County v. Banks*, 44 Mich. 467; *Chapman v. Sault Ste Marie*, 146 Mich. 23; *Becker v. St. Charles*, 37 Mo. 13; *Brinck v. Collier*, 56 Mo. 164; *St. Louis v. St. Louis University*, 88 Mo. 155, 158; *Vossen v. Dautel*, 116 Mo. 379; *Baker v. Squire*,

143 Mo. 92, 98; *Cassidy v. Sullivan*, 75 Neb. 847; *Arnold v. Orange*, 73 N. J. Eq. 280; 66 Atl. Rep. 1052; *Holdane v. Cold Spring*, 21 N. Y. 474; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261, 269; *Flack v. Green Island*, 122 N. Y. 107; *People v. Underhill*, 144 N. Y. 316; *Palmer v. Palmer*, 150 N. Y. 139, 147; *Buffalo v. Delaware, L. & W. R. Co.*, 190 N. Y. 84, 97; *Newton v. Dunkirk*, 106 N. Y. Supp. 125; *Lent v. Tilyou*, 106 N. Y. App. Div. 189, 194; *Palmer v. East River Gas Co.*, 115 N. Y. App. Div. 677, 682; *Witte v. Koerner*, 123 N. Y. App. Div. 824; *Cincinnati & M. V. R. Co. v. Roseville*, 76 Ohio St. 108; *Commonwealth v. Shoemaker*, 14 Pa. Super. Ct. 194; *Oakley v. Luzerne*, 25 Pa. Super. Ct. 425; *International & G. N. R. Co. v. Cuneo* (Tex. Civ. App.), 108 S. W. Rep. 714; *Buntin v. Danville*, 93 Va. 200, 204.

"The owner of land can neither create nor destroy a highway over it without the *co-operation of the public*. He may lay out a proposed street on his land, grade it and offer it to the public for use, but it does not become a public highway until it is accepted as such. At any time before acceptance, he can withdraw his tender of dedication; but after acceptance, his control ceases, except that he may still use his land for such purposes as do not interfere with its free use for all street purposes. When accepted, it becomes *ipso facto* subject to the easement of a street over it for all proper street uses, until the public yields up its right in some manner provided by law." *Per Vann, J.*, in *Buffalo v. Delaware, L. & W. R. Co.*, 190 N. Y. 84, 97. The essentials of a common law dedication are thus stated by *Wilkin, J.*, in *Stacy v. Glen Ellyn Hotel Co.*, 223 Ill. 546, 548, "In order to constitute a dedication at common law it is essential (1) that there be an *intention* on the part of the proprietor of the land to dedicate the same to public use; (2) that there be an *acceptance* thereof by the public; and (3) that the *proof* of these facts be clear, satisfactory and unequivocal."

the wants of the community at large.¹ In the absence of a statutory restriction or prohibition, it is generally held that *acceptance* by the public may be shown *by long continued user* without any acts or conduct on behalf of the municipal corporation.² Whether the

¹ *New Orleans v. United States*, 10 Pet. (U. S.) 662, 713, *per Mr. Justice McLean*.

² *Watson v. Carver*, 27 App. D. C. 555; *Mobile v. Fowler*, 147 Ala. 403; *Stone v. Brooks*, 35 Cal. 489, 497; *People v. Davidson*, 79 Cal. 166, 170; *Smith v. San Luis Obispo*, 95 Cal. 463, 470; *Hall v. Kauffman*, 106 Cal. 451; *Helm v. McClure*, 107 Cal. 199, 204; *Riley v. Hammel*, 38 Conn. 574; *Hall v. Meriden*, 48 Conn. 416; *Hartford v. New York & N. E. R. Co.*, 59 Conn. 250; *Kent v. Pratt*, 73 Conn. 573; *Summers v. State*, 51 Ind. 201, 204; *Green v. Elliott*, 86 Ind. 53; *German Bank v. Brose*, 32 Ind. App. 77; *Hammond v. Maher*, 30 Ind. App. 286; *Gillespie v. Duling*, 41 Ind. App. 217; 83 N. E. Rep. 728; *Taraldson v. Lime Springs*, 92 Iowa, 187; *Keokuk v. Cosgrove*, 116 Iowa, 189; *Wyandotte City Cemetery Assoc. v. Meinger*, 14 Kan. 312, 316; *Raymond v. Wichita*, 70 Kan. 523; *Armistead v. Vicksburg*, S. & P. R. Co., 47 La. An. 1381; *Abbott v. Cottage City*, 143 Mass. 521, 525; *Attorney-General v. Abbott*, 154 Mass. 323, 328; *Diamond Match Co. v. Ontonagon*, 72 Mich. 249; *Wilder v. St. Paul*, 12 Minn. 192, 211; *Morse v. Zeize*, 34 Minn. 35, 37; *Price v. Breckenridge*, 92 Mo. 378; *Baker v. Vanderburg*, 99 Mo. 378; *Cassidy v. Sullivan*, 75 Neb. 847; *Keyport v. Freehold & A. R. Co.*, 74 N. J. L. 480; *Holdane v. Cold Spring*, 21 N. Y. 474, 479; *Palmer v. East River Gas Co.*, 115 N. Y. App. Div. 677, 682, *per Gaynor, J.*; *Witte v. Koerner*, 123 N. Y. App. Div. 824; *Deadwood v. Whittaker*, 12 S. Dak. 515, 522; *Gillean v. Frost*, 25 Tex. Civ. App. 371; *Spencer v. Arlington*, 49 Wash. 121; 94 Pac. Rep. 904; *Pence v. Bryant*, 54 W. Va. 263, 269; *Harper's Ferry v. Kaplon*, 58 W. Va. 482; *Buchanan v. Curtis*, 25 Wis. 99; *Childs v. Nelson*, 69 Wis. 125; *Smith v. Beloit*, 122 Wis. 396.

"The acceptance may be an express one, evidenced by some formal act of the public authorities; or it may be one implied from their acts, such as repairing, improving, lighting, or otherwise assuming control of the lands dedicated, or it may be implied from user by the public for the pur-

poses for which it is dedicated. . . . When the dedication is beneficial or greatly convenient or necessary to the public, an acceptance will be implied from slight circumstances." *Alden Coal Co. v. Challis*, 200 Ill. 222. See to same effect, *Owen v. Brookport*, 208 Ill. 35, 44.

The different methods in which a highway may be created are thus described by *Vann, J.*, in *Cohoes v. Delaware & H. Canal Co.*, 134 N. Y. 397, 402. "Public highways may be created in four ways: 1. By proceedings under statute. 2. By prescription, or where land is used by the public for a highway for twenty years, with the knowledge, but without the consent, of the owner. The presumption of a grant of the right of way springs from the mere lapse of said period of time in connection with the adverse user by the public. 3. By dedication through offer and implied acceptance, or where the owner throws open his land intending to dedicate it for a highway, and the public use it for such a length of time that they would be seriously inconvenienced by an interruption of the enjoyment. This rests upon the principle that the owner is estopped from revoking his offer after the public have acted on it for so long a period that it would be a fraud upon them if he were permitted to do so. No particular length of time is required to effect such a dedication as every case of an estoppel *in pais* necessarily depends upon its own facts. 4. By dedication through offer and actual acceptance, or where the owner throws open his land and by acts or words invites acceptance of the same for a highway, and the public authorities, in charge of the subject, formally, or in terms accept it as a highway. In the absence of an actual conveyance the owner does not part with his title to the land, but only with the right to possession for the purpose of a highway. Although there has been some conflict of opinion upon the subject, we understand this to be the law as established by the weight of authority in this State."

Kentucky. In this State it was

user by the public is of such a nature as to constitute an acceptance is a question of fact,¹ depending upon the circumstances of the particular case. No general rule can be laid down defining the *duration or the character of the public user* which will be deemed to be an acceptance of the dedication, but it may be said that in general it must be of such a nature and continue for such a time as to render the reclamation of the lands by the owner unjust, inequitable and improper as impairing the public interests and affecting private rights.² The elements of estoppel are an important

formerly held that user by the general public does not constitute an acceptance of dedicated lands for any purpose, and that the acceptance must be effected by the act of the local authorities. *Gedge v. Commonwealth*, 9 Bush (Ky.), 61, 64; *Wilkins v. Barnes*, 79 Ky. 323; *Louisville & N. R. Co. v. Survant*, 96 Ky. 197. But in a later case the court reconsidered these decisions, and held that long continued public use of a way was sufficient to constitute an acceptance of the dedication, "when the road is a benefit to the public and not a burden." *Riley v. Buchanan*, 116 Ky. 625.

Massachusetts. This State seems to be an exception to the rule that a dedication of a public way may be accepted by user by the general public. For all purposes it would seem to be the rule that the acceptance of a *public way* must be by the act of the public authorities. In *Moffatt v. Kenny*, 174 Mass. 311, 313, *Knowlton, J.*, thus summarized the rule adopted by the courts of that State: "In this Commonwealth there can be no public way by dedication without an acceptance of it by the public authorities. Before the enactment of St. 1846, c. 203, such an acceptance could be shown either by a vote to accept or by circumstances giving rise to a strong implication, such as frequent and long-continued use by the public, and repairing, lighting, or other significant acts of persons authorized to represent the city or town in that behalf. *Hemphill v. Boston*, 8 Cush. (Mass.) 195. While public use may be important as evidence, it is not in itself sufficient to show an acceptance. Since the enactment of the statute above referred to there can be no effectual acceptance without a laying out of a way in the ordinary mode prescribed by the statutes. Pub. Sts. c. 49, § 94.

Hobbs v. Lowell, 19 Pick. (Mass.) 415; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. (Mass.) 332; *Morse v. Stocker*, 1 Allen (Mass.), 150; *Hayden v. Stone*, 112 Mass. 346; *Guild v. Shedd*, 150 Mass. 255." *Holmes, J.*, points out in *Abbott v. Cottage City*, 143 Mass. 521, that no distinction has been made in Massachusetts between what is necessary to make a town liable for a defect and what is sufficient to deprive the owner of his rights; and that in the case of public ways the acceptance for either purpose must be by the public authorities. Where, however, the dedication is of a public park, the court in the case last cited qualified the rule, holding that as the use is in the public at large there is no substantial ground upon which acceptance by the town can be declared to be necessary; and that apart from the considerations specially applicable to highways, the so-called acceptance which is essential to perfect a dedication may be indicated by common user; or, as it might be better put, acceptance will be presumed if the gift is beneficial, and user is evidence that it is beneficial. In *Attorney-General v. Abbott*, 154 Mass. 323, a case also involving the acceptance of a dedication of a public park, the court said: "The acceptance of such a dedication at common law need not appear of record, and need not be by the town. The acceptance is by the public at large, and the principal thing to show it is use by the public. There is no need of a formal grantee. The fee remains in the original owner." See also, *Nicodemus v. Southborough*, 173 Mass. 455, 459; *Slater v. Gunn*, 170 Mass. 509, 512; *Commonwealth v. Low*, 3 Pick. (Mass.) 408.

¹ See *post*, § 1093.

² *Niles v. Los Angeles*, 125 Cal. 572; *Pence v. Bryant*, 54 W. Va. 263, 269.

feature in a completed dedication. After lands have been set apart for public use and enjoyed as such and private and individual rights have been acquired with reference thereto, the law considers that there is something in the nature of an estoppel *in pais* which precludes the original owner from revoking the dedication and reclaiming the lands from the public use.¹

§ 1087 (642). **Acceptance by Municipal Authorities.** — But the acceptance of lands dedicated to a public use may also be established by the acts of the municipal authorities, for the municipality is the trustee of the public and its agent in applying the lands to the public use to which they are dedicated. For some purposes, acceptance by the municipal authorities is essential, and acceptance by mere public user is not sufficient. Thus, in order to charge the municipality or local district with the duty to repair, or to make it liable for injuries for suffering the street or highway to be or remain defective, there must be more than an acceptance of the dedication by general public user. There must be an acceptance by the municipality, or by the proper or authorized local public authorities.² It has,

¹ *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 437; *per Mr. Justice Thompson*. See also, *Morgan v. Chicago & A. R. Co.*, 96 U. S. 716; *Denver v. Clements*, 3 Colo. 484. "Dedication is but a phrase of estoppel." *Gar-route J.*, in *Prescott v. Edwards*, 117 Cal. 298. In *Noyes v. Ward*, 19 Conn. 250, 265, *Storrs, J.*, said: "This doctrine [of dedication] rests on the intelligible, rational, and wholesome principle of common law that whenever a person has made representations or pursued a line of conduct with a view to lead or induce others to adopt a particular course of action, and such representations or conduct have produced that effect, they shall be held to be binding and conclusive against him, and he shall not afterwards be permitted to detract or repudiate them to the injury of those who have been induced thus to act."

² *Stone v. Brooks*, 35 Cal. 489, 497; *Archer v. Salinas City*, 93 Cal. 43; *Salida v. McKinna*, 16 Colo. 523, 527, citing text; *Parsons v. Atlanta University*, 44 Ga. 529; *Georgia R. & B. Co. v. Atlanta*, 118 Ga. 486; *Sandersville v. Hurst*, 111 Ga. 453; *Kelsoe v. Oglethorpe*, 120 Ga. 951, 953; *People v. Worth Tp. Highway Com'rs*, 52 Ill. 498; *Littler v. Lincoln*, 106 Ill. 353, 370, citing text; *Woollacott v. Chicago*, 187 Ill. 504, 518; *Russell v. Lincoln*, 200 Ill. 511, 517; *Willey v. People*, 36 Ill. App. 609; *Indianapolis v. McClure*, 2 Ind. 147; *Burroughs v. Cherokee*, 134 Iowa, 429, 432; *Gedge v. Commonwealth*, 9 Bush (Ky.), 61, 64; *Cochran v. Shepherdsville (Ky.)*, 43 S. W. Rep. 250, quoting text; *State v. Wilson*, 42 Me. 90; *Mayberry v. Standish*, 56 Me. 342; *Bartlett v. Bangor*, 67 Me. 460, 466, quoting text; *Kennedy v. Cumberland*, 65 Md. 514, 521, quoting text; *State v. Kent County*, 83 Md. 377; *Baltimore v. Broumel*, 86 Md. 153; *Ogle v. Cumberland*, 90 Md. 59, 62, citing text; *Durgin v. Lowell*, 3 Allen (Mass.), 398; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. (Mass.) 332; *Hayden v. Stone*, 112 Mass. 346; *Abbott v. Cottage City*, 143 Mass. 521, 524; *Moffatt v. Kenny*, 174 Mass. 311, 314; *Stickley v. Sodus*, 131 Mich. 510; *Chapman v. Sault Ste Marie*, 146 Mich. 23; *St. Paul & D. R. Co. v. Duluth*, 73 Minn. 270, 275; *Tegarden v. McBean*, 33 Miss. 283; *Harrison County v. Seal*, 66 Miss. 129; *Moore v. Cape Girardeau*, 103 Mo. 470; *Hunter v. Weston*, 111 Mo. 176; *Meiners v. St. Louis*, 130 Mo. 274; *Baldwin v. Springfield*, 141 Mo. 205, 212; *Downend v. Kansas City*, 156 Mo. 60; *Johnson v. St. Joseph*, 96 Mo. App. 663; *Knight v. Kansas City*, 113 Mo.

however, also been held that an acceptance by the municipal authorities is implied from user by the public when the use is

App. 561, 564; *Foster v. Kansas City*, 114 Mo. App. 728, 730; *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13; *Hoboken Land & I. Co. v. Hoboken*, 36 N. J. L. 540, 545; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Attorney-General v. Morris & E. R. Co.*, 19 N. J. Eq. 386; *Booraem v. North Hudson C. R. Co.*, 39 N. J. Eq. 465; *Brigantine v. Holland Trust Co. (N. J. Eq.)*, 35 Atl. Rep. 344; *Oswega v. Oswego Canal Co.*, 6 N. Y. 257; *Lewis v. New York, L. E. & W. R. Co.*, 123 N. Y. 496; *Stapleton v. Newburgh*, 9 N. Y. App. Div. 39; *Steel v. Huntingdon*, 191 Pa. 627; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. 318, 322; *Downing v. Coatesville*, 214 Pa. 291; *State v. Richmond*, 1 R. I. 49; *Blodget v. Royalton*, 14 Vt. 288; *Hyde v. Jamaica*, 27 Vt. 442, 443; *Folsom v. Underhill*, 36 Vt. 580; *Tower v. Rutland*, 56 Vt. 28; *Winchester v. Carroll*, 99 Va. 727, 739, citing text; *Richmond v. Gallego Mills Co.*, 102 Va. 165, 171, citing text; *Lynchburg Traction & L. Co. v. Guill*, 107 Va. 86; *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, citing text; *Pence v. Bryant*, 54 W. Va. 263, citing text.

Connecticut. The rule in this State is unique, and it is believed that it is not adopted in any other State. Acceptance by the public by public user is sufficient to charge the town with liability for injuries through failure to repair. *Green v. Canaan*, 29 Conn. 157; *Guthrie v. New Haven*, 31 Conn. 308. Not only is this the case, but it is held that the municipality has no power, independently of public user, and without express legislative authority, to establish a highway by accepting a dedication for that purpose. Thus, in *Makepeace v. Waterbury*, 74 Conn. 360, an action to recover damages for personal injuries, *Hamersley, J.*, said, "The acceptance must be by the 'unorganized public' and not by formal action of a municipality. Neither town nor city has power to establish a highway by corporate vote, accepting land given for that purpose, when the legislature has not given it specific authority. Acts of a municipality may, however, tend to show a use by the public, as well as its nature and extent, and for this reason such acts may be relevant to the question of

acceptance by the public." Citing, *Noyes v. Ward*, 19 Conn. 250, 264; *Green v. Canaan*, 29 Conn. 157, 163; *Guthrie v. New Haven*, 31 Conn. 308, 321; *Hartford v. New York & N. E. R. Co.*, 59 Conn. 250, 252. Hence, it has been held that where a dedication was attempted by platting and by a quitclaim deed by the owner of the land to a trustee for the city, and afterwards the trustee conveyed the dedicated lands to the city, referring in the conveyance to the map on which the streets were laid down, the dedicated lands did not become a highway without actual user by the public although other streets on the map were accepted by such use, and although there had been a vote by the city to accept the conveyance of the streets. *New York, N. H. & H. R. Co. v. New Haven*, 46 Conn. 257. See also, *Hall v. Meriden*, 48 Conn. 416, 431.

Indiana. It has been held that acceptance by public user is sufficient to charge the municipality with liability for defects without the proof of any formal acceptance by the municipality or the adoption of the street or way by the municipal officers by other acts. *Hammond v. Maher*, 30 Ind. App. 286. But it is to be observed that the only authority cited which supports this doctrine is the case of *Green v. Canaan*, 29 Conn. 157, which as shown above is founded upon the peculiar doctrine adopted in Connecticut. The other cases cited only support the view that there may be an acceptance by user so far as the public, as distinguished from the municipal, right, is concerned.

It has been held that an indictment for obstructing a highway or street will not lie when the dedication of the highway or street has not been accepted by the municipal authorities. *Gedge v. Commonwealth*, 9 Bush (Ky.), 61; *State v. Bradbury*, 40 Me. 154; *Hemphill v. Boston*, 8 Cush. (Mass.) 195; *Commonwealth v. Low*, 3 Pick. (Mass.) 408; *Commonwealth v. Belden*, 13 Metc. (Mass.) 10, 15; *Commonwealth v. Moorehead*, 118 Pa. 344; *Commonwealth v. Llewellyn*, 14 Pa. Super. Ct. 214; *State v. Richmond*, 1 R. I. 49; *Commonwealth v. Kelly*, 8 Gratt. (Va.) 632. See also, *People v. Underhill*, 144 N. Y. 316. But, as has been shown, in some States,

continued for a *period corresponding with the statutory limitation of real actions*.¹ The methods in which the municipality may accept lands dedicated to public use, and become liable for the maintenance of streets, ways and other public places, are of great variety, and may be said to include every act done by the municipality through its proper officers in the exercise of its jurisdiction and control of public streets and highways. When property is dedicated to public use for a street, way or other purpose, the acceptance by the municipality *need not be express* and appear of record, but may be implied from any acts showing the *recognition* by the municipality of its existence as a public street or highway and the *assumption of control* over the same as by repairs and improvements, knowingly made and ordered or knowingly paid for by the local authorities, which has the legal power to adopt the street or

by statute, a public highway cannot exist without acceptance by the municipal authorities, and some of these decisions may have been rendered on the ground that in the particular State, acceptance by the act of the corporate authorities was necessary under legislative requirement. As to Massachusetts, see § 1086, *ante*. In *State v. Birmingham*, 74 Iowa, 407, an indictment for obstructing a highway was sustained although there had been no acceptance by the municipal authorities.

In *State v. Carver*, 5 Strob. (S. Car.) L. 217, the defendant was indicted for obstructing two streets in an addition to a town. The streets were designated on a plat by the proprietor, and the defendant's lots were bounded thereby. Other parties were interested in the same dedication, and, against their protest, defendant fenced up the streets in front of his lots. These had never been accepted by the town authorities, or worked upon. It was held that the defendant could not be convicted on this evidence, and that the mere assertion of the public right to the street by the prosecuting officer of the State, by indictment for their obstruction, was not sufficient. The court, admitting that there was a dedication so far as the proprietor, by any act of his, could effect it, remarked that, "it is very clear, from the authorities, that without some act of acceptance or some use by the public, the owner of the land cannot create a street in a town, or a public road in the country. The reason is very clear. The opening

and repairing of streets and roads impose an expense on the public, and in this State (*Georgetown St. Com'rs v. Taylor*, 2 Bay (S. Car.), 282), subject the authorities, whose duty it is to repair, to indictment for neglect of duty. Now, this charge and liability can only be imposed by law; but if the simple act of dedication could impose them, then they would be imposed, not by law, but by the will of an individual. All the cases, both English and American, sustain these positions. *Rex v. Leake*, 5 Barn. & Ad. 469, does not decide that there need be no acceptance; it decides only that where a road has been established, by use, as a public road, the parish was bound to repair, without any act of adoption. The use by the public was the same as adoption by the parish." Followed, *Aiken T. C. v. Lithgoe*, 7 Rich. (S. Car.) Law, 435.

¹ *Jennings v. Tisbury*, 5 Gray (Mass.), 73; *Bassett v. Harwich*, 180 Mass. 585; *Gilder v. Brenham*, 67 Tex. 345; *Winchester v. Carroll*, 99 Va. 727, 739. See also *Kennedy v. Cumberland*, 65 Md. 514, 521; *Baltimore v. Broumel*, 86 Md. 153.

But in *Missouri* it is held that mere user by the public for any length of time, although it may be for the statutory period of prescription, will not impress upon the dedicated lands the character of public streets, and thereby cast upon the municipality the obligation to keep them in repair or make it liable for failure to do so. *Downend v. Kansas City*, 156 Mo. 60.

highway.¹ If the property is dedicated by the act of the municipality itself, no acceptance by the municipality is necessary.² An act of

¹ *Salida v. McKinna*, 16 Colo. 523; *Durango v. Davis*, 13 Colo. App. 285; *Shirk v. Chicago*, 195 Ill. 298; *Hall v. Breyfogle*, 162 Ind. 494, 495; *Burroughs v. Cherokee*, 134 Iowa, 429, 438; *Abilene v. Wright*, 4 Kan. App. 708; *Louisville v. Snow's Admr. (Ky.)*, 54 S. W. Rep. 860; *Paducah v. Johnson (Ky.)*, 93 S. W. Rep. 1035; *Kennedy v. Cumberland*, 65 Md. 514, 521; *Smith v. Buffalo*, 90 Hun (N. Y.), 118, 125; *Flack v. Green Island*, 122 N. Y. 107, 115, citing text; *Uhlefeldt v. Mount Vernon*, 76 N. Y. App. Div. 349; *Newton v. Dunkirk*, 121 N. Y. App. Div. 296, 298; *Guinn v. Eaves*, 117 Tenn. 524; *Richmond v. Gallege Mills*, 102 Va. 165, 171.

Acceptance by the municipal authorities of dedicated ways has been inferred by the courts from the following acts: Ordinance accepting dedicated streets and declaring them to be public streets, *Eureka v. Gates*, 137 Cal. 89; *Dallas v. Gibbs*, 27 Tex. Civ. App. 275; see also *Elliot v. Atlantic City*, 149 Fed. Rep. 849; *Peoples Traction Co. v. Atlantic City*, 71 N. J. L. 134; ordinance laying out street, *Shirk v. Chicago*, 195 Ill. 298; repairs made and ordered, *Dayton v. Rutland*, 84 Ill. 279; *Manderschid v. Dubuque*, 29 Iowa, 73; *State v. Kent County*, 83 Md. 377, 382, citing text; *Hayden v. Attleborough*, 7 Gray (Mass.), 338; *Eckerson v. Haverstraw*, 6 N. Y. App. Div. 102; *Spencer v. Arlington*, 49 Wash. 121; 94 Pac. Rep. 904; grading, curbing, and notifying owners to construct sidewalks, *Riddle v. Charlestown*, 43 W. Va. 796, 798; working highway, *Johnson v. State*, 1 Ga. App. 195; occasional repairs coupled with long user, *Fowler v. Linquist*, 138 Ind. 566; *Commonwealth v. Belden*, 13 Metc. (Mass.) 10; approval of plat and improvement of street by order of city council, *Seattle v. Hill*, 23 Wash. 92; grading street, *Oettinger v. District of Columbia*, 18 App. D. C. 375; paving and curbing, *Haxton v. Kansas City*, 109 Mo. 53, 62; grading, ditching, and sidewalking streets with cinders, *Conner v. Nevada*, 188 Mo. 148, 159; constructing public sewer at expense of municipality

Arnold v. Orange, 73 N. J. Eq. 280; 66 Atl. Rep. 1052; adoption of ordinance for construction of sewer, *Matter of Hunter*, 163 N. Y. 542, rev'g 47 N. Y. App. Div. 102; *Philadelphia v. Thomas' Heirs*, 152 Pa. 494; improvement of streets and highways, *Miller v. Jonathan Creek Highway Comrs.*, 125 Ill. App. 431; *Parriott v. Hampton*, 134 Iowa, 157; *Lyons v. Mullen*, 78 Neb. 151; 110 N. W. Rep. 743; improvement of street and levy of special assessment therefor, *Nichols v. New England Furn. Co.*, 100 Mich. 230; expenditure of public money on streets, *Weida v. Hanover*, 30 Pa. Super. Ct. 424; adopting official map showing street, *Gibbs v. Ashford*, 27 Tex. Civ. App. 629; maintaining street lamps and granting permission to gas company to lay mains, *Palmer v. East River Gas Co.*, 115 N. Y. App. Div. 677; or electric light poles, *Durango v. Davis*, 13 Colo. App. 285; but not lights erected by a private corporation, although they are maintained by the village, *Arnold v. Orange*, 73 N. J. Eq. 280; 66 Atl. Rep. 1052; notice of opening of street, *Parriott v. Hampton*, 134 Iowa, 157; taking possession of water pipes, hydrants, &c., and connecting them with city's general water system; *Chicago v. Smith*, 204 Ill. 356; agreement by village with city granting city right to lay water pipes through certain streets as shown on a map, *Arnold v. Orange*, 73 N. J. Eq. 280; 66 Atl. Rep. 1052; digging well in street, *Aiken v. Lithgoe*, 7 Rich. Law (S. Car.), 435; clearing away snow from street and requiring owner to clear sidewalks, *Stapleton v. Newburgh*, 9 N. Y. App. Div. 39; bringing an action of ejectment, *Atlantic City v. Groff*, 64 N. J. L. 527; *Hohokus v. Erie R. Co.*, 65 N. J. L. 353; *Atlantic City v. Snee*, 68 N. J. L. 39.

The method prescribed by charter for the acceptance of dedicated streets by adopting a special ordinance held *not to exclude common law methods* of acceptance by the municipality. *Arnold v. Orange*, 73 N. J. Eq. 280; 66 Atl. Rep. 1052; *Matter of Hunter*, 164 N. Y. 365.

In *Michigan* it has been held that

² When the dedication is made by the municipality itself, acceptance by the municipality is necessarily implied

from the act of dedication. *Attorney-General v. Tarr*, 148 Mass. 309, 315.

*the legislature adopting the way is sufficient to bind the municipality and to charge it with responsibility.*¹

acceptance by a city of land dedicated for a street *may be inferred* from a resolution *authorizing the construction of a railroad* through the same. *Michigan Central R. Co. v. Bay City*, 129 Mich. 264. But in *Illinois* the *contrary view* has been adopted that until a dedicated way has been accepted by the municipal authorities, it is not a public street in such sense that a city can grant the right to lay street railroad tracks therein. *Russell v. Chicago & M. El. R. Co.*, 205 Ill. 155.

Iowa. By statute it is provided that no street or alley, which shall be hereafter dedicated to public use by the proprietor of the ground in any city, shall be deemed a public street or alley or to be under the use or control of the city council, unless the dedication shall be accepted and confirmed by an ordinance specially passed for such purpose. It was held that a street is not a public street in the absence of the ordinance prescribed by statute. *Laughlin v. Washington*, 63 Iowa, 652. But later decisions lay down the rule that the statute does not prevent acceptance being shown by other acts of the city than the adoption of a formal ordinance. *Keokuk v. Cosgrove*, 116 Iowa, 189. Thus if the city assumes control and by ordinance directs the grading of a street, it becomes liable for non-repair, although there is no ordinance expressly accepting the street. *Byerly v. Anamosa*, 79 Iowa, 204. The statute only applies to cities, and not to towns. *Burlington, C. R. & N. R. Co. v. Columbus Junction*, 104 Iowa, 110.

When a dedicated highway has been accepted by the municipality, user by the public is not essential or necessary. The way may be dedicated by the owner, accepted by the town or city authorities, and it becomes a way at once, although never used by the public and not essential to the public convenience. *Hayden v. Stone*, 112 Mass. 346, 350. Where an owner dedicated, upon a map, a strip of land within a town for a street, and afterwards, *by a new charter, the town limits were reduced* so as not to include the land, it was held that the city could not accept the land so dedicated, because it had no extra-territorial jurisdiction, and that the subsequent extension of the limits to cover the property did not cure the inability to accept. *St. Louis v. St. Louis University*, 88 Mo. 155. Other proof of adoption. *Blodgett v. Royaltown*, 17 Vt. 40; *Detroit v. Det. & Milw. R. R. Co.*, 23 Mich. 173; *Baker v. Johnston*, 21 Mich. 319; *Shartle v. Minneapolis*, 17 Minn. 308; *Emery v. Washington*, 1 Brayton (Vt.), 128; *Parsons v. Atlanta Univ. Trs.*, 44 Ga. 529; *Rose v. St. Charles*, 49 Mo. 509. A city cannot accept a *dedication* for street purposes of lands *beyond its limits*. *St. Louis v. St. Louis University*, 88 Mo. 155. See also *Steealey v. Kansas City*, 179 Mo. 400. Index, *Boundaries*; *Charter*; *Property*.

In *Ontario*, it is provided by statute that municipal corporation shall not be liable to keep in repair any roads, streets, bridge or highway laid out by any private person until established by by-law of the corporation or other-

¹ *Rudolph v. Ackerman*, 58 N. Y. App. Div. 596.

Where the *State* dedicates streets by platting a city upon its own land, the act is, of itself, an acceptance by the public. *Reilly v. Racine*, 51 Wis. 526; *supra*, § 1076, note. A statute which declares a survey showing a street to be an official document and a correct delineation of the street, held to operate as an acceptance of the street. *Palmer v. Clinton*, 52 Ill. App. 67. An act of the general assembly incorporating a town providing that "all the tract of land included in the plan of said town be and is hereby declared to be the limits of the same in con-

formity to said plan," is an adoption of the plan or map as part of the charter, with its streets there marked out and dedicated; and the acceptance of the charter operates, *ipso facto*, as an acceptance of such dedication without further action on the part of the municipality. *Demopolis v. Webb*, 87 Ala. 659; *Webb v. Demopolis*, 95 Ala. 116. Under the *Ohio* Municipal Corporations Act, a city cannot be charged with the duty of repairing streets dedicated, unless its assent to the dedication be given. *Wisby v. Boute*, 19 Ohio St. 238. See also *Steubenville v. King*, 23 Ohio St. 610; *Lough v. Machlin*, 40 Ohio St. 332.

§ 1088. **Partial Acceptance of Dedication.**—There may be an acceptance of a *part* as distinguished from the whole of the lands dedicated to a public way or street or other public use.¹ The question of acceptance is always one of fact, and the use of a part of a dedicated street may be of such a nature as to show an *intention to accept the whole* street. This is peculiarly so where a street is laid out by stakes, or by the erection of fences, or on a map, as of

wise assumed for public use by such corporation in the manner provided by statute. *Biggar Mun. Man.* (Canada), 1900, p. 808.

In *Illinois*, it has been held that where an addition to a city is platted, and the city extends its limits by taking in the whole addition platted, the acceptance of the plat for that purpose by the municipal authorities and the inclusion of the territory covered by the plat within the limits of the municipality is not an acceptance of the streets and alleys shown on the plat. *Russell v. Chicago & M. El. R. Co.*, 205 Ill. 155; *Venice v. Madison County Ferry Co.*, 216 Ill. 345; *Reichert Milling Co. v. Freeburg*, 217 Ill. 384, 388. But in *Iowa*, in the case of a statutory dedication it was held that the acceptance on the part of an incorporated town or city of an amended charter which included an addition previously laid off and platted, amounted to acceptance of such addition and the streets and alleys thereon. *Des Moines v. Hall*, 24 Iowa, 234. Similarly it has been held that an act reincorporating a town as "laid off in streets, lots, and alleys" furnishes proof of acceptance of the dedication of streets and alleys already laid off. *Depriest v. Jones* (Va.), 21 S. E. Rep. 478. See also to the same effect in the extension of the city limits, *Little Rock v. Wright*, 58 Ark. 142.

¹ *Mobile v. Fowler*, 147 Ala. 403, 407; *Wolfskill v. Los Angeles County*, 86 Cal. 405; *Hall v. Meriden*, 48 Conn. 416; *Kelsoe v. Oglethorpe*, 120 Ga. 951, 954; *Chicago v. Drexel*, 141 Ill. 89, 109; *Jordan v. Chenoa*, 166 Ill. 530; *Hewes v. Crete*, 175 Ill. 348; *Augusta v. Tyner*, 197 Ill. 242, 246; *Russell v. Chicago & M. El. R. Co.*, 205 Ill. 155, 167; *Reichert Milling Co. v. Freeburg*, 217 Ill. 384, 387; *Bell v. Burlington*, 68 Iowa, 296; *Johnson v. Burlington*, 95 Iowa, 197, 200; *Kennedy v. Cumberland*, 65 Md. 514, 522; *Field v. Manchester*, 32 Mich. 279, 281;

Detroit v. Beecher, 75 Mich. 454, 469; *Fulton v. Mehrenfield*, 8 Ohio St. 440, 448; *State v. Trask*, 6 Vt. 355, 367.

In *Bell v. Burlington*, 68 Iowa, 296, a plat was made and filed which showed a street sixty feet in width on the westerly side of the property. It was apparently intended that a contribution of thirty feet to the street should also be made from the adjoining property. The city used and improved only the easterly thirty feet of the strip of sixty feet shown on the plat and the adjacent lot owners had enclosed and improved the westerly thirty feet thereof for a period of thirty years. It was held that it must be conclusively presumed that only the *portion improved and used* by the city had been *accepted* as a street. See to the same effect, *Johnson v. Burlington*, 95 Iowa, 197, 200. A dedicated street becomes a highway only to the extent to which it is actually opened and used. *Commonwealth v. Royce*, 152 Pa. 88; *Oakley v. Luzerne*, 25 Pa. Super. Ct. 425.

In *South Amboy v. New York & L. B. R. Co.*, 66 N. J. L. 623, 626, there was a dedication of certain streets by map or plat; and a railroad company having taken possession of one of the streets, the city brought ejectment against it to recover possession of the street. The court, unnecessarily perhaps, used language to the effect that when lands are platted the lands dedicated thereby must be accepted as an entirety. *Van Syckel, J.*, said: "Dedication of a street is a *dedication of it in its entirety*. The equivalent which the donor receives is presumably the benefit he may derive from it when accepted by the public. Manifest injustice might be done to the donor, and he might be deprived of any substantial advantage, if the public could select and accept a fraction of the street and reject the balance. An acceptance of part must constitute an acceptance of the whole."

a designated width, but the public travel is confined to a strip in the center of the dedicated space. Such use will be deemed to be evidence of the acceptance of the entire width.¹ The same principle may apply to the acceptance of a street or highway throughout its length. The *improvement or repair of intermediate portions* of a continuous way may be evidence of an *acceptance of the entire way*.²

¹ *Watkins v. Lynch*, 71 Cal. 21, 27; *Ellsworth v. Lord*, 40 Minn. 337; *Moore v. Roberts*, 64 Wis. 538. See also *Houston v. Finnegan* (Tex. Civ. App.), 85 S. W. Rep. 470. Where the acceptance of a platted street by the public is not expressly limited and the entire street is open, such acceptance must be taken as *including the full width* of the street as shown by the plat, although the regular travel is confined to a narrower strip. *Sullivan v. Tichenor*, 179 Ill. 97. To the same effect, *McDonald v. Stark*, 176 Ill. 456; *Simmons v. Cornell*, 1 R. I. 519. Where highways are established by user only without any evidence of dedication, user of a tract through the center of a way otherwise defined as of a certain width, may be evidence of the creation by user of a highway of the entire width. The question is one for the jury to be determined by it in view of all the facts. See *Davis v. Clinton*, 58 Iowa, 389; *Sprague v. Waite*, 17 Pick. (Mass.) 309; *Burrows v. Guest*, 5 Utah, 91; *Whitesides v. Green*, 13 Utah, 341; *Schettler v. Lynch*, 23 Utah, 305, 317.

In *Hall v. Meriden*, 48 Conn. 416, *Loomis, J.*, in discussing partial acceptance of a street said: "The acceptance of a street by the public is always one of fact, the law merely contributing its definition of the term. While the acceptance covers only what is incidental to the street, there is yet, properly speaking, no legally constructive acceptance unless in a peculiar case which we will hereinafter consider. [The dedication of all the streets on a paper village laid out as an entirety.] Thus the actual use of a street laid out eighty feet wide would be an acceptance of a street as of that width, while the same amount of use of a street laid out forty feet wide would be an acceptance of it as only of that width. In each of these cases the public by its use has accepted it as it was dedicated or as the use found it. But this is not so much by operation of law as by operation of actual use as a fact." In *Southern Pacific R. Co. v. Ferris*,

93 Cal. 263, a street was dedicated by map which showed two tracks or traveled ways with a water course and trees between. Only one way was used by the public. It was held that the use of such way was an acceptance of the entire street, but in this case the property owners had conformed their fences to the lines laid down on the map. The question under consideration was the right of a railroad company to use the street for its track under its franchises.

² *Fairbury Union Agricultural Board v. Holly*, 169 Ill. 9; *Kennedy v. Le Van*, 23 Minn. 513, 515; *Morse v. Zeize*, 34 Minn. 35, 37; *Scribner v. Blute*, 28 Wis. 148. In order to effect an acceptance of dedicated property it is not necessary that the public use the entire property dedicated. Any public use of part of the property, indicating a purpose to accept the gift, fixes the public right to the whole. *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. 318, 328.

In *Kennedy v. Le Van*, 23 Minn. 513, 515, there was a continuous traveled track for a distance of fourteen miles. Work had been done upon the way by the public authorities, but not at any point opposite to or within the plaintiff's land. Plaintiff having fenced in the way, the public authorities threw down the fences and opened up the way. Plaintiff thereupon sued in trespass for entering his land, destroying fences, etc. The defense was that the defendants were town officers engaged in improving a public highway created by a common law dedication. *Cornell, J.*, said: "Whenever the matter in dispute concerns a common law dedication by the owner and an acceptance by the public of an intermediate portion of a continuous thoroughfare, or line of road, evidence of the construction of any improvement, or the making of any repairs, upon such line of road, under proper public authority or direction, on either side of the disputed portion, but sufficiently near, under the circumstances, to raise a reasonable

Where the dedication is effected by means of a plat, it has, in some jurisdictions, been held that the improvement and use of a street as

presumption that they were done mainly in reference to the public use of the whole line, and could only be beneficially enjoyed in connection with such use, is clearly competent for the jury upon the question of acceptance."

In *London & S. F. Bank v. Oakland*, 90 Fed. Rep. 691, 700; s. c. 86 Fed. Rep. 30, a map was filed which showed a street named "Fallon Street" extending between Sixth and Thirteenth Streets. It was held that the acceptance by user of that part of Fallon Street from Sixth to Tenth Streets was an acceptance of Fallon Street to Thirteenth Street to be thereafter opened as occasion or necessity required it. The failure of a municipal corporation to open and improve part of a new street does not operate as a rejection of the part not opened or improved. *Sims v. Frankfort*, 79 Ind. 446.

In *Hall v. Meriden*, 48 Conn. 416, language is used which implies a refusal on the part of the court to regard the improvement and use of a part of a way as the acceptance of the whole way throughout its entire length, but it is to be observed that such language was applied to a street or way commencing in an urban community and extending into a rural district. *Loomis, J.*, pointed out that the acceptance of a street by the public is always one of fact and that the use of a track in the center of a dedicated street implies an acceptance of the entire width, and said: "There is no room for such an operation of the use upon a portion of an opened street that extends entirely beyond all actual use on the part of the public. It will be seen at once upon a consideration of the matter that any such rule would be one very difficult of practical application. Thus, a street is laid out by private land owners in the suburbs of a growing city extending a mile out into the country. We will suppose it to be cleared of trees and fences and perhaps marked by visible monuments so as to have been opened for a street, but also as here, not worked. Now the occupancy of the street by houses, and the use of it by the public in connection with the houses, would begin at the end next the city and extend very gradually outward, making perhaps a very clear

acceptance of the street for a quarter of a mile, while no use whatever is made of the street beyond. Can it be that this use so clearly limited and defined in extent can constitute a use, and by such constructive use, an acceptance of the part of the new street that is most remote from the city? If it could operate to make an acceptance of that remote part of the street, why not of a still remoter part, two miles instead of one? And if it could not operate to accept a part of the street so remote, as we think it very clear that it could not, where shall the line be drawn? We see that we encounter a practical difficulty that is very serious. There is only one rule to apply in such a case, and that is the rule of actual use. Where the actual use stops, there the acceptance stops, with only the qualification before suggested that such use will take in whatever may be properly incidental to it. Under this rule the use may cover in some cases a little more length of road than has been literally driven on or passed over by the public. Thus, the remotest house on the new street may have been constantly traveled up to and from by persons and vehicles, such travel in fact extending only to the gate in front of the house, while the road as opened may extend two or three rods beyond. In such a case the road may be regarded as accepted for these few rods, but not by operation of law, but only as incidental to the actual use."

A result which is the same as that which arises under a partial acceptance may be reached by acts indicating an intention on the part of the municipality to abandon its right to accept a part of a dedicated street or way, as where it has neglected to open and improve it for a long period of time, and the property owner has erected buildings or otherwise applied it to his exclusive use. See *New York, N. H. & H. R. Co. v. New Haven*, 46 Conn. 257; *Jordan v. Chenoa*, 166 Ill. 530, 535; *Hewes v. Crete*, 175 Ill. 348; *Reichert Milling Co. v. Freeburg*, 217 Ill. 384, 387; *State v. Trask*, 6 Vt. 355, 367. Where lands were laid out on a plat which showed a street, and thereafter part of the street was fenced in and the authorities ordered the street laid out as fenced, it was held

platted is to be regarded as an acceptance of all the streets in the entire tract and not merely of such portion as it may choose to improve.¹ But in other jurisdictions the court seems to have contented itself with simply ruling that acceptance of a part is not necessarily an acceptance of the whole without giving effect to any presumptions.²

§ 1089. **Time of Acceptance.** — It has been said that a dedication may be made *in præsentis* to be carried into effect *in futuro*.³

that there was an acceptance only of the part outside the fences and an implied refusal on the part of the municipal authorities to accept any part within the fences. *Hewes v. Crete*, 175 Ill. 348.

¹ *Lee v. Harris*, 206 Ill. 428; *Heitz v. St. Louis*, 110 Mo. 618; *Naylor v. Harrisonville*, 207 Mo. 341. See also *Houston v. Finnegan* (Tex. Civ. App.), 85 S. W. Rep. 470.

In *Illinois*, the rule seems to be that the acceptance of some of the streets shown on a plat will be deemed an acceptance of the entire system of streets and alleys so appearing, unless the intention to limit the acceptance is shown by some affirmative official declaration of the remaining streets and alleys. *Lee v. Harris*, 206 Ill. 428. See also *Augusta v. Tyner*, 197 Ill. 242, 246; *Russell v. Chicago & M. El. R. Co.*, 205 Ill. 155, 167. In *Iowa*, it has been said that where a city opened certain of the streets platted, its act indicated the intent to accept the remaining streets whenever necessary to the public use. *Parriott v. Hampton*, 134 Iowa, 157, citing *Lee v. Harris*, 206 Ill. 428. In *Chaffee v. Aiken*, 57 S. Car. 507, the question whether there was an acceptance of a particular part of the street was left to the jury to determine from all the facts, and the action of the trial court was affirmed on appeal, the Supreme Court remarking that when it is shown that there has been an acceptance by the use of a part of a street, the burden of proof is on the other party to show that the acceptance did not extend to the entire street. In *Derby v. Alling*, 40 Conn. 410, under the peculiar circumstances of the case in which, in addition to a plat, there was a conveyance to the town and an ordinance accepting the conveyance, it was held that when a paper village is laid out as an entire thing, the dedication of all the streets to the public is entire, and when the public act upon such dedication the acceptance of part may,

and, in general, will be construed as an acceptance of the whole as an entirety.

² In *Wolfskill v. Los Angeles County*, 86 Cal. 405, it was declared that acceptance by user or otherwise of one or more streets or highways shown on a recorded map will not operate as an acceptance of all or any other of the streets or highways delegated thereon. In *Kelsoe v. Oglethorpe*, 120 Ga. 951, 954, the court held that if the municipality accept a portion only of a street laid out by the owner, it will not be deemed to have accepted another portion of the street as to which it has not exercised any corporate authority. *Evans, J.*, said: "When a large area of land has been laid off into streets and lots by the owner, there can be no implied acceptance of any street over which the corporate authorities have never assumed control. And if the municipality assumed control over a portion only of a street thus laid out, it will not be deemed to have accepted an easement over another portion of the street, as to which there has been no exercise of corporate authority." In *Kennedy v. Cumberland*, 65 Md. 514, 522, the action was to recover damages for personal injuries. A plan had been made showing streets some of which were repaired by the municipality, and some not. *Miller, J.*, said: "It was perfectly competent for and within the absolute discretion of the city authorities to accept some of these streets and refuse to accept others; and the fact that they did repair others, and did not repair this one, tends rather to show that they had determined, and for good reasons, not to incur the expense of grading and repairing it, and not to accept its dedication." Partial acceptance of lands dedicated for a public street will establish the street only to the extent of the public occupation and user, but no further. *Wayne County v. Miller*, 31 Mich. 447.

³ *Denver v. Clements*, 3 Colo. 484; *Derby v. Alling*, 40 Conn. 410.

A reasonable time must be allowed for the acceptance of a dedication and what is such reasonable time will necessarily depend on the situation and circumstances,¹ and the acceptance must be within such reasonable time, otherwise the right to accept will be lost.² In determining whether the right to accept continues, the wants and conveniences of the public use must be taken into consideration. It is not imperative in the case of an implied dedication of a street that the city shall immediately enter upon the actual acceptance of the street throughout its entire length or width. User need not follow closely upon the dedication, particularly where streets are extended over suburban property. It may be years before the convenience of the public or those who live upon adjacent lots requires that they should formally be taken in charge by the municipal authorities, and in the absence of acts showing a positive intention to revoke on the part of the owner, the right to accept the dedication will usually continue until the wants and conveniences of the public require the use of the dedicated streets.³

¹ *Lake View v. Le Bahn*, 120 Ill. 92; *Lee v. Harris*, 206 Ill. 428; *Shea v. Ottumwa*, 67 Iowa, 39; *Cambridge v. Cook*, 97 Iowa, 599; *Sarvis v. Caster*, 116 Iowa, 707.

² *Niles v. Los Angeles*, 125 Cal. 572; *Vermont v. Muller*, 161 Ill. 210; *Cambridge v. Cook*, 97 Iowa, 599; *Field v. Manchester*, 32 Mich. 279; *Omaha v. Hawver*, 49 Neb. 1; *Matter of Fox Street*, 54 N. Y. App. Div. 479. What is such reasonable time for the acceptance of a dedication is a question for the jury. *Chaffee v. Aiken*, 57 S. Car. 507.

In *Michigan* it is held that a common-law dedication must be accepted within a reasonable time or the offer will be considered as withdrawn. *Cooley, J.*, said: "The mere recognition of the purpose for which the offer was made, in a conveyance to third persons, is no acceptance, for it is not a step in the direction of occupation and use in the manner proposed. The offer implies that the proprietor has an interest in the intended purpose being accomplished, and the consideration which completes the transaction is not mere words of recognition or of acceptance, but an actual appropriation of the property within some reasonable time for the use designed." *People v. Jones*, 6 Mich. 176; *Cass County v. Banks*, 44 Mich. 467, citing *Baker v. Johnston*, 21 Mich. 319; *Wayne County v. Miller*, 31 Mich. 447; *White v. Smith*, 37 Mich.

291. And it may be withdrawn before acceptance. *Gregory v. Ann Arbor*, 127 Mich. 454.

³ *Kruger v. Constable*, 116 Fed. Rep. 722; *Lee v. Mound Station*, 118 Ill. 304; *Augusta v. Tyner*, 197 Ill. 242; *Russell v. Lincoln*, 200 Ill. 511; *Marion v. Skillman*, 127 Ind. 130; *Shea v. Ottumwa*, 67 Iowa, 39; *Keokuk v. Cosgrove*, 116 Iowa, 189; *Burroughs v. Cherokee*, 134 Iowa, 429; *Lafitte v. New Orleans*, 52 La. An. 2099; *Sprague v. Waite*, 17 Pick. (Mass.) 309; *Briel v. Natchez*, 48 Miss. 423; *Indianola Light, I. & C. Co. v. Montgomery*, 85 Miss. 304; *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13; *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 540; *Price v. Plainfield*, 40 N. J. L. 608; *Atlantic City v. Snee*, 68 N. J. L. 39; *South Amboy v. New York & L. B. R. Co.*, 66 N. J. L. 623; *Jersey City v. Morris C. & B. Co.*, 12 N. J. Eq. 547; *Meier v. Portland Cable Co.*, 16 Oreg. 500; *Oregon City v. Oregon & C. R. Co.*, 44 Oreg. 165; *Hardy v. Memphis*, 10 Heisk. (Tenn.) 127; *Williams v. Galveston (Tex. Civ. App.)*, 58 S. W. Rep. 551; *Dallas v. Gibbs*, 27 Tex. Civ. App. 275; *Corsicana v. Anderson*, 33 Tex. Civ. App. 596; *Krause v. El Paso*, 101 Tex. 211; 106 S. W. Rep. 121; *Reilly v. Racine*, 51 Wis. 526; *Bartlett v. Beardmore*, 74 Wis. 485; *Ashland v. Chicago & N. W. R. Co.*, 105 Wis. 398.

§ 1090. **Dedication by Platting and Sale; Necessity of Acceptance by Public.** — The cases uniformly hold that the *platting* of land by the owner and the sale and conveyance of lots with reference to the plat, constitute *strong evidence of intent* to dedicate to public use the streets and ways indicated upon the plat.¹ But there appears to be some conflict of authority on the question whether the dedication is complete, and public rights are created without any act of acceptance by the municipal or public authorities, or without such user by the public as will imply an acceptance. In this connection it must be kept in view that the platting and sale create certain rights in the grantees of the original owner,² which, as between the grantor and the grantee, are irrevocable in their nature. But do these rights enure to the benefit of the public without any user by the public in general, or acts of acceptance by the public or municipal authorities? Many of the decisions appear to hold that an irrevocable dedication to public use is complete and perfect by the mere making and filing of a plat and the sale of lots with reference thereto without any acts of acceptance by public user, or by the municipal authorities.³ But it is to be

¹ See, *ante*, § 1079.

² See, *ante*, §§ 1083, 1084.

³ *Demopolis v. Webb*, 87 Ala. 659; *Reed v. Birmingham*, 92 Ala. 339; *Weiss v. Taylor*, 144 Ala. 440; *Mobile v. Fowler*, 147 Ala. 403; *Jackson v. Birmingham Foundry & Machine Co.*, 154 Ala. 464; 45 So. Rep. 660; *Hope v. Shiver*, 77 Ark. 177; *Davies v. Epstein*, 77 Ark. 221; *Brewer v. Pine Bluff*, 80 Ark. 489; *Boise City v. Hon*, 14 Idaho, 272; 94 Pac. Rep. 167; *Schneider v. Jacob*, 86 Ky. 101; *Rives v. Dudley*, 3 Jones Eq. (N. Car.) 126; *Moose v. Carson*, 104 N. Car. 431; *Conrad v. West End Hotel & Land Co.*, 126 N. Car. 776; *Carter v. Portland*, 4 Ore. 339; *Meier v. Portland Cable R. Co.*, 16 Ore. 500, 505, 509; *Hogue v. Albina*, 20 Ore. 182, 186; *Spencer v. Peterson*, 41 Ore. 257; *Nodine v. Union*, 42 Ore. 613, 616; *Oregon City v. Oregon & C. R. Co.*, 44 Ore. 165, 176; *Christian v. Eugene*, 49 Ore. 170; *Oliver v. Newberg*, 50 Ore. 92; 91 Pac. Rep. 470; *Corsicana v. Zorn*, 97 Tex. 317; *Heard v. Connor* (Tex. Civ. App.), 84 S. W. Rep. 605; *Sanborn v. Amarillo*, 42 Tex. Civ. App. 115; 93 S. W. Rep. 473; *Tyler v. Boyette*, 43 Tex. Civ. App. 573; 96 S. W. Rep. 935; *La Bounty v. Seattle*, 46 Wash. 141; *Lueders v. Tenino*, 49 Wash. 521; 95 Pac. Rep. 1089; *Riddle*

v. Charlestown, 43 W. Va. 796; *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 400.

In *Christian v. Eugene*, 49 Ore. 170, it is said that the purchase of lots with reference to a plat constitutes a sufficient acceptance by the public of the dedication of streets and other public places designated thereon. See also to the same effect *Evans v. Blankenship*, 4 Ariz. 307, 316; *Christian v. Eugene*, 49 Ore. 170; *Meier v. Portland Cable R. Co.*, 16 Ore. 500, 509. In *Boise City v. Hon*, 14 Idaho, 272; 94 Pac. Rep. 167, it was held that irrespective of any acts evidencing acceptance by the municipality or by the legislature, a dedication was complete when the owner platted the land, filed the plat for record and sold lots with reference to the plat. *Sullivan, J.*, who delivered the opinion of the court said: "The underlying principle supporting the doctrine of estoppel is applicable to this case considered from the standpoint of the donor. It is based on the idea that a man shall not defeat his own act or deny its validity to the prejudice of another." This action was in ejectment by the city to oust the defendant from a strip of land which was claimed to have been dedicated as a street. Unconditional dedication on re-

observed of these decisions that in many of them sufficient acts of acceptance by the public authorities or by public user were shown, or, where such was not the case, that the facts and circumstances justified the inference that the dedicator had not revoked or recalled his tender of dedication. Other decisions recognize the fact that, as against the owner who has platted the land and has sold lots

corded town plat (recognized by the city charter) of land as a "public levee" or landing place, held effectual without any specific formal acceptance of such levee; and it was further held that user was not essential to maintain or continue the rights of the public, and it was considered doubtful whether the public rights could be lost by adverse occupation. *Coffin v. Portland*, 11 Saw. C. C. R. 600; s. c. 27 Fed. Rep. 412; *Deady, J. Compare Portland & W. V. R. R. Co. v. Portland*, 14 Oreg. 188; *San Leandro v. Le Breton* ("Court Square"), 72 Cal. 170.

In *Pennsylvania*, it has been said that "the dedication of streets and alleys, in laying out a plan for a town, is a contract with the public." *Per Lewis, J.*, in *Heckerman v. Hummell*, 19 Pa. 64, 69. It has also been said that "when the proprietor of a body of land sells and conveys lots according to a plan which shows them to be on streets, he must be held to have stamped upon them the character of public streets." *Scranton City v. Thomas*, 141 Pa. 1, 4, citing *Trutt v. Spotts*, 87 Pa. 339; *Transue v. Sell*, 105 Pa. 604; *Pearl Street, Re*, 111 Pa. 565. It has further been said, "the sale of lots according to a plan which shows them to be on a street implies a grant or covenant to the purchaser that the street shall be forever kept open to the use of the public and operates as a dedication of them to public use. The right passing to the purchaser is not the mere right that he may use the street, but that all persons may use it." *Per Fell, J.*, in *Quicksall v. Philadelphia*, 177 Pa. 301, 304. See also to the same effect, *Woodward v. Pittsburg*, 194 Pa. 193; *Osterheldt v. Philadelphia*, 195 Pa. 355; *Garvey v. Harbison W. R. Co.*, 213 Pa. 177, 179; *Southwestern State Normal School Case*, 213 Pa. 244, 246; *Smith v. Union Switch & Signal Co.*, 17 Pa. Super. Ct. 444. Hence, when streets are laid out upon a plan and sales are made with reference thereto, the owner of the land included within the street as designated

on the plan is not entitled to compensation for the taking of the land. *Quicksall v. Philadelphia*, 177 Pa. 301; *Osterheldt v. Philadelphia*, 195 Pa. 355. But acceptance by the municipality is necessary to make the municipality responsible for the care of the streets. But such acceptance need not be by formal ordinance. Any exercise of authority is sufficient. *Steel v. Huntington*, 191 Pa. 627; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. 318; *Downing v. Coatesville*, 214 Pa. 291. See also *Oakley v. Luzerne*, 25 Pa. Super. Ct. 425; *Weida v. Hanover*, 30 Pa. Super. Ct. 424. Similarly, it has been held that before an indictment for maintaining a nuisance by encroaching on a public street or alley will lie, there must be evidence of acceptance of the street or alley by the public. *Commonwealth v. Llewellyn*, 14 Pa. Super. Ct. 214; *Commonwealth v. Moorehead*, 118 Pa. 344. But it is also provided by statute that any street or alley laid out by any person on any village or town plot or plan of lots on land owned by such person, in case the same has not been opened to, or used for the public for twenty-one years thereafter, shall be of no force and effect and shall not be opened without the consent of the owners. It has been held that this statute is a valid enactment so far as the public and the rights of the municipality are concerned, whatever its effect may be on the rights of purchasers of lots according to the map or plan. *Quicksall v. Philadelphia*, 177 Pa. 301, 305. See also *Woodward v. Pittsburg*, 194 Pa. 193; *Cotter v. Philadelphia*, 194 Pa. 496. There is a distinction between the sale of lots according to a plan made by the owner of lands upon which streets are laid out, and the mere reference in a deed in aid of the description to streets projected by the municipality. In the former case the inference of dedication arises; in the latter it does not. *Brooklyn Street, Re*, 118 Pa. 640; *Quicksall v. Philadelphia*, 177 Pa. 301, 304.

with reference to the plat, *the owner*, having unequivocally manifested his intention to abandon the property and to dedicate it to public use, is, by making the plat and selling lots with reference thereto, *precluded from exercising any power of retraction*, at least, without the consent of those to whom he has sold the property, and on such platting and sale the public right to appropriate the lands to public use at any time when the public wants require it immediately attaches.¹ But other decisions recognize a *clearly defined distinction* between the rights acquired by the *public* through dedication effected by platting and sale, and the *private rights* acquired by the grantees by virtue of the grant or covenant contained

¹ *Brewer v. Pine Bluff*, 80 Ark. 489; *Stuttgart v. John*, 85 Ark. 520.

Stuttgart v. John, 85 Ark. 520, was an action to enjoin a city from opening certain streets and alleys through the plaintiff's property. It was claimed that the streets had been dedicated to public use by making and recording a plat thereof and by the sale of lots with reference thereto. *McCulloch, J.*, who delivered the opinion of the court said: "It is well settled by the decisions of this court that where owners of land lay out a town or an addition to a city or town upon it, platting it into blocks and lots intersected by streets and alleys, and sell lots by reference to the plat, they thereby dedicate the streets and alleys to the public use, and that such dedication is irrevocable. *Brewer v. Pine Bluff*, 80 Ark. 489; *Davies v. Epstein*, 77 Ark. 221; *Hope Shiver*, 77 Ark. 177; *Dickinson v. Arkansas City Imp. Assoc.*, 77 Ark. 570. Where lots have been sold with reference to the plat, *no formal acceptance* by the city or town is necessary, as by that act the dedication becomes irrevocable, and the municipality may accept at any time and assume control over the streets and alleys. *Brewer v. Pine Bluff*, 80 Ark. 489, *supra*."

In *Minnesota*, it is held that where there has been a platting of lands and sale with reference to the plat, the conveyance of the lands works an estoppel in favor of the grantee, and no subsequent revocation can be made without his consent, and the right so granted may be adopted and enforced by the public authorities. *Hurley v. Mississippi & R. R. Boom Co.*, 34 Minn. 143; *Borer v. Lange*, 44 Minn. 281; *Great Northern R. Co. v. St. Paul*, 61 Minn. 1; *State v. St. Paul*

M. & M. R. Co., 62 Minn. 450, 454. See also *Poudler v. Minneapolis*, 103 Minn. 479; *Nagel v. Dean*, 94 Minn. 25.

New Jersey. Where lands have been platted and sales have been made with reference to the plat, the several purchasers, by force of the deeds, acquire by implied covenant the right to the use of the street as an appurtenant to the lands conveyed to them, and the street becomes dedicated to public use. And acceptance by the public authorities is not essential to conclude the owner from the power of retraction, when his intention to permanently abandon his property and dedicate to the public use is once unequivocally manifested. In that event, the right of the public to appropriate the lands to public use at any future time when their wants or convenience require it immediately attaches. *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13, 22; *Price v. Plainfield*, 40 N. J. L. 608; *Atlantic City v. Groff*, 64 N. J. L. 527; *Hohokus v. Erie R. Co.*, 65 N. J. L. 353, 362; *South Amboy v. New York & L. B. R. Co.*, 66 N. J. L. 623. But to make an effective and complete dedication there must be an acceptance by the act of the municipal authorities or by public user. *Keyport v. Freehold & A. H. R. Co.*, 74 N. J. L. 480; *New York & L. B. R. Co. v. South Amboy*, 57 N. J. L. 252, 258. And until acceptance the fee simple title and control of the property remain in the dedicator, and he may use the lands as he will, provided he does not in any way interfere with the right of the public to accept the dedication whenever it sees fit to do so. *Darling v. Jersey City*, 73 N. J. Eq. 318; 67 Atl. Rep. 709.

in a deed which refers to a plat, or bounds the property upon a street through the grantor's lands. These decisions adopt the view that where lands are platted and sales are made with reference to the plat, the acts of the owner in themselves merely create private rights in the grantees entitling the grantees to the use of the streets and ways laid down on the plat or referred to in the conveyance. But these rights are purely in the nature of private rights founded upon a grant or covenant, and no public rights attach to such streets or lands until there has been an express or implied acceptance of the dedication, evidenced either by general public user, or by the acts of the public authorities. In this view, the making of the plat and the sale of lands with reference thereto are merely evidence of an intent to dedicate, which like every other common law dedication, to be made complete and carried into effect so as to create public rights, must be accepted and acted upon by the public.¹

¹ *People v. Reed*, 81 Cal. 70; *Niles v. Los Angeles*, 125 Cal. 572; *Myers v. Oceanside*, 7 Cal. App. 87; 93 Pac. Rep. 686; *Russell v. Chicago & M. El. R. Co.*, 205 Ill. 155; *Swedish Evangelist Lutheran Church v. Jackson*, 229 Ill. 506; *Steinauer v. Tell City*, 146 Ind. 490; *Baltimore v. Broumel*, 86 Md. 153; *Grandville v. Jenison*, 84 Mich. 54; *Becker v. St. Charles*, 37 Mo. 13; *Clements v. West Troy*, 16 Barb. (N. Y.) 251; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261; *DeWitt v. Ithaca*, 15 Hun (N. Y.), 568, 571; *State v. Hamilton*, 109 Tenn. 276; *San Antonio v. Sullivan*, 23 Tex. Civ. App. 619.

In *California*, a common-law dedication by platting lands and making sales with reference thereto does not create any public rights until there has been an acceptance by the public. *People v. Reed*, 81 Cal. 70; *Sacramento v. Clunie*, 120 Cal. 29; *Los Angeles v. Kysor*, 125 Cal. 463; *Niles v. Los Angeles*, 125 Cal. 572; *Eureka v. Gates*, 137 Cal. 89; *Myers v. Oceanside*, 7 Cal. App. 87; 93 Pac. Rep. 686. As a matter of law it cannot be said that a dedication follows from the making and filing of a map for record and by sales and conveyances with reference thereto. It has been doubted in this State whether as a matter of fact the court would be justified in declaring the ultimate fact of dedication to result from these probative facts. As in a question with the municipality, little importance attaches to the fact

that the owner sold lots according to the plat or map on file. Such acts sometimes indicate an intention to dedicate a street or place. But the filing of the map has always been held to constitute an offer of dedication. *Anaheim v. Langenberger*, 134 Cal. 608. In the case of dedication the respective rights of the owners of the lots who may have purchased from parties filing the map are not involved. Such sales may be evidence of intent to dedicate, but they are nothing more. *Sacramento v. Clunie*, 120 Cal. 29. See also *King v. Dugan*, 150 Cal. 258. In *Prescott v. Edwards*, 117 Cal. 298, it was said: "There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. Some of the cases say that platting a tract of land, recording the plat, and selling lots by reference to such plat, constitute a dedication of the streets in favor of the purchasers of these lots, even though the dedication to the public is not perfected and completed. The statement is not correct as a legal principle, as may be seen from what has already been said." See to the same effect, *Los Angeles v. Kysor*, 125 Cal. 463, 466. When the dedication of a part of a street has not been accepted, or the property used by the public, it is purely a question of estoppel *in pais* whether it can be revoked or not. If no one has acted upon the offer in such a mode as to be injured by the revocation, the owner

§ 1091 (632). **Revocation of Dedication.** — Unless private rights have attached, a common-law dedication of land for a highway,

may revoke the dedication. *Schmitt v. San Francisco*, 100 Cal. 302. The owner after selling some of the lots according to a plan or map might, with the consent of the purchasers, or if he should himself repurchase all the lots so sold, withdraw such offer before the public has acquired any interest in the streets either by formal acceptance or by actual user. *Archer v. Salinas City*, 93 Cal. 43, 52; *Phillips v. Day*, 82 Cal. 24.

Illinois. To effect an irrevocable dedication and to make public rights attach, there must be an acceptance by public user or by the acts of the municipality whether the dedication be a common law or a statutory dedication. *Russell v. Chicago & M. El. R. Co.*, 205 Ill. 155, 165; *Owen v. Brookport*, 208 Ill. 35, 41; *Littler v. Lincoln*, 106 Ill. 353, 368; *Jordan v. Chenoa*, 166 Ill. 530; *Reichert Milling Co. v. Freeburg*, 217 Ill. 384; *Swedish Evangelist Lutheran Church v. Jackson*, 229 Ill. 506. If a plat or map is made in accordance with the statute and is properly acknowledged and recorded so that it will operate as a statutory dedication, the fee of the streets or land dedicated vests upon acceptance in the municipality in trust for the public. *Jordan v. Chenoa*, 166 Ill. 530; *Clark v. McCormick*, 174 Ill. 164, 171; *Russell v. Lincoln*, 200 Ill. 511; *Owen v. Brookport*, 208 Ill. 35, 39. But even in the case of a statutory dedication, acceptance is necessary, and until acceptance the fee does not vest in the municipality. *Hamilton v. Chicago, B. & Q. R. Co.*, 124 Ill. 235; *Hewes v. Crete*, 175 Ill. 348; *Owen v. Brookport*, 208 Ill. 35, 41; *Venice v. Madison County Ferry Co.*, 216 Ill. 345. If the plat or map is not made acknowledged and recorded as required by statute, and operates only as a common-law dedication which is effectual upon acceptance, the title to the streets vests in the adjoining owners to the center of the street subject to the easement of the public. *Clark v. McCormick*, 174 Ill. 164; *Thompson v. Maloney*, 199 Ill. 276, 282; *Russell v. Lincoln*, 200 Ill. 511; *Owen v. Brookport*, 208 Ill. 35, 39; *Ingraham v. Brown*, 231 Ill. 256, 258. But it has also been held that after the sale of lots an offer of dedication

by platting is irrevocable without the consent of the grantees, and the city may at any time accept and open the street. *Russell v. Lincoln*, 200 Ill. 511; *Rusk v. Berlin*, 173 Ill. 634; *Riverside v. McLain*, 210 Ill. 308, 320. The effect of the Illinois decisions is thus summarized in *Russell v. Chicago & M. El. R. Co.*, 205 Ill. 155, 165, by *Ricks, J.* "The owners of the lands included in South Highland Addition to Highland Park having platted the same, and having shown on the plat a number of the streets, among them the street in question, and having sold property with reference to such plat along said Railroad Avenue, they and their privies and successors in title are estopped as against purchasers and holders of property in such addition and bought with reference to such plat, to deny the existence of such streets and passage ways, as held in *Earl v. Chicago*, 136 Ill. 277; *Clark v. McCormick*, 174 Ill. 164, and other cases that have been before this court. But these cases only go to the extent of establishing the private right of the property holder, as contradistinguished from the right of the public, to have such designated streets remain open for their access and the access of those who may have occasion to travel such streets in connection with the property thus conveyed. They do not go to the extent of declaring streets and passage ways thus established as public highways, because, after all, until some affirmative act which makes certain the purpose of the municipal authorities to accept such offer of the streets as public highways, they still stand as mere offers of dedication. It does not lie within the power of the individual who may elect to plat and sell his property with reference to such plat, to impose upon the public authorities, merely by his own act, the burden of the care and responsibility of such dedicated streets and passageways as public highways until those authorities representing the public have seen fit, by some unequivocal declaration or act, to accept and assume such burden and liability (*Littler v. Lincoln*, 106 Ill. 353; *Jordan v. Chenoa*, 166 Ill. 530; *Chicago v. Gosselin*, 4 Ill. App. 570); and until the proper municipal authorities do accept the streets thus

street, or other public use may, according to some authorities, *be revoked by the owner* at any time before there has been an acceptance

dedicated as public highways, the fee of the streets does not vest in the municipality. *Hewes v. Crete*, 175 Ill. 348; *Hamilton v. Chicago*, B. & Q. R. Co., 124 Ill. 235; *Jordan v. Chenoa*, 166 Ill. 533."

In *Indiana*, there are at least *dicta* to the effect that when property is platted and lots are sold with reference to the plat, the rights of both the public and the purchaser of the lots intervene, and the dedication of streets and public places shown on the plat is irrevocable. *Indianapolis v. Kingsbury*, 101 Ind. 200; *Miller v. Indianapolis*, 123 Ind. 196; *Rhodes v. Brightwood*, 145 Ind. 21; *Woodruff place v. Raschig*, 147 Ind. 517, 525; *Hall v. Breyfogle*, 162 Ind. 494. But in one of these decisions the court said that nothing in the decision should be taken as holding that a dedication of public grounds may be made against the consent of the public, and that to make the dedication complete there must always be an acceptance, express or implied. In the case before the court, it held that there had been an acceptance. *Rhodes v. Brightwood*, 145 Ind. 21, 30.

Maine. The platting of lands and sale of lots with reference thereto have been characterized as an *incipient dedication* of the streets shown on the plat to the public. *Bartlett v. Bangor*, 67 Me. 460. Such incipient dedication is irrevocable and binding upon the proprietor of the land and his grantees, until it is proved by the subsequent acts of the owners that the dedication is extinguished. *Danforth v. Bangor*, 85 Me. 423, 428. But each one claiming the benefit of the estoppel of the grantor to deny his grantees the use of the land as a street must rest his claim on his own title deed and not on the deed of another through whom he has not derived his title. *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 449, citing *Bartlett v. Bangor*, 67 Me. 460; *Heselton v. Harmon*, 80 Me. 326; *Howe v. Alger*, 4 Allen (Mass.), 206; *Oliver v. Pitman*, 98 Mass. 46; *Fogarty v. Kimmell*, 105 Mass. 264; *Regan v. Boston Gaslight Co.*, 137 Mass. 36. Although not opened for the public use as streets by the city at the time, the land is subject to be taken by the city and opened as streets and ways at any time without

the payment to those claiming the land of more than nominal damages, if any at all. *Danforth v. Bangor*, 85 Me. 423. But the dedication does not become complete so as to impose on the municipality the burden of keeping the streets in repair until they have been accepted by a competent authority or until user by the public for at least twenty years. *Bartlett v. Bangor*, 67 Me. 460.

In *Maryland*, it is held that where lands have been platted and sold with reference to a plat, or where a deed has been made bounding the lands conveyed upon a street, so long as the implied covenant between the grantor and grantee exists, the city can accept unless there has been an abandonment or estoppel of some kind; but as the dedication to the public springs from and is supported by the title conveyed to the grantee, it must depend upon the continued existence of that covenant. It ceases with it, if there has been no acceptance during the time it was within the power to accept. The dedication may be defeated, if the covenant is rescinded before the street is opened or used by the public. *Hall v. Baltimore*, 56 Md. 195; *Clendenin v. Maryland Const. Co.*, 86 Md. 80; *Story v. Ullman*, 88 Md. 244; *Canton Co. v. Baltimore*, 106 Md. 69.

In *Michigan* it has been several times decided that an *acceptance of a plat containing streets, &c.*, by the proper authorities, in behalf of the public, was essential to a complete dedication. *Cass County v. Banks*, 44 Mich. 467, noticed *supra*; *People v. Jones*, 6 Mich. 176; *Tillman v. People*, 12 Mich. 401; *Baker v. Johnston*, 21 Mich. 319; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173, 210.

It has been said that when the owner has caused a survey and plat to be made in which he offers to dedicate certain streets and alleys shown thereon for a public use, and he has sold lots and blocks designated thereon in accordance with the description on the plat, he cannot withdraw his offer of dedication, but leaves the streets and alleys indicated upon the plat to be opened by the municipal authorities at such time as the public interest may require, and of which they are the judges. *Russell v. Lincoln*, 200 Ill.

by formal act of the proper authorities, or by user, as hereinbefore explained.¹ And a municipal corporation which has accepted a dedication of property to public use may, before vested rights have been

511, 517. The effect of platting and sale being to estop the grantor from revoking the dedication, the municipality is at liberty at any time to accept the same, not only in the interest of the grantees, but also in the interest of the public, provided such grantor and grantees have not united in revoking the dedication prior to such acceptance. *Niagara Falls v. New York C. & H. R. Co.*, 41 N. Y. App. Div. 93. See also *Bridges v. Wyckoff*, 67 N. Y. 130. An acceptance of a dedication ten years subsequent to the filing of the plat is in time, under a statute providing that no street dedicated to public use shall be deemed a public street unless the dedication shall be accepted and confirmed by ordinance or resolution. *Backman v. Oskaloosa*, 130 Iowa, 600.

¹ *Prescott v. Edwards*, 117 Cal. 298; *Trine v. Pueblo*, 21 Colo. 102; *Manitou v. International Trust Co.*, 30 Colo. 467; *Steinauer v. Tell City*, 146 Ind. 490; *Lightcap v. North Judson*, 154 Ind. 43; *Huntington v. Townsend*, 29 Ind. App. 269; *Minneapolis & St. L. R. Co. v. Britt*, 105 Iowa, 198; *Clendenin v. Maryland Const. Co.*, 86 Md. 80; *Field v. Manchester*, 32 Mich. 279; *Baker v. St. Paul*, 8 Minn. 491; *Holdane v. Cold Springs*, 21 N. Y. 474; *Baldwin v. Buffalo*, 35 N. Y. 375; s. c. 29 Barb. (N. Y.) 396; *Buffalo v. Delaware, L. & W. R. Co.*, 190 N. Y. 84; rev'g 114 N. Y. App. Div. 915; *Matter of Beck St.*, 19 N. Y. Misc. 571; *Rudolph v. Ackerman*, 30 N. Y. Misc. 698; *Eckerson v. Haverstraw*, 6 N. Y. App. Div. 102; *Matter of Fox Street*, 54 N. Y. App. Div. 479; *Buffalo v. D. L. & W. R. Co.*, 68 N. Y. App. Div. 488; *State v. Hamilton*, 109 Tenn. 276; *Athens v. Burkett* (Tenn. Ch. App.), 59 S. W. Rep. 404; *Houston v. Finnegan* (Tex. Civ. App.), 85 S. W. Rep. 470; *Buntin v. Danville*, 93 Va. 200; *Norfolk v. Nottingham*, 96 Va. 34; *Seattle v. Hill*, 23 Wash. 92; *Mahler v. Brumder*, 92 Wis. 477. But see *Jersey City v. Morris Canal & B. Co.*, 12 N. J. Eq. 547; *Weisbrod v. Chicago & N. W. R. Co.*, 18 Wis. 35; *Lee v. Sandy Hill*, 40 N. Y. 442; *Atlantic City v. Groff*, 64 N. J. L. 527.

Completed dedication by map held

not revocable, although not accepted. *Hoboken Meth. E. Church v. Hoboken*, 33 N. J. L. 13; *Cook v. Burlington*, 30 Iowa, 94. See *supra*, § 1074, note. So, in *California*, an acceptance by the public, by a formal act or by actual user, is not necessary to complete a dedication where the intent to dedicate is made out. *Stone v. Brooks*, 35 Cal. 489. Compare *Baker v. Johnston*, 21 Mich. 319; *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, citing text; *San Francisco v. Canavan*, 42 Cal. 541; *Cass County v. Banks*, 44 Mich. 467; noted, *post*, § 1087, note.

Cul de sac. As to dedication and revocation of dedication of a strip of land which was a mere *cul de sac*, see *Holdane v. Cold Springs Trs.*, 21 N. Y. 474; s. c. 23 Barb. 103; *Tillman v. People*, 12 Mich. 401; *People v. Jackson*, 7 Mich. 432; *Stone v. Brooks*, 35 Cal. 489. In *Hanson v. Eastman*, 21 Minn. 509, an open place on a town plat, although a *cul de sac*, was held to be a public street. See also *Mankato v. Warren*, 20 Minn. 144; *Bateman v. Bluck*, 14 E. L. & Eq. 69; *People v. Kingman*, 24 N. Y. 545; *Houston v. Finnegan* (Tex. Civ. App.), 85 S. W. Rep. 470.

As to dedication and revocation of land under water at terminus of a street, see *Mark v. West Troy*, 76 Hun (N. Y.), 162. The fact that if a street did not exist, each intersecting street would be a *cul de sac*, does not establish dedication in the absence of other evidence. *Manchester v. Hoag*, 66 Iowa, 649. *Highways.* A road although obstructed at one end may be deemed a highway (*Wood v. Veal*, 5 B. & Ald. 454; *Queen v. Spence*, 11 Up. Can. Q. B. 31, 46, 47), but would not be deemed a highway if closed at both ends. *Bailey v. Jamieson*, L. R. 1 C. P. Div. 329. And once a highway always a highway. *Badgely v. Bender*, 3 Up. Can. Q. B. o. s. 221; *Rex v. Marchioness of Downshire*, 4 A. & E. 232; *Regina v. Purdy*, 10 Up. Can. Q. B. 545; *Thomas v. Ringwood Board*, L. R. 9 Eq. 418; *Harvey v. Truro Rural Council*, 72 Law J. Ch. 705 [1903], 2 Ch. 638; *Buffalo v. Delaware, L. & W. R. Co.*, 190 N. Y. 84, 96.

acquired under the dedication, revoke, with the consent of the dedicator, the acceptance.¹ The revocation by the owner may be accomplished by *any affirmative act recalling it*, or by an *abandonment of the scheme*.² It may be shown by acts *inconsistent with the public use* to which it is claimed the land was dedicated,³ as by a *conveyance of the lands* under circumstances and for purposes inconsistent with the continuance of the offer to dedicate,⁴ or by an open use

¹ Municipality No. 3 v. Levee S. C. P. Co., 7 La. An. 270.

² Dickinson v. Arkansas City Imp. Co., 77 Ark. 570. A plat was filed in 1892, by an improvement company which shortly thereafter became insolvent. The lands of the company were sold, were fenced in and were used for agriculture. The plat was laid out upon a scheme which indicated a city. In fact, only a straggling village was erected. It was held that the dedication was *abrogated by failure to open* and maintain the streets, the *general failure of the purpose* of the dedication, by the sale of the lands and by the exclusive use of the lands for farm purposes. Glasgow v. Mathews, 106 Va. 14. In Kentucky it has been held that adverse possession for the statutory period, of lands dedicated for streets by enclosing the same and using them for purposes inconsistent with the dedication, barred the right of the city to accept and open the streets. Latonia v. Latonia Agricultural Assoc. (Ky.) 109 S. W. Rep. 356. Where a bridge was dedicated to public use, it was held that failure to repair and maintain the bridge and non-user for an unreasonable length of time was an abandonment of the public right and estopped the municipality from asserting it. Oney v. West Buena Vista Land Co., 104 Va. 580. See also Scott v. Moore, 98 Va. 668, 687.

In Wisconsin, where it is held that the right to accept dedication will not, in general, be lost by long continued non-user, if such non-user be joined to circumstances which create an estoppel against the city, *e. g.*, an express refusal of the city to open the street in the filling of low ground at considerable expense, and the erection of valuable buildings on the dedicated land, the right to accept is terminated. Paine Lumber Co. v. Oshkosh, 89 Wis. 449. See also Reuter v. Lawe, 94 Wis. 300. Where streets and alleys dedicated by platting have never been opened and

the dedication never accepted by the public, but the owners have fenced in the land and used it for their own purposes for a period of twenty years, the city will be estopped from asserting its right to open the streets designated on the plat. Schooling v. Harrisburg, 42 Oreg. 494. A delay of twenty years, during which the city had made no express or implied acceptance of a plaza offered to be dedicated by the filing of a map and plat, justifies the court, in an action by the city to quiet title, in finding that no dedication had taken place. Anaheim v. Langenberger, 134 Cal. 608.

³ Myers v. Oceanside, 7 Cal. App. 87; 93 Pac. Rep. 686; Huntington v. Townsend, 29 Ind. App. 269; Uptagraff v. Smith, 106 Iowa, 385; Blennerhassett v. Forest City, 117 Iowa, 680; Corey v. Fort Dodge, 118 Iowa, 742; Weber v. Iowa City, 119 Iowa, 633. The assessment and payment of taxes upon dedicated lands in itself neither precludes the inference of intention to dedicate, nor the right of the municipality to accept the dedication. Evans v. Blankenship, 4 Ariz. 307, 316; San Leandro v. Le Breton, 72 Cal. 170; Smith v. San Luis Obispo, 95 Cal. 463; Boise City v. Hon, 14 Idaho, 272; 94 Pac. Rep. 167; Rhodes v. Brightwood, 145 Ind. 21; Getchell v. Benedict, 57 Iowa, 121; Hanger v. Des Moines, 109 Iowa, 480; Ellsworth v. Grand Rapids, 27 Mich. 250; Buschmann v. St. Louis, 121 Mo. 523; Gillean v. Frost, 25 Tex. Civ. App. 371; Sanborn v. Amarillo, 42 Tex. Civ. App. 115; 93 S. W. Rep. 473; Ashland v. Chicago & N. W. R. Co., 105 Wis. 398; Westmount v. Warminton, 9 Rap. Jud. Que. Q. B. 101. But see Lunkenheimer Co. v. Cincinnati, 23 Ohio Cir. Ct. 617.

⁴ Eureka v. Croghan, 81 Cal. 524; Schmitt v. San Francisco, 100 Cal. 302; John Mouat Lumber Co. v. Denver, 21 Colo. 1; Trine v. Pueblo, 21 Colo. 102; Chicago v. Drexel, 141 Ill. 89; Lightcap v. North Judson, 154 Ind. 43; Brown v. Taber, 103 Iowa, 1; Minne-

of the property for a *purpose of a permanent character wholly inconsistent* with the projected dedication.¹ But *after acceptance* the right to revoke does not exist.² When private rights have intervened the dedicator cannot, at least without the assent of the persons in whom these private rights have vested, revoke his dedication.³

§ 1092 (632). **Acceptance; Revocation.** — Conformably to the foregoing principles, a proposal by a land-owner to give, free of charge, and upon certain conditions to be performed by the city, so much of his land as may be required to open or widen a street or highway, will, if the proposition be accepted and the conditions complied with, in a reasonable time, *estop such owner from claiming damages* for his land; a formal vote of acceptance is not necessary; and seasonably fulfilling the conditions of the offer is sufficient.⁴

§ 1093. **Province of Court and Jury; Burden of Proof.** — We have seen that the essential elements of a dedication are the intent of the owner to dedicate, and an acceptance thereof by the public or by the municipal authorities acting on behalf of the public. In all implied dedications such intent and acceptance are usually to be deduced from the acts of the parties, and the question whether there has been an implied dedication is, when the facts are disputed, or where the credibility of the witnesses requires to be weighed, peculiarly a *question of fact* for the practical judgment of a jury.⁵

apolis & St. L. R. Co. v. Britt, 105 Iowa, 198; Uptagraff v. Smith, 106 Iowa, 385; Clendenin v. Maryland Const. Co., 86 Md. 80. But a deed made after acceptance by the city is ineffective as a revocation. Seattle v. Hill, 23 Wash. 92, 99.

¹ Uvalde County v. Uvalde (Tex. Civ. App.), 32 S. W. Rep. 368; Houston v. Finnegan (Tex. Civ. App.), 85 S. W. Rep. 470.

² London & San Francisco Bank v. Oakland, 90 Fed. Rep. 691; Davenport v. Buffington, 97 Fed. Rep. 234; Stewart v. Conley, 122 Ala. 179; McIntyre v. El Paso County, 15 Colo. App. 78; Rhodes v. Brightwood, 145 Ind. 21, 27; Evansville & T. H. R. Co. v. Ft. Branch, 149 Ind. 276; Michigan Cent. R. Co. v. Hammond, W. & E. C. El. R. Co., 42 Ind. App. 66; 83 N. E. Rep. 650; Cohoes v. Delaware & H. Canal Co., 134 N. Y. 397; Buffalo v. Delaware, L. & W. R. Co., 190 N. Y. 84, rev'g 114 N. Y. App. Div. 915;

Eckerson v. Haverstraw, 6 N. Y. App. Div. 102; Smith v. Union Switch & Signal Co., 17 Pa. Super. Ct. 444; Richardson v. McKeesport, 18 Pa. Super. Ct. 199; Buntin v. Danville, 93 Va. 200. Partial revocation does not revoke the entire original dedication. Eckerson v. Haverstraw, 6 N. Y. App. Div. 102, aff'd 162 N. Y. 652.

³ Reed v. Birmingham, 92 Ala. 339; Zearing v. Raber, 74 Ill. 409; Chicago v. Drexel, 141 Ill. 89; Clark v. McCormick, 174 Ill. 164; Woodburn v. Sterling, 184 Ill. 208.

⁴ Grace v. Walker, 95 Tex. 39, citing text; Crockett v. Boston, 5 Cush. (Mass.) 182. Sixteen months, considering the matter to be acted upon and the usual course of proceeding, was not considered an unreasonable time. *Ib.* See on this point, Baker v. Johnston, 21 Mich. 319; 2 Herman on Estoppel, §§ 1140-1149.

⁵ Sacramento v. Clunie, 120 Cal. 29; Los Angeles v. Kysor, 125 Cal. 463;

In establishing a dedication the *party asserting* it must assume the *burden of proving* it.¹

§ 1094 (643). **Parks and Public Squares.** — Taking *private property for a park or a public square*, in a city, is taking the same for *public use*, and under legislative sanction it may lawfully be done on compensation being made; and the mode of compensation, whether by a tax upon the whole city or upon those specially benefited, is a matter for legislative regulation.²

§ 1095 (644). **Same Subject; Dedication.** — The doctrine of *dedication* to public uses has also been extended and applied to

Niles v. Los Angeles, 125 Cal. 572; Hartford v. New York & N. E. R. Co., 59 Conn. 250; Gray's Appeal, 80 Conn. 248; Grube v. Nichols, 36 Ill. 93; Woodburn v. Sterling, 184 Ill. 208; German Bank v. Brose, 32 Ind. App. 77; Cheney v. Anderson, 72 Kan. 696; Raymond v. Wichita, 70 Kan. 523; Kennedy v. Cumberland, 65 Md. 514; Finnegan v. St. Joseph, 123 Mich. 330; Morse v. Zeize, 34 Minn. 35; Boye v. Albert Lea, 93 Minn. 121; Downend v. Kansas City, 71 Mo. App. 529; Riverside v. Pennsylvania R. Co., 74 N. J. L. 476; Robertson v. Meyer, 59 N. J. Eq. 366; Flack v. Green Island, 122 N. Y. 107; Lent v. Tilyou, 106 N. Y. App. Div. 189, 193; Newton v. Dunkirk, 121 N. Y. App. Div. 296; Waters v. Philadelphia, 208 Pa. 189; Tilzie v. Haye, 8 Wash. 187; Biggar's Mun. Man. (Canada, 1900), 807, citing Belford v. Haynes, 7 Upper Can. Q. B. 464; Reg v. Spence, 11 Upper Can. Q. B. 31.

The question as to *how much* land is included in a dedication is one wholly of fact. In this case the court refused to find, as a matter of law, that a fence which had been standing for forty years marked a boundary line of the strip dedicated. Wetherell v. Newington, 54 Conn. 67. Where there is substantial conflict of evidence the verdict of the jury will not be disturbed. Sacramento v. Clunie, 120 Cal. 29; Los Angeles v. Kysor, 125 Cal. 463.

Express dedication. The construction of a plat containing an express dedication is a matter of law for the court. Miller v. Indianapolis, 123 Ind. 196; Hanson v. Eastman, 21 Minn. 509. See also State Historical Assoc. v. Lincoln, 14 Neb. 336.

¹ West End v. Eaves, 152 Ala. 334; 44 So. Rep. 588; Chapman v. Sault

Ste Marie, 146 Mich. 23; Boye v. Albert Lea, 93 Minn. 121; Darling v. Jersey City, 73 N. J. Eq. 318; 67 Atl. Rep. 709; Lewis v. Portland, 25 Oreg. 133, 155; Houston v. Finnegan (Tex. Civ. App.), 85 S. W. Rep. 470.

² Shoemaker v. United States, 147 U. S. 282; Wilson v. Lambert, 168 U. S. 611, 616, citing text; People v. Williams, 51 Ill. 63; Cook v. South Park Com'rs, 61 Ill. 115; West Chicago Park Com'rs v. Western Union Tel. Co., 103 Ill. 33; Holt v. Somerville, 127 Mass. 408; Foster v. Boston Park Com'rs, 133 Mass. 321; St. Louis County Ct. v. Griswold, 58 Mo. 175; Kansas City v. Ward, 134 Mo. 172, 177; Kansas City v. Bacon, 147 Mo. 259, 273; Owners of Ground *re* Pine St. v. Albany, 15 Wend. (N. Y.) 374; Bouton v. Brooklyn, 15 Barb. (N. Y.) 375, 384; Matter of Central Park, 63 Barb. 282; Matter of New York City, 99 N. Y. 569. See chapters on Eminent Domain, *ante*, and on Taxation, *post*.

In Wilson v. Lambert, 168 U. S. 611, 616, an Act of Congress providing for the laying out of a park in the District of Columbia, provided that the park should be set aside "for the benefit and enjoyment of the people of the United States." The court held that, notwithstanding this broad declaration of the general public nature of the park use, the property owners benefited by laying out the park might be specially assessed for the expense thereof. But the legislature cannot authorize a city to assess property benefited by the construction of the park when such property lies outside the city limits, although it may abut on the park. Matter of Prospect Park, 60 N. Y. 398, aff'g 2 Hun (N. Y.), 628. Index, *Boundaries; Charter; Property*.

parks and public squares in cities and villages, these being regarded as easements for the benefit of the public; and the fact of dedication may be established in the same manner as in the case of highways and streets.¹

¹ *Wilson v. Lambert*, 168 U. S. 611, citing text; *Forney v. Calhoun County*, 84 Ala. 215; *Rhodes v. Brightwood*, 145 Ind. 21, 23, quoting text; *Gillean v. Frost*, 25 Tex. Civ. App. 371, 374, citing text; *Sturmer v. Randolph County Ct.*, 42 W. Va. 724, quoting text.

Dedication of parks. *Davenport v. Buffington*, 97 Fed. Rep. 234; *Avondale Land Co. v. Avondale*, 111 Ala. 523; *Douglass v. Montgomery*, 118 Ala. 599; *Archer v. Salinas*, 93 Cal. 43; *McIntyre v. El Paso County*, 15 Colo. App. 78; *Pierce v. Roberts*, 57 Conn. 31; *Chicago v. Ward*, 169 Ill. 392; *Rhodes v. Brightwood*, 145 Ind. 21; *Abbott v. Cottage City*, 143 Mass. 521; *Conkling v. Mackinaw City*, 120 Mich. 67; *Price v. Plainfield*, 40 N. J. L. 608; *Morris v. Sea Girt Land Imp. Co.*, 38 N. J. Eq. 304; *Steel v. Portland*, 23 Oreg. 176, 184; *Morrow v. Highland Grove Traction Co.*, 219 Pa. 619; *Gillean v. Frost*, 25 Tex. Civ. App. 371; *Sanborn v. Amarillo*, 42 Tex. Civ. App. 115; 93 S. W. Rep. 473; *Bates v. Beloit*, 103 Wis. 90.

Dedication of public squares. *San Leandro v. Le Breton*, 72 Cal. 170 ("court square"); *Princeville v. Auten*, 77 Ill. 325; *Lee v. Mound Station*, 118 Ill. 304 ("public square"); *Marsh v. Fairbury*, 163 Ill. 401; *Riverside v. MacLain*, 210 Ill. 308, 320; *Doe v. Attica*, 7 Ind. 641; *Miami County v. Wilgus*, 42 Kan. 457 ("seminary square"); *Dover v. Fox*, 9 B. Mon. (Ky.) 200; *Baker v. Johnston*, 21 Mich. 319 ("public square"); *Winona v. Huff*, 11 Minn. 119; *Price v. Thompson*, 48 Mo. 363; *Price v. Breckenridge*, 92 Mo. 378; *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13; *Watertown v. Cowen*, 4 Paige Ch. (N. Y.) 510; *Pearsall v. Post*, 20 Wend. (N. Y.) 111, 117; s. c. 22 Wend. (N. Y.) 425, 433, 451, 454; *Reynolds's Heirs v. Stark County*, 5 Ohio, 204 (donation for "county buildings"); *Smith v. Heuston*, 6 Ohio, 101 (donation for "public buildings"); *Brown v. Manning*, 6 Ohio, 298 ("public square"); *Lebanon v. Warren County*, 9 Ohio, 80 ("public ground"); *Huber v. Gazley*, 18 Ohio, 18; *Le Clerq v.*

Gallipolis, 7 Ohio, Part I, 218; *Commonwealth v. Rush*, 14 Pa. St. 186; *Commonwealth v. Beaver Borough*, 171 Pa. 542; *Lamar County v. Clements*, 49 Tex. 347; *State v. Wilkenson*, 2 Vt. 480; *Abbott v. Mills*, 3 Vt. 521; *State v. Catlin*, 3 Vt. 530; *State v. Trask*, 6 Vt. 355; *Daniels v. Wilson*, 27 Wis. 492 ("reserved public square").

A plat, by which lands were sold, contained a block marked "*Annette Park, now belonging to R. Graves.*" It was held that there was a dedication of the park to public use; that the public use involved in the description of the lot as a park was not sufficiently qualified by the additional words which did not apply to the use, but merely indicated the ownership which continued in the dedicator after dedication to public use. *Bayonne v. Ford*, 43 N. J. L. 292. The word "Lawn" on a plat of lands at the seashore by which lots were sold, held to give purchasers an interest in the lands so designated. *Fisk v. Ley*, 76 Conn. 295.

"Whenever a public square or common is marked out or set apart as such by the owners, and individuals are induced to purchase lots or lands bordering thereon, in the expectation held out by the proprietor that it should so remain; or even if there are no marks upon the ground, but a map or plan is made and lots marked thereon and sold as such, it is not competent for the proprietors to disappoint the expectations of the purchasers by resuming the lands thus set apart, and appropriating them to any other use." *Per Williams, J.*, in *Abbott v. Mills* (Court-House Square), 3 Vt. 521. On a map, by which lots were sold, a block was shown which was not divided into lots, and was distinguished from the other blocks by a different coloring, by delineation of trees and paths, and the representation of a fountain. No words were used expressly indicating that the block was dedicated as a "square" or "park." It was held that the intent to dedicate the block for public use as a square or park was sufficiently evidenced. *Wegor v. Delran*, 61 N. J. L. 224. The same principle is recognized in *Morrow v.*

§ 1096. **Park Uses.** — The word “*park*” written upon a block of land designated upon a map is as *significant of a dedication*, and the use to which the land is dedicated, as the word “*street*” written upon such map.¹ In municipal affairs, a *park is a piece of ground set apart* and maintained for public use and laid out in such a way as to afford pleasure to the eye as well as opportunity for open-air recreation.² In laying out and adorning public parks, *aesthetic con-*

Highland Grove Traction Co., 219 Pa. 619, 623.

“*Place*” on a map imports dedication when there are other marks upon it which indicate a public use. *Fessler v. Union*, 67 N. J. Eq. 14.

A dedication of a park by delineation on a plat *must be accepted* by the public. *Archer v. Salinas*, 93 Cal. 43. Similarly, a “*plaza*” delineated on a plat does not become a public place, until acceptance, whatever the rights of purchasers may be. It was held that where twenty years had elapsed and inconsistent uses had intervened, the city was estopped from accepting it. *Anaheim v. Langenberger*, 134 Cal. 608. A dedication of a park may be accepted by general public user. *Abbott v. Cottage City*, 143 Mass. 521; *Conkling v. Mackinaw City*, 120 Mich. 67. But occasional use of dedicated lands for picnics or pleasure parties is consistent with private ownership and is not in itself sufficient to establish acceptance. *Los Angeles v. Kysor*, 125 Cal. 463.

¹ *Archer v. Salinas*, 93 Cal. 43, 50; *Pierce v. Roberts*, 57 Conn. 31; *Price v. Plainfield*, 40 N. J. L. 608, 613; *Steel v. Portland*, 23 Oreg. 176, 184.

In *Archer v. Salinas*, 93 Cal. 43, 50, *Harrison, J.*, said: “The word ‘*park*’ written upon a block of land designated upon a map, is as significant of a dedication, and the use to which the land is dedicated, as is the word ‘*street*’ written upon such map. The word carries with itself the idea of an open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located, and is so defined by lexicographers. In England, the word when applied to an inclosed tract of land in the country, has a different signification and signifies that the lands inclosed are the private grounds of the proprietor. In this country too, a man may enclose his own land and style it a park, or give that name to his place, without giving to the public any right to its use,

for in such a case there would be no semblance of dedication; but the meaning of the word is to be determined by the circumstances connected with its use. In London, as well as in any city in this country, the term ‘*park*’ signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same, whether the word be used alone or with some qualifying term, as Hyde Park, or Regent’s Park, or, as in the present case, ‘*Central Park*.’”

The word “*park*” written upon a block on a map of city property indicates a public use; and conveyances made by the owners of the plotted land, by reference to such map, operate conclusively as a dedication of the block. *Price v. Plainfield*, 40 N. J. L. 608; *Maywood Co. v. Maywood* (“*Maywood Park*” on recorded plat), 118 Ill. 61. It has been held that the *addition of the owner’s name* to the word park on a map, *e. g.* “*Ehmen’s Park*,” does not imply private ownership and negative intent to dedicate. *Ehmen v. Gothenburg*, 50 Neb. 715.

² *Century Dictionary*, approved in *Commonwealth v. Hazen*, 207 Pa. 52, 57; *Morrow v. Highland Grove Traction Co.*, 219 Pa. 619, 623.

Other definitions of the term have been given as follows: “A park is a place for the resort of the public for recreation, air, and light.” *Riverside v. MacLain*, 210 Ill. 308, 324; *Ehmen v. Gothenburg*, 50 Neb. 715; *Price v. Plainfield*, 40 N. J. L. 608, 613. “An open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located.” *Archer v. Salinas City*, 93 Cal. 43, 50, *per Harrison, J.* “A pleasure ground for the recreation and enjoyment of the people of the city or town in which the park is situated.” *Rhodes v. Brightwood*, 145 Ind. 21, 29, *per Howard, J.* “A plat of ground in a city or town set apart for ornament, a place which the residents of the municipality may frequent for pleasure,

siderations have an important place and may be recognized by the legislature and by the municipality.¹ A park may be devoted to any use which tends to promote popular enjoyment and recreation. Although primarily involving the idea of open air and space, occupation in part by monuments, statues, museums, galleries of art, free public libraries, and other agencies contributing to the æsthetic enjoyment of the people is not a perversion of the lands from park uses.² These are maintained for the use, convenience, and recreation

exercise and enjoyment." *McIntyre v. El Paso County*, 15 Colo. App. 78.

In *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 240, *Folger, J.*, said: "In the idea of a public park, is comprehended more than a use, either occasional or limited by years, or susceptible of co-existence with a private right capable of concurrent exercise. The words suggest more than an open extensive area of land, to be passed over, or but temporarily occupied by the public, and on which any private person may still do acts of ownership. To create a public park, an extensive area is needed; but the area must be improved, and in various processes, alterative and subversive of natural formation, must much money be absorbed and many years go by before it is complete. And so costly, so extensive, so peculiar in character, and so undisturbed by interference, must be these processes and the results of them, that there is need of permanency and exclusiveness of public possession and control, as against the exercise of any private right therein. Of itself then, the power to take lands for a public park, unless limited by the terms in which it is given, would, to a large degree, carry with it the right to acquire the largest title in the lands taken."

A plat showed an open square marked "Alliquippa Grove," colored in green, with paths laid out in it, and it was announced that the grove had been set apart as a public park. Held that there was a dedication of a park, and that the fact that the word "grove" was used instead of "park" was immaterial. *Morrow v. Highland Grove Traction Co.*, 219 Pa. 619. The court pointed out that a *grove* is the natural nucleus of a park or pleasure ground for the people. A natural grove set apart and cared for becomes quickly what to the common understanding is a park. In *Commonwealth v. Hazen*, 207 Pa. 52, the

court held that a *game and fish preserve* for the benefit of the stockholders or members of a private corporation is not a park; and hence that a statute entitled "An act to incorporate the Blooming Grove Park Association" was unconstitutional as special legislation not only failing to express its purpose in its title, but as having a misleading title; and that the defendant, who had been convicted under certain penal clauses of the act for killing deer within the property of the association, had been improperly convicted and was entitled to be discharged. *Index, Title.*

¹ *Attorney-General v. Williams*, 174 Mass. 476, 478; s. c. 178 Mass. 330. In *Laird v. Pittsburg*, 205 Pa. 1, 5, *Mitchell J.*, said: "The growth of sentiment for artistic adornment of public grounds and buildings is part of the history of our time and country. Public parks have come to be recognized as not only the natural place for walks and drives afoot, a wheel or with horse or carriage, for boating, skating, and other outdoor athletics, but also as the appropriate and most effective location for monuments and statues, either to historic heroes or to pure art, fountains, flower displays, botanical and zoölogical gardens, museums of nature and of art, galleries of painting and sculpture, music stands and music halls, and all other agencies of æsthetic enjoyment of eye and ear. The parks of cultivated Europe are filled with works of art, and the great cities of this country are following fast in the same direction."

² *Spires v. Los Angeles*, 150 Cal. 64 (free public library); *Hartford v. Maslen*, 76 Conn. 599 (soldier's memorial); *Laird v. Pittsburg*, 205 Pa. 1 (free library and art building); *Attorney-General v. Sunderland*, L. R. 2 Ch. Div. 634.

The right to erect a *public library building* upon "Centre Park, in section

of persons resorting to and using public parks. But the municipality cannot, at least without statutory authority, appropriate any part of a public park to the erection of buildings for administrative purposes, as for town or city halls, court-houses, school-houses, &c.¹

§ 1097 (645). **Use of Public Squares.** — A distinction has been suggested between parks and public squares.² Whether there be any substantial distinction or not, there is, at least, a close analogy between the two classes of public use.³ Where the words "public

7 of the city of Detroit," was sustained as a use which fell within the particular dedication, the history of which is given by *Campbell, J.*, and the power of the legislature and the municipality over the purposes for which public places may be used, discussed. *Riggs v. Detroit Bd. of Ed.*, 27 Mich. 262.

¹ *Spies v. Los Angeles*, 150 Cal. 64; *Attorney-General v. Sunderland*, L. R. 2 Ch. Div. 634.

A park in a city or town cannot be used for the erection of a county court-house, *McIntyre v. El Paso County*, 15 Colo. App. 78; or a public school-house, *Rowzee v. Pierce*, 75 Miss. 846; or for a city hall with a jail in the basement. *Church v. Portland*, 18 Oreg. 73. It has also been held that lands designated for park purposes cannot, at least without plain legislative authority, be appropriated to laying out streets and public highways, these uses being inconsistent with and destructive of park uses. *Riverside v. MacLain*, 210 Ill. 308; *Price v. Thompson*, 48 Mo. 363. As regards pleasure driveways, it has been suggested that there is a distinction between cases where a public park has been created and established by the municipality under statutory provisions, and cases where lands have been dedicated for the purpose of a park by the original owner thereof. A pleasure driveway may be a legitimate feature of a public park created and established by a municipality, but in a dedicated park it is always a question of the intention of the donor. *Riverside v. MacLain*, 210 Ill. 308, 328.

The owner of land fronting on a common or public park participates with the public in a beneficial interest therein, and may maintain injunction to protect his interest. In this case the building of a wall along a highway, taking in a part of a public green, so as to obstruct

the view from complainant's house, was restrained. *Wheeler v. Bedford*, 54 Conn. 244. The abutting owners are entitled to relief by injunction against the perversion to other uses of public squares and parks. *Riverside v. MacLain*, 210 Ill. 308, 329. As to the right of non-abutting owners to injunction, see *Douglass v. Montgomery*, 118 Ala. 599; *Church v. Portland*, 18 Oreg. 73. Resident tax payer held entitled to restrain perversion of public park by injunction. *Davenport v. Buffington*, 97 Fed. Rep. 234; *McIntyre v. El Paso County*, 15 Colo. App. 78. The vested rights of abutting owners in a public park are not affected by a change in the use of the abutting buildings. *Chicago v. Ward*, 169 Ill. 392. Index, *Abutter*. The purchasers may enjoin the owner of the land or his voluntary grantee from the erection of buildings upon a square. *Fisher v. Beard*, 40 Iowa, 625. Index, *Equity*; *Injunction*; *Remedy*.

² In *Bloomsburg Imp. Co. v. Bloomsburg*, 215 Pa. 452, 457, the court, after saying there was a distinction between the general definition of "public squares" and "parks," pointed out that the ancient idea of a public square carried down through time was that a public square meant simply a widening of the street, or the reservation of a plot of ground at intersections of streets for the purpose of beautifying the town, or providing a breathing space in its centre, or where the people were most likely to congregate or meet. "The word 'square' on a plat indicates a public use, either for purposes of free passage, or to be ornamented and improved for grounds of pleasure, amusement, recreation and health." *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13, 17.

³ It may be suggested that the

square" are used on a plat this is an unrestricted dedication to public use,¹ and the use varies according to circumstances, to be judged of and directed by the proper local authorities or corporate guardian, subject to the control of the laws and the courts.² The use to which a public square may be devoted may be controlled by the terms of the dedication.³ The local authorities have, however, no implied

apparent conflict in the decisions with reference to the uses to which public squares may be put, arises from the fact that a square in many instances is neither more nor less than a small public park centrally located and as such intended purely for purposes of recreation and pleasure, whilst in some instances as suggested by the Supreme Court of Pennsylvania, *supra*, it is merely a widening of the highway and intended to be devoted to highway uses. Which view should be adopted will necessarily depend largely upon local usage and custom, the method of dedication, and the relative advantage to the public to be derived from applying the square to one use rather than to the other.

¹ *Rhodes v. Brightwood*, 145 Ind. 21, 23, quoting text; *Alton v. Ill. Transp. Co.*, 12 Ill. 38, 60; *Commonwealth v. Bowman*, 3 Pa. St. 203; *Commonwealth v. Rush*, 14 Pa. St. 186; *Commonwealth v. Beaver Borough*, 171 Pa. 542; *Commonwealth v. Connellsville*, 201 Pa. 154, 588, quoting text.

The words "market square" on a plat held not in themselves sufficient to show dedicatory intent although tending to do so when joined to other circumstances. *Scott v. Des Moines*, 64 Iowa, 438, 644. The words "county block," marked across a block on a town plat, held not a sufficient dedication to the county under the statutes of Minnesota. *Hennepin Co. Com'rs v. Dayton*, 17 Minn. 260.

Nature and effect of a conveyance of land to trustees, with an election to them to dedicate as a public square or not, as they might see fit, see *New York v. Stuyvesant*, 17 N. Y. 34; 11 Paige (N. Y.), 414.

"Squares," says Bohn, in his *Handbook of London*, 1854, "are an excellent feature, peculiar to the large towns of England, but more particularly to London, being distinguished from the *Piazzi*, *Plazas*, *Places*, &c., of continental cities, by having originated in a sacrifice of building ground, not to

the purposes of ornament and architectural beauty, but to the pure necessity for ventilation." Quoted by *Read, J.*, in his interesting opinion in *Baird v. Rice*, 63 Pa. St. 489, 497, where he gives the history of the public squares of Philadelphia and states the nature of the uses for which they were dedicated by Penn.

"Place," as used in plats of towns, "is a French word, and means a public place surrounded by buildings, kept open for the embellishment of a city or the convenience of its commerce." *Per Preston, J.*, in *Xiques v. Bujac*, 5 La. An. 499, 510; *Langley v. Gallipolis*, 2 Ohio St. 107. See also *Fessler v. Union*, 67 N. J. Eq. 14. The term "Common" construed. *Goode v. St. Louis*, 113 Mo. 257.

Indefinite location. *Rung v. Shoneberger*, 2 Watts (Pa.), 23.

² *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469, *per Sergeant, J.*; referred to by *Gibson, C. J.*, *Commonwealth v. Bowman*, 3 Pa. St. 203, *supra*. See also *Commonwealth v. Beaver Borough*, 171 Pa. 542; *Commonwealth v. Connellsville*, 201 Pa. 154, 158, quoting text; *Baker v. Johnston*, 21 Mich. 319, where *Campbell, J.*, discusses this subject.

³ In *Riverside v. MacLain*, 210 Ill. 308, 328, it is said that a distinction is to be made between cases where a public square is dedicated without restriction, and cases where the dedication is restricted to a particular purpose. In the former case, any reasonable public use may be made of the square, but in the latter it must be devoted to the particular purpose indicated by the dedication. Space marked "*College Square*," held to be a dedication to public use for an institution of learning. *Weeping Water v. Reed*, 21 Neb. 261. The words "*Seminary Place*" on a map indicate an intent to dedicate to school purposes. *Kansas City Board of Education v. Kansas City*, 62 Kan. 374. See also *Miami County v. Wilgus*, 42 Kan. 457; *Wilgus v. Miami County*, 54 Kan. 605.

power to authorize private dwelling-houses or other private structures to be erected thereon, and, if erected, they are public and indictable nuisances.¹ It has been held that, under circumstances, the corporate authorities may authorize the use thereof for public buildings, but the right to erect county buildings upon the public square of a county town is regarded by Chief Justice Gibson as resting alone on a usage which, in Pennsylvania, "has acquired the consistence of law."² Although it has been suggested that a public

The words "*Market Square*" on a plat of dedicated lands were held not to be sufficient in themselves to restrict the use to market purposes as they might indicate an arbitrary name selected by the dedicator. *Scott v. Des Moines*, 64 Iowa, 438, 444. "*Court Square*" on a plat of lands in a town held not to limit the dedication to the use of the public for county as distinguished from town purposes. *San Leandro v. Le Breton*, 72 Cal. 170. When the use is not expressed, the intended use may be shown by parol. *Princeville v. Auten*, 77 Ill. 325. The conveyance of a block of ground for the use of the public as a "*court-house square*" creates a trust which is not executed by a sale of the block or a portion of it, and the application of the proceeds to the erection of a court-house. *Franklin Co. Com'rs v. Lathrop*, 9 Kan. 453.

¹ *Commonwealth v. Rush*, 14 Pa. St. 186; *State v. Atkinson*, 24 Vt. 448; *Hutchinson v. Pratt*, 11 Vt. 402, 423, per *Williams*, C. J.; *Pomeroy v. Mills*, 3 Vt. 279; *State v. Woodward*, 23 Vt. 92; *Columbus v. Jaques* (market house in street), 30 Ga. 506; *State v. Mobile*, 5 Port. (Ala.) 279; *People v. Carpenter*, 1 Mich. 273; *Cooper v. Alden*, *Harring*, Ch. (Mich.) 72; *Sturmer v. Randolph County Ct.*, 42 W. Va. 724. As to erections under the civil law upon lands dedicated to public use, see *New Orleans v. United States*, 10 Pet. (U. S.) 662, 725, 735, per *McLean*, J. *Post*, § 1131, note.

² *Langley v. Gallipolis*, 2 Ohio St. 107, 110, per *Bartley*, C. J.

Pennsylvania. In this State the uses to which public squares may be devoted seem to be founded upon custom and usage. In *Rung v. Shoneberger*, 2 Watts (Pa.), 23, *Rogers*, J., said: "In this State there are few ancient towns in which squares do not form part of the plan. They are generally located at the intersection of

the streets; and are intended as sites for the erection of buildings for the use of the public, such as court houses, market houses, school houses, and churches; sometimes they are designed for ornaments; and at others they are intended for the promotion of the health of the inhabitants by admitting a free circulation of air." In *Commonwealth v. Bowman*, 3 Pa. St. 203, the defendants were indicted for occupying, by authority from the county commissioners, a building upon the square (dedicated without restriction) of an incorporated town. *Gibson*, C. J., said: "The public square is as much a highway as if it were a street, and neither the county nor the public can block it up, to the prejudice of the public or of an individual. . . . It is dedicated to the use of all of the citizens as a highway, and all have a right to pass over it without unreasonable let or hindrance, — in which respect it differs from the public squares in Philadelphia, which are dedicated to health and recreation, and which are necessarily subjected to regulation by the local authorities." The case, however, recognizes the right of the county to reasonable accommodation for its court-house and public offices in the great square of the county town, the foundation of this right being, as expressed by *Gibson*, C. J., "one of the usages of our State, which has acquired the consistence of law." The extent of the right is limited to the single purpose sanctioned by the usage. In *Baird v. Rice*, 63 Pa. St. 489, *Read*, J., traces the history of the public squares in Philadelphia dedicated by Penn "for like uses as the Moorfields in London," and the centre square for *buildings and public concerns*; and it was held that the legislature might vacate streets in this latter square and authorize the erection of a court-house and municipal buildings thereon, since this was in

square is simply a widening of the street¹ and that it may be used for purposes of free passage,² authority is to be found which denies the power of municipal corporations to lay out streets or highways within the limits of a public square.³

effect nothing more than a legislative appropriation of the square and streets to the purposes for which the square was originally dedicated. In *Commonwealth v. Beaver Borough*, 171 Pa. 542, it is said that "public squares" are dedicated to such appropriate uses as would under usage and custom be deemed to have been fairly in contemplation at the time of dedication, as court-houses, markets, churches, pleasure grounds, &c. The use of a public square for a county court-house was sustained in *Mahon v. Norton*, 175 Pa. 279. In *Mahon v. Luzerne County*, 197 Pa. 1, 7, where the court also sustained the use of a central square for a court-house, *Mitchell, J.*, said: "The title to spaces left open by the original plans of towns, or by subsequent general dedication for similar purposes, is in the commonwealth for the benefit of the whole public, and the uniform course of decision has been that *central squares*, in the laying out of towns, were meant as much, perhaps primarily more, for public buildings than to secure space, and therefore the commonwealth may authorize their occupation in that manner without altering their original use. . . . The occupation of a public square of the kind referred to by a public building is part of, or at least germane to, the use for which it was originally dedicated." Where land in a town has been dedicated as "public ground" "for the use of the inhabitants of said town and for travelers who may erect thereon temporary boat-yards," and it appeared that the use of the land by travellers had ceased in fact, it was held that the town might use a small part thereof as a site for a town hall. *Commonwealth v. Connellsville*, 201 Pa. 154.

In *Indiana*, it is said by *Davison, J.*, *arguendo*, in *Westfall v. Hunt*, 8 Ind. 174, that "the phrase, '*public square*,' when used in our statutes, — as also in its popular import, — refers almost exclusively to grounds occupied by the court-house and owned by the county." See also *Scantlin v. Garvin*, 46 Ind. 262. In *Rhodes v. Brightwood*, 145 Ind. 21, 29, it was said by *Howard, J.*, that in the early organization of counties

and the location of county sites, the word "public square" had a special reference to the location of the court-house and other county buildings.

Erection of a *school building* held to be a legitimate use of a public square. *Reid v. Edina Board of Education*, 73 Mo. 295. But although there is authority to sustain the power to erect public buildings on public squares there is also authority to the contrary. Thus, it has been held that a *town-hall cannot be erected* upon a public square. *Princeville v. Auten*, 77 Ill. 325. A *bell tower*, to give warning of fire, has also been held to be an unlawful use of a public square or "place." *Fessler v. Union*, 67 N. J. Eq. 14. It has been held that on a square dedicated on a plat as "market square," a city may lease to a private individual the privilege of erecting a building for market purposes. *McReynolds v. Broussard*, 18 Tex. Civ. App. 409.

Control of public square within the limits of the city corporation, on which a court-house and jail were situated, held to be in the city authorities, against whose ordinance the county authorities could not create a nuisance by the erection of horse-racks thereon. *Samuels v. Nashville*, 3 Sneed (Tenn.), 298. Respective rights of *city* and *county* in square, and effect of abandonment by county. *Campbell County Court v. Newport*, 12 B. Mon. (Ky.) 538; *Augusta v. Perkins*, 8 B. Mon. (Ky.) 207; *Rutherford v. Taylor*, 38 Mo. 315. A public square laid out before the city was incorporated had been used since 1743 for court-house, jail, and county purposes, including hitching-posts and standing room for farmers' horses. The city was restrained at the instance of the county from removing the hitching-posts and otherwise altering a part of the square. *Frederick County v. Winchester*, 84 Va. 467; *supra*, § 1079, note; *infra*, § 1099.

¹ See *Bloombsburg Imp. Co. v. Bloombsburg*, 215 Pa. 452, 457, *supra*.

² See *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13, 17, cited *supra*.

³ In *Jacksonville v. Jacksonville R.*

§ 1098 (646). **Enclosure and Ornamentation of Public Squares.** — *The uses and purposes of a public square or common are, in some respects, different from those of a public highway. Thus, a street or highway cannot be enclosed by the local authorities; but a public square or common in a town or city, where the dedication is general and without special limitation or use, may be enclosed, notwithstanding it has remained open many years, and may be improved and ornamented for recreation and health. But the place must, for the purposes of the dedication, remain free and common to the use of all the public.*¹

Co., 67 Ill. 540, *Thornton, J.*, says: "What were the uses and purposes intended? *Streets and a public square are denoted.* Each has a well-known and well-defined use and meaning. The one was designed for the purpose of travel, and the right of passage over the streets in any mode not to destroy their usefulness was given by the plat. The square was intended for beauty and adornment, and for the health and recreation of the public. A dedication must always be construed with reference to the object with which it was made. The donors never could have intended that this ground should be used as a street." See also to the same effect, *Price v. Thompson*, 48 Mo. 363. As to the laying out of streets or highways in public parks, see *ante*, § 1096. Where lands have been dedicated as a public square, it was held that the corporate authorities had power to make a *pleasure driveway* therein. *Commonwealth v. Beaver Borough*, 171 Pa. 542.

A part of a *public plaza or square* does not become a public street by being excluded from an enclosure erected about the rest of the square and used as a street. *Cohn v. Parcels*, 72 Cal. 367. The public may acquire a *highway across a public square* by dedication or by user for twenty years. The county authorities in *Indiana* may make such a dedication. *Greene County v. Huff*, 91 Ind. 333. See *infra*, § 1100, note. If a *street runs through the public square* the council of the city cannot direct it to be fenced up unless specially authorized. *Portland v. Whittle*, 3 Oreg. 126. Rights of adjacent owners. See chapter on Streets, *post*, §§ 1123, 1124.

It has been held that land which has been dedicated as a public square cannot be used for *railroad purposes*.

Jacksonville v. Jacksonville R. Co., 67 Ill. 540. Where a statute provided for laying out a town and *dedicated a tract as a common* for the advancement of its interests as a town and its commercial prosperity, it was held that the town could lawfully grant a part of the common for *railroad depot*. *Crawford v. Mobile & G. R. Co.*, 76 Ga. 405. Compare *Barney v. Keokuk*, 94 U. S. 324; s. c. 4 Dillon, 593; *post*, chapter on Streets. The term *common* construed. *Goode v. St. Louis*, 113 Mo. 257.

¹ *Guttery v. Glenn*, 201 Ill. 275, 284, quoting text; *Langley v. Gallipolis*, 2 Ohio St. 107; *Llano v. Llano County*, 5 Tex. Civ. App. 132, citing text. See also *Baker v. Johnston*, 21 Mich. 319; *Sequin v. Ireland*, 58 Tex. 183.

May be enclosed and ornamented. *Guttery v. Glenn*, 201 Ill. 275; *Hutchinson v. Pratt*, 11 Vt. 402, 423, where *Williams, C. J.*, points out some of the differences between public squares and commons and highways. *Leftwich v. Plaquemine*, 14 La. An. 152. In this case, *Merrick, C. J.*, observes: "As a public square is not designed as a highway or thoroughfare for all sorts of conveyances, but is intended as an ornament of a town and place of recreation and amusement, the corporate authorities may enclose the same." Compare remarks of *Gibson, C. J.*, in *Commonwealth v. Bowman*, 3 Pa. St. 203; *supra*, § 1097, note. See also *Baird v. Rice*, 63 Pa. St. 489. A *public monument* may be erected upon a square. *Hoyt v. Gleason*, 65 Fed. Rep. 685.

"By a '*town common*' in common parlance, is understood an enclosed or unenclosed place belonging to the town, in which no individual has a private property." *Per Gaston, J.*, in *Bath Com'rs v. Boyd*, 1 Ired. (N. Car.) L.

§ 1099 (647). **Use of Public Square by County.** — A county has no inherent right to appropriate the exclusive use of a public square in a town, not dedicated expressly to it but to the public or citizens generally. It has no more right than an individual to prevent or disturb the enjoyment of the inhabitants in grounds dedicated to public use.¹

§ 1100 (648). **Dedication for Other Public or Charitable Purposes.** — Property may also be dedicated in writing or by parol to other municipal, public, or charitable uses, such as church squares or lots;² for a burying-ground;³ for markets;⁴ for public buildings;⁵ for

194. See also *Goode v. St. Louis*, 113 Mo. 257. *Ferry right of riparian donor* on the dedicated front or commons recognized as reserved by him by reason of long user and acquiescence therein by the public. *Newport v. Taylor's Ex.*, 16 B. Mon. (Ky.) 699. As to ferries, see *ante*, chap. viii. *Wharf rights of such donor. Ante*, § 1077, note. A city may maintain an action against a county for the removal of a county jail and an offensive cesspool upon a public square dedicated for a court-house. *Llano v. Llano County*, 5 Tex. Civ. App. 132.

¹ *McCullough v. San Francisco Bd. of Ed.*, 51 Cal. 418; *Princeville v. Auten*, 77 Ill. 325; *Llano v. Llano County*, 5 Tex. Civ. App. 132, citing text. *Ante*, § 1097 note. The owner of a lot bounding on a public square has a right over and above that of the general public to have the square kept free of encroachment and suffers by the erection of buildings thereon a peculiar, individual injury which will enable him to maintain an individual action against the municipality for its breach of trust in the erection of the buildings. *Fessler v. Union*, 67 N. J. Eq. 14; *Chicago v. Ward*, 169 Ill. 392.

² *Antones v. Eslava's Heirs*, 9 Port. (Ala.) 527; *Hannibal v. Draper*, 15 Mo. 634; *Patrick v. Kalamazoo Y. M. C. A.*, 120 Mich. 185; *Maysville v. Wood*, 102 Ky. 263. As to a municipal corporation holding land in trust for religious purposes. *Supra*, § 989. *Church lots* on plat held to be a dedication for a public purpose, in which the municipality has an interest, and can eject the dedicator or his grantee. But

Mr. Chief Justice *Eustes's* opinion is, that by such a designation, the property is not *locus publicus*, but private. *Xiques v. Bujac*, 5 La. An. 499. In this case, relating to "Annunciation Place," or "Square," the civil law relating to dedication, and particularly dedications for church purposes, is very fully considered. In *Lennig v. Ocean City Assoc.*, 41 N. J. Eq. 24, land was dedicated to public use for *camp-meeting* purposes.

Under general dedication of "*Church Square*," what church entitled. *Pella Christian Church v. Scholte*, 2 Iowa, 27; *Chapman v. Gordon*, 29 Ga. 250; *Beatty v. Kurtz*, 2 Pet. (U. S.) 566; *Shapleigh v. Pillsbury*, 1 Me. 271, 280; *Rice v. Osgood*, 9 Mass. 38; *Pearsall v. Post*, 20 Wend. (N. Y.) 111, 118, *per Cowen, J.* Dedication of "*Home for Inebriates*." *Home for the Care of the Inebriates v. San Francisco*, 119 Cal. 534. When the statute only authorizes dedications for "streets, alleys, commons, or other public uses," it does not authorize a *statutory dedication for church purposes*. *Patrick v. Kalamazoo Y. M. C. A.*, 120 Mich. 185, 192.

³ *Hunter v. Sandy Hill Trs.*, 6 Hill (N. Y.), 407; criticised, 2 Smith Lead. Cas. (4th ed.) 193. See also *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 454; *Weisenberg v. Truman*, 58 Cal. 63; *Wood v. Macon & B. R. Co.*, 68 Ga. 539; *Hunt v. Zolles*, 75 Vt. 48; *Kansas City v. Scarritt*, 169 Mo. 471; *Campbell v. Kansas City*, 102 Mo. 326; *Beun v. Hatchet*, 81 Va. 25. Staking off ground as a cemetery and allowing burials therein amounts to a dedication.

⁴ *Dummer v. Jersey City*, 20 N. J. L. 86; *Indianapolis & B. R. Co. v. Indianapolis*, 12 Ind. 620.

⁵ *Reynolds's Heirs v. Stark County Com'rs*, 5 Ohio, 204; *Smith v. Heuston*, 6 Ohio, 101; *Ib.* 298, 305.

school purposes; ¹ and for *purposes of recreation and ornament*.² But the *use* must be a public one.³

§ 1101 (649). **Use of Dedicated Land for Wharves.** — Lands dedicated to the public, without restriction, upon the *margin of a navigable river*, may be used for a *landing or wharf*, as well as for purposes of passage.⁴ Upon the adjudged cases there exists some doubt whether the public can prescribe for or claim, by way of implied or common-law dedication, land for a *public landing*. There may be

Wormley v. Wormley, 207 Ill. 411. The title to land was vested in a city for a burial-ground forever. Afterwards an act of the legislature was passed directing the city council, if in its judgment it was wise to do so, to discontinue the use of the land as a cemetery and devote it to other municipal uses. Under such legislative authority the council took action to change the use of the land so as to convert it into a public market place. The Chancellor held that the use for cemetery purposes was perpetual, and not capable of being divested by legislative enactment. Stockton v. Newark, 42 N. J. Eq. 531. But the Court of Errors and Appeals reversed this judgment, and held that the use was a charitable and public one, and as such was subject to legislative change in the manner attempted. Newark v. Stockton, 44 N. J. Eq. 179; *infra*, §§ 1103, 1104.

¹ Klinkener v. McKeesport School District, 11 Pa. St. 444; Weeping Water v. Reed, 21 Neb. 261; Kansas City Board of Education v. Kansas City, 62 Kan. 374; Miami County v. Wilgus, 42 Kan. 457; Forbes v. Ft. Scott, 7 Kans. App. 452.

² Pella Christian Church v. Scholte, 24 Iowa, 283. The words on a plat, "*Garden Square*," held not necessarily to imply a dedication. *Ib.* So of the words, "*Spencer Square*." Logansport v. Dunn, 8 Ind. 378. Square marked "*Coliseum*." Livaudais v. Municipality, 16 La. 512; Xiques v. Bujac, 5 La. An. 499; Cox v. Griffin, 18 Ga. 728. The word "*Park*," on plat construed. Perrin v. N. Y. Cent. R. Co., 36 N. Y. 120; Price v. Plainfield, 40 N. J. L. 608.

The right to have land remain un-built upon within reasonable limits for purposes of *light, air, and prospect* can be acquired by dedication. Attorney-General v. Vineyard Grove Co., 181

Mass. 507. *Servitudes of view* arising from dedication to public use. French v. New Orleans & C. R. Co., 2 La. An. 80.

³ Todd v. Pittsburgh, Ft. W. & C. R. Co., 19 Ohio St. 514. A dedication to a *corporation of limited membership* is not "for a public use." California Academy of Science v. San Francisco, 107 Cal. 334.

Marking on plat a lot, "*Depot of O. & P. Railroad*," does not dedicate it. *Ib.*; s. p. McWilliams v. Morgan, 61 Ill. 89. Effect of plat with street entitled "Railroad Avenue," with the words therein "R. R. Depot." Ayres v. Penn. R. Co., 48 N. J. L. 44. Dedication for *railroad purposes* sustained. Kansas City & N. C. R. Co. v. Baker, 183 Mo. 312.

The right to maintain a *dam* and to *flow the land of others* may be acquired by dedication. Boye v. Albert Lea, 93 Minn. 121. Consent to the deposit of earth on the margin of plaintiff's lot as a lateral support for the grade of a street, held to be dedication of plaintiff's property to that use, estopping her after four years' user from requiring the city to remove the earth so deposited. Williams v. Hudson, 130 Wis. 297.

⁴ Newport v. Taylor's Ex., 16 B. Mon. (Ky.) 699; Whyte v. St. Louis, 153 Mo. 80; *ante*, § 1077, note, and cases cited; *post*, § 1234, note; Godfrey v. Alton, 12 Ill. 29; Alton v. Ill. Transp. Co., 12 Ill. 38; Memphis v. Wright, 6 Yerg. (Tenn.) 497. In this last case it was held that a part of the *public promenade* might, by the direction of the city, be converted into a landing or wharf. The opinion asserts, *arguendo*, a measure of power in the corporation over the public property entirely too broad. As to *wharves*, see Index, *Riparian Proprietor*; *Rivers*; *Wharves*.

an express dedication for this purpose, and, on principle, within the limits of a municipality bordering on navigable waters, it would seem to be going too far to say that in no case can a common-law dedication of land for a public wharf or landing be shown by user, and the proprietor be estopped from denying the right of the public to such use.¹

¹ *California Nav. & Imp. Co. v. Union Transp. Co.*, 126 Cal. 433, 441; *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. St. 318. See *Buffalo v. Delaware, L. & W. R. Co.*, 39 N. Y. Supp. 4.

Denying that the principle of implied dedication of public ways, squares, &c., by long user and acquiescence, extends to *public landings*, see *Pearsall v. Post*, 20 Wend. (N. Y.) 111; affirmed 22 Wend. (N. Y.) 425. In these cases the history and nature of dedications to public uses are learnedly considered, and the numerous cases collected, digested, and commented on. Same principle. *Bethum v. Turner*, 1 Me. 111; *State v. Wilson*, 42 Me. 9, where the *nature of landings* and the respective rights of the owner of the soil and the public are elaborately considered. *Littlefield v. Maxwell*, 31 Me. 134.

It has been held that a mere delineation on a filed map by which conveyances are made of a wharf extending into navigable water at the end of a public street does not conclusively indicate a dedication of the wharf to public use. The use of wharves is different from the use of streets and ways; wharves are affected with a *quasi-public* use; wharfage is demandable by some one; and the mere fact that a wharf is delineated on a map does not imply the abandonment of it to public use. *Palen v. Ocean City*, 64 N. J. L. 669. See also *O'Neill v. Annett*, 27 N. J. L. 290; *California Nav. & Imp. Co. v. Union Transportation Co.*, 126 Cal. 433; *Mark v. West Troy*, 151 N. Y. 453, aff'g 76 Hun (N. Y.), 162. The *dedication of a highway* to and from a wharf does not imply dedication of the wharf. *California Nav. & Imp. Co. v. Union Transportation Co.*, 126 Cal. 433. But that there may be a prescriptive right to, or a dedication of, public landings, see *Penny Pot Landing Case*, 16 Pa. St. 79; *Coolidge v. Learned*, 8 Pick. 504; *Municipality v. Kirk*, 5 La. An. 34; *Abbott v. Cottage City*, 143 Mass. 521; where *Pearsall v. Post*, 20 Wend. (N. Y.) 111,

is referred to by *Holmes, J.*, in his suggestive and valuable opinion.

A very eminent judge in *Missouri* uses this language: "As to the ownership of the soil of the street, the question is of no practical importance. The right of the owner of a lot in town is as much property as the lot itself, and the legislature can no more deprive a man of the one than the other without compensation." *Napton, J.*, *Lackland v. No. Mo. R. R. Co.*, 31 Mo. 180. See s. c. 34 Mo. 259; *Thurston v. St. Joseph*, 51 Mo. 510, *per Adams, J.* More fully on this point, see *post*, chapters xxiv and xxv on Streets.

The words "*reserved landing*," on proprietor's recorded plat, held to indicate intention not to dedicate. *Grant v. Davenport*, 18 Iowa, 179; *Cowles v. Gray*, 14 Iowa, 1. But dedication was inferred from the exception in ancient deeds of "convenient landing place" in conjunction with other circumstances. *Dougan v. Greenwich*, 77 Conn. 444.

Where land is dedicated as a "*commons*" along a navigable stream, the public authorities may build wharves. *Newport v. Taylor's Ex.*, 16 B. Mon. (Ky.) 699; *ante*, § 1077, note. "*Levee*." *Mankato v. Meagher*, 17 Minn. 265. Words "*public levee*" in recorded plat of city of Portland, Oregon, construed as meaning a public landing place, and an effectual dedication. *Coffin v. Portland*, 11 Saw. C. C. R. 600; 27 Fed. Rep. 412, *Deady, J.* The legislature held to have the power to authorize the construction of wharves, warehouses, and terminal facilities by a railway company on such levee. *Ib.* Compare *Portland & W. V. Co. v. Portland*, 14 Oreg. 188.

A strip of land along the margin of a navigable river *dedicated as a levee*, with streets opening therefrom and forming the only means of egress and ingress for many lots, is dedicated as a street as well as a landing place for boats, and is not abandoned because river commerce, necessitating its use

§ 1102 (650). **Alienation of Dedicated Lands; Change of Use.**

— A municipal corporation has no *implied or incidental authority to alien*, or to dispose of for its own benefit, property dedicated to or held by it in trust for the public use or to extinguish the public uses in such property, nor is such property subject to the payment of the debts of the municipality.¹

for the latter purpose has ceased. *McAlpine v. Chicago G. W. R. Co.*, 68 Kan. 207, citing text. Reservation for "highway and other public uses." *Cook v. Burlington*, 30 Iowa, 94; *post*, § 1234, note.

¹ *New Orleans v. United States*, 10 Pet. (U. S.) 662; *District of Columbia v. Cropley*, 23 App. D. C. 232, quoting text; *Murray v. Allegheny*, 136 Fed. Rep. 57, 60, citing text; *Douglass v. Montgomery*, 118 Ala. 599, 606, citing text; *Arkansas River Packet Co. v. Sorrels*, 50 Ark. 466, 473, citing text; *Beebe v. Little Rock*, 68 Ark. 39, 62, citing text; *Branham v. San Jose*, 24 Cal. 585; *La Societa Italiana v. San Francisco*, 131 Cal. 169; *Cromwell v. Brown Stone Q. Co.*, 50 Conn. 470; *Alton v. Illinois Transp. Co.*, 12 Ill. 38; *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540; *Warren v. Lyons City*, 22 Iowa, 351; *Ransom v. Boal*, 29 Iowa, 68; *Augusta v. Perkins*, 3 B. Mon. (Ky.) 437; *Alves' Ex. v. Henderson*, 16 B. Mon. (Ky.) 131, 168; *Buckner v. Augusta*, 1 A. K. Marsh (Ky.), 9; *Kennedy v. Covington*, 8 Dana (Ky.), 50; *Roberts v. Louisville*, 92 Ky. 95; *Jefferson Par. Police Jury v. McCormack*, 32 La. An. 624; *West Carroll Par. v. Gaddis*, 34 La. An. 928; *Rutherford v. Taylor*, 38 Mo. 315; *Price v. Thompson*, 48 Mo. 363; *Matthews v. Alexandria*, 68 Mo. 115; *Cummings v. St. Louis*, 90 Mo. 259; *Hoboken M. E. Church v. Hoboken*, 33 N. J. L. 13; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *Van Wert Bd. of Education v. Edson*, 18 Ohio St. 221; *San Antonio v. Lewis*, 15 Tex. 388; 7 Tex. 288 (plaza or commons). And see the learned and valuable opinion of *Baldwin, J.*, in *Hart v. Burnett*, 15 Cal. 580, as to the power of the Spanish municipal authorities over the lands of the pueblo. As to power of the State and the title of San Francisco to the *Pueblo Lands*, see *San Francisco v. Canavan*, 42 Cal. 541; *Pickett v. Hastings*, 47 Cal. 269. See also on this subject, *San Francisco City & County v. Le Roy*, 138 U. S. 656; *Knight v. United States*

Land Assoc., 142 U. S. 161; *United States v. Santa Fe*, 165 U. S. 675.

The municipality cannot restrict the use of dedicated lands in such manner as to impair the right of full enjoyment by the public, except it be by express legislative authority. *District of Columbia v. Cropley*, 23 App. D. C. 232, 248. A city council *cannot sell a public square* without authority from the legislature, even though the corporation holds it "for such public uses as the council may, from time to time, direct and ordain," and the object of selling is to apply the proceeds to the public use of paying the debts of the corporation incurred for public purposes. *Commonwealth v. Rush*, 14 Pa. St. 186; *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469, *per Sergeant, J.*

A conveyance to a city of lands, though for a consideration, containing the condition "said lands to be used only as a common or street; if otherwise to revert to me or my heirs," and the subsequent dedication as a public park, impose a trust for the public and a sale by the grantor's heirs of their reversionary right does not entitle the city to revoke the dedication and grant a right of way over the land to a railroad. *Douglass v. Montgomery*, 118 Ala. 599, citing text. A power to vacate streets does not authorize a city to *relinquish* a part of a street to adjoining owners for a term of years, at the expiration of which it is to revert to the city. *Glasgow v. St. Louis*, 87 Mo. 678; *post*, §§ 1160, 1190.

Dedication on plat of two lots "for school purposes, and on which to erect school-houses" is a dedication to a specific use, and the property is inalienable by the incorporated place in which it lies, so as to extinguish the use. And there is no power of alienation without the consent of the dedicator or his representatives, even though the lots, by reason of a railroad and depot near by, have been rendered unsuitable for school-houses, and their use for that purpose dan-

§ 1103 (651). **Same Subject; Legislative Authority.**—How far the legislature has the power, or may confer upon the municipality authority to dispose of lands held for such purposes is a more difficult question, and depends largely, we should say, upon the nature and extent of the dedication. As between the municipality and the general public, the legislative power is, in the absence of special constitutional restriction, supreme, and so it is in all cases where there are no private rights involved. If the municipal corporation holds the full title to the ground for public uses, without restriction, the legislature may doubtless direct and regulate the purposes for which the public may use it.¹ But if a grant be made by a proprietor of a town in laying it out for a specific and limited purpose, as for example, a "public square," the municipality or public acquiring it upon a trust for the uses and purposes set forth on the plat or in the conveyance, it has been decided by the Supreme Court of Iowa that the grantor in such a case retains an interest therein of such a nature that it is not, as against him, within the power of the legislature to authorize its sale by the municipality, since such a sale is a violation of the specific trust upon which the property was dedicated or acquired.²

gerous. *Van Wert Bd. of Ed. v. Edson*, 18 Ohio St. 221.

Where lots are granted to county commissioners and their successors, in trust for the use of the said county in fee simple for the purpose of erecting thereon county buildings, which were erected, the land, on the subsequent removal of the seat of justice and the discontinuance of the original uses, does not revert to the original grantor or his heirs. *Seebold v. Shitler*, 34 Pa. St. 133. See more fully *ante*, chap. on Corporate Property, § 991, and note.

"Market space" on plat makes it public, and when exchanged by legislative authority for other property for a "market space," that other, though deeded to the city in fee simple, is held by the city in trust, and cannot be sold on execution in payment of corporate debts. *Indianapolis & B. R. Co. v. Indianapolis*, 12 Ind. 620.

¹ *Harter v. San Jose*, 141 Cal. 659, 665, quoting text; *Seattle Land & Imp. Co. v. Seattle*, 37 Wash. 274, quoting text. The streets and public squares of the city of Washington were conveyed by the original proprietors of the lands to trustees, "for the use of the United States forever." It

was held that these words conveyed an absolute, unconditional fee simple, and that the original proprietors had, as such, no interest therein, and could not, therefore, object to a sale, authorized by an Act of Congress, of such portions thereof as were no longer useful for streets and squares. *Van Ness v. Washington*, 4 Pet. (U. S.) 232; *Potomac Steamboat Co. v. Upper Potomac S. Co.*, 109 U. S. 672. Legislature may authorize sale of lands of which the title is invested in a municipality in fee, acquired for a park, but it cannot be empowered to do so where this would impair a specific contract with a creditor of the city. (*Brooklyn Park Com'rs v. Armstrong*, 3 Lans. (N. Y.) 429; s. c. 45 N. Y. 234; *ante*, § 996, note.)

² *Warren v. Lyons City*, 22 Iowa, 351. See also *Arkansas Riv. Packet Co. v. Sorrels*, 50 Ark. 466, 473, citing text; *Chicago v. Ward*, 169 Ill. 392; *St. Paul v. Chicago, M. & St. P. R. Co.*, 63 Minn. 330, 352; *Newark v. Watson*, 56 N. J. L. 667; *Van Wert Bd. of Education v. Edson*, 18 Ohio St. 221; *Louisville & N. R. Co. v. Cincinnati*, 76 Ohio St. 481; *Gilman v. Milwaukee*, 55 Wis. 328. The point decided in *Warren v. Lyons City*, 22

§ 1104 (651a). **Same Subject.** — Under the limitations upon legislative power which are imposed by the Federal and State Constitutions in respect of private property and rights arising under valid contracts, it is often extremely difficult to define the scope of constitu-

Iowa, 351, is not so clearly right as to put the matter beyond reargitation. See and compare *Newark v. Stockton*, 44 N. J. Eq. 179, *ante*, § 1100. In *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540, the case of *Warren v. Lyons City* is cited. It has been decided that the legislature could not authorize a railway company to construct and operate its road over a "public square," and it was enjoined at the instance of the city from so doing over the batture or levee in New Orleans. *New Orleans M. & C. R. Co. v. New Orleans*, 26 La. An. 478; s. c. *Ib.* 517; *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540, *supra*. See *infra*, § 1105, and note; *post*, §§ 1123, 1124. When the absolute title is acquired by condemnation for public use, the legislature may authorize the sale in cases where the rights of creditors or the obligation of contracts are not thereby impaired. *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *ante*, § 1034.

The case of *Franklin County v. Lathrop*, 9 Kan. 453, holds that the legislature so far represents the public that its consent to the alienation of public grounds dedicated under the statute is sufficient if no private rights have intervened, but that individuals purchasing from the town proprietors lots fronting on such public grounds, subsequent to their dedication, and making lasting and valuable improvements thereon, when lots are enhanced in value by their position, and would be made of less value by a change of such grounds from public to private uses, have a vested interest in the trust which the legislature cannot destroy. See *Newark v. Stockton* (lands held by city in trust for burial grounds forever), 44 N. J. Eq. 179, reversing s. c. 42 N. J. Eq. 531; also *ante*, § 1100; chapter xxiv on Streets, *post*.

Where the public have only an easement, the legislature cannot pass a law vesting so much of a street as may be closed or discontinued in the corporation of a city, as this deprives the owner of his property without due process of law. *John and Cherry Streets*, *In re*, 19 Wend. 659. In *Con-*

necticut, the public have simply an easement in highways, with the right to use materials thereon, in a reasonable manner, to make or repair them; the adjoining landowner retains the fee, and the exclusive right to herbage growing thereon, and the public cannot put their cattle in the highway to graze; and it is expressly held that under such circumstances the legislature cannot, without providing compensation, authorize towns to pass by-laws giving liberty to the inhabitants to depasture their cattle in the public highways. *Woodruff v. Neal*, 28 Conn. 168. As to extent of legislative power, see *ante*, chap. iv.; *post*, chapter on Streets; *ante*, § 1076.

Upon this subject of the power of municipal corporation to *alien public places*, with the consent of the sovereign power of the State, see opinion of *McLean, J.*, in *New Orleans v. United States*, 10 Pet. 662, 720. See also *Hebert v. Savalle*, 27 Ill. 448; *Bell v. Ohio & Pa. R. R. Co.*, 25 Pa. St. 161; s. c. dissent of *Black, C. J.*, 1 Grant Cas. 105; *Warren v. Lyons City*, 22 Iowa, 351; *Philadelphia & Trenton R. R. Co., In re*, 6 Whart. (Pa.) 25; *Franklin Co. v. Lathrop*, 9 Kan. 453; *Hart v. Burnett*, 15 Cal. 580; *Payne v. Treadwell*, 16 Cal. 222; distinguished by *Field, C. J.*, in *Grogan v. San Francisco*, 18 Cal. 590, 614; *infra*, § 1122 *et seq.*

Legislature may authorize sale of "commons." *Woodson v. Skinner*, 22 Mo. 13; *Carondelet v. McPherson*, 20 Mo. 192; *Swartz v. Page*, 13 Mo. 603; *Les Bois v. Bramell*, 4 How. (U. S.) 449, 458. See *ante*, chap. iv., as to extent of legislative power over corporations and their property. The boundaries of the power, if indeed it has any limits, are not easily defined. Property held under valid grants from a city is within the protection of the Constitution, and can only be taken by the exercise of the right of eminent domain. *Langdon v. New York*, 93 N. Y. 129; *People v. O'Brien*, 111 N. Y. 1. See also chapter on Corporate Property, *ante*; *post*, chapter on Streets.

tional legislative authority. It is ever a tender and delicate duty for the judicial tribunals to set up impassable landmarks and boundaries to legislative power. We have already met this question repeatedly, and we again meet it here. In the absence of any restriction by contract or special restriction in the Constitution, the power of the legislature over the uses of public property — that is, its power to modify and regulate such uses — is undisputed, and so far as the public or municipality is concerned, it is, perhaps, quite unlimited.¹ Doubtful and difficult questions arise, however, when the legislature, instead of regulating, asserts the right to destroy, and when such legislation injuriously affects the dedicator of property or the abutting owners. No general rule can be laid down on this subject. Special provisions having a bearing upon it vary in the Constitutions of the several States. Indeed, the general principles of the law relating to the rights of the dedicator and of such owners are in a state not completely developed. It is therefore not possible to do more than to affirm that while the general rule is that the legislative dominion over the uses of public property is plenary, it is also true, as is more fully shown elsewhere, that there may be rights in the dedicator or in the abutting owner of such a nature, — that is, property rights and rights resting upon contract, — that they cannot be destroyed, and of which he can only be deprived by the exercise of the right of eminent domain, — that is to say, on being justly compensated therefor.²

§ 1105 (652). **Civil Law Doctrine; Alienation in Louisiana.** — By the *civil law the public have*, in land dedicated to public use, *the right to the ground itself*.³ But such lands form no part of the public domain or crown lands, and the king or sovereign cannot alien them otherwise than by exercise of the right of eminent domain, although he may authorize certain erections thereon.⁴ And the doc-

¹ *Seattle Land & Imp. Co. v. Seattle*, 37 Wash. 274, quoting text.

² See *ante*, chaps. iv. and ix., as to extent of legislative power; §§ 1023, 1024, 1034, 1038, 1103, and notes; *post*, §§ 1123, 1124, 1259-1261. Where both the State and the city have united in changing or modifying the public use to which lands held in trust for the public may be put, — *e. g.*, by authorizing the construction of a railroad under Boston Common, — persons who are merely taxpaying citizens, or voters, or a constituent part of the public at large can assert no right to the continued use of such property for the accustomed

purpose, or to have compensation paid for the surrender of the use, against the combined action of the legislature in authorizing and the city in making or concurring in the change. *Prince v. Crocker*, 166 Mass. 347, 362, citing text.

³ *Renthrop v. Bourg*, 4 Martin (La.), 97; *Doe v. Jones*, 11 Ala. 63, 83.

⁴ *New Orleans v. United States*, 10 Pet. 662, 725, 735, where *McLean, J.*, examines very fully the laws of France and Spain in respect to dedications to public use. 3 Kent Com. 451, and note.

trine has been declared by the Supreme Court of Louisiana, that where *public places* have been destined or created by the sovereign power, or with its consent, this power may authorize the municipal corporation interested in such places to alien or to change their use or destination whenever the public interest requires it, and that the rights of the owners of property in the vicinity are subordinate to this paramount right of the legislature.¹

§ 1106 (653). **Reverter; Misuser; Remedy.** — Property unconditionally dedicated to public use, or to a particular use, *does not revert to the original owner* except where the execution of the use becomes impossible. If the dedicated property be appropriated to an unauthorized use, equity will cause the trust to be observed or the obstructions removed.² But if the property is no longer de-

¹ New Orleans v. Hopkins, 13 La. 326; New Orleans v. Leverich, *Id.* 332; Delabigarre v. Municipality, 3 La. An. 230. It was decided both by the State court (New Orleans v. Hopkins, *supra*, and see De Armas v. New Orleans, 5 La. 132) and by the Supreme Court of the United States, that the public space, or *quay*, in front of Old Levee Street and the river, in the city of New Orleans, was public property, *hors de commerce* (New Orleans v. United States, 10 Pet. 662), and did not pass to the United States under the treaty of cession of the Province of Louisiana. Pending the controversy between the United States and the city of New Orleans as to the ownership of this property, the parties litigant agreed that it should be laid out into lots and sold, and the proceeds be held subject to the final decision of the court. After judgment was rendered in favor of the city of New Orleans, the legislature of Louisiana passed an act sanctioning the sale of this public property, and the question arose whether the legislature had this power. The Supreme Court of Louisiana held that the legislature possessed this right, laying down the principle that the *sovereign power of the State had the right to change the destination of public places* whenever it deemed the interest of the public required it, and that the right of the adjacent lot proprietors was necessarily subordinate to the paramount power of the legislature. New Orleans v. Hopkins, 13 La. 326; Same v. Leverich, *Id.* 332. See *supra*, §§ 1103; *post*, §§ 1190.

² *Per McLean, J., Barclay v. How-*

ell's Lessee, 6 Pet. (U. S.) 498, 507; *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Coffin v. Portland* (dedication for "public levee"), 11 Sawy. C. C. R. 600; s. c. 27 Fed Rep. 412, *per Deady, J.*, citing text; *Bayard v. Hargrove*, 45 Ga. 342; *Warren v. Lyons City*, 22 Iowa, 351, *per Wright, J.*; *McAlpine v. Chicago G. W. R. Co.*, 68 Kan. 207, quoting text; *Campbell County Ct. v. Newport*, 12 B. Mon. (Ky.) 538; *Augusta v. Perkins*, 8 B. Mon. (Ky.) 207; *Price v. Thompson*, 48 Mo. 363; *Goode v. St. Louis*, 113 Mo. 257; *Hand v. St. Louis*, 158 Mo. 204; *Price v. Meth. E. Church*, 4 Ohio, 514; *Brown v. Manning*, 6 Ohio, 298; *Le Clerq v. Gallipolis Trs.*, 7 Ohio, Pt. I, 218; *Webb v. Moler*, 8 Ohio, 552; *Williams v. First Presb. Cincinnati Church*, 1 Ohio St. 478; *Van Wert Bd. of Ed. v. Edson*, 18 Ohio St. 221; *Portland & W. V. R. Co. v. Portland*, 14 Ore. 188; *post*, § 1138 *et seq.* Right of resident taxpayer to bring suit to restrain misuser of dedicated property. *McIntyre v. El Paso County*, 15 Colo. App. 78. Dedication on condition. *Supra*, § 1072, note.

The construction of a canal through a street by the State suspends, but does not destroy, the easement for a street, and such easement revives on the abandonment of the canal. *Logansport v. Shirk*, 88 Ind. 563.

Chancery will protect the rights of the public in all public places, and will restrain an illegal alienation by the municipal corporation or by others, and, if necessary, will order a reconveyance. *Attorney-General v. Good-*

voted to the public uses to which it has been dedicated, and such public uses are *no longer possible of execution*, the fee will revert to the dedicator released from the easement of the public.¹

rich, 5 Grant (Can.), Rep. 402; Guelph v. Canada Co., 4 Grant (Can.), Rep. 632; Harr. Munic. Man. (5th ed.) 350; *post*, § 1132.

Conveyance to municipality on condition that the property be used for a specific purpose. French v. Quincy, 3 Allen, 9. The donor's grant cannot be diverted to purposes other than those designated by them. Kansas City Bd. of Ed. v. Kansas City, 62 Kan. 374. As to remedy, see chapter on Streets, *post*, § 1130 *et seq.* Index — *Equity; Injunction; Trustees and Trust Property.*

¹ Mahoning County v. Young, 59 Fed. Rep. 96; Wanzer v. Blanchard, 3 Mich. 11; Patrick v. Kalamazoo Y. M. C. A., 120 Mich. 185; Campbell v. Kansas City, 102 Mo. 326; Goode v. St. Louis, 113 Mo. 257; Newark v. Watson, 56 N. J. L. 667, 674; Williams v. Cincinnati First Presb. Church, 1 Ohio St. 478; Le Clerq v. Gallipolis, 7 Ohio, Part I, 218; Van Wert Bd. of Ed. v. Edison, 18 Ohio St. 221, 226; Louisville & N. R. Co. v. Cincinnati, 76 Ohio St. 481, 504.

Lands were dedicated as a *cemetery*. Subsequently burials therein were prohibited by statute and the use of the lands for cemetery purposes abandoned. It was held that inasmuch as the public use had been abandoned and had become impossible by reason of the statute, the lands reverted to the dedicator. Newark v. Watson, 56 N. J. L. 667. A common-law dedication of a *grave-yard* was effected by plat. An ordinance of the city was passed vacating the land for burial purposes, and notice by advertisement was given to the relatives of the persons buried therein to remove the remains. The lands were thereafter used for park purposes and fenced and ornamented. It was held that the lands reverted to the dedicator, and that the doctrine of *cy pres* did not apply to prevent the reverter of dedications to charitable purposes. Campbell v. Kansas City, 102 Mo. 326, 341, 343. The court said: "As long as the rights of sepulture parted with in the donation are outstanding in the public, the plaintiffs have no right to recover the use of the lands for any enjoyment or purpose of their own. . . . The public

may cease to bury in the dedicated ground whenever it pleases. It may also refuse or neglect to either erect or preserve any monuments to indicate the identity of those already buried, or to give and continue to the place the character and name of a grave yard. When this happens, the original use terminates and the fee vests in the original donors or their legal representatives, free from it." See also Kansas City v. Scarritt, 169 Mo. 471, another case involving the same lands where this decision was upheld. But *no reverter of a burial ground* takes place until it loses its identity as such, and the mere *opening of a street* across the burial ground does not in itself effect a reverter. Hunter v. Sandy Hill, 6 Hill (N. Y.), 407. Index, *Cemeteries.*

After a church society had erected a building on a lot dedicated to the use of one of the first four religious denominations forming a society in the town and erecting a church, the society conveyed the lot to the Y. M. C. Association which demolished the church and erected a building for its own wants. It was held that there was an abandonment of the use to which the lot was dedicated, entitling the owners of the fee to the possession thereof. Patrick v. Kalamazoo Y. M. C. A., 120 Mich. 185. Where property had been dedicated for a *county seat*, and the county afterwards removed the county seat to another place and sold the court-house thereon to the owner of the fee, it was held that it had lost all interest in the land, and had no proprietary rights under the dedication. Kent County v. Grand Rapids, 61 Mich. 144.

It has been said that non-user of a highway for many years is *prima facie* evidence of a release of the public right to the owner of the soil. Beardslee v. French, 7 Conn. 125. But mere non-user of the public right is not in itself such an abandonment as will effect a reverter. See Forbes v. Ft. Scott Bd. of Ed., 7 Kan. App. 452; Wyandotte County v. First Presbyterian Church, 30 Kan. 620; Wilgus v. Miami County, 54 Kan. 605; McAlpine v. Chicago G. W. R. Co., 68 Kan. 207; Parker v. St. Paul, 47 Minn. 317;

§ 1107 (653 a). **Concluding Observations.** — In closing our survey of this interesting title we may stop pausefully for a moment to note how impressively the doctrines of our jurisprudence concerning it illustrate their thorough and complete adaptation to the wants and exigencies of civilized society. To meet these, the ordinary rules of law relating to private rights have been modified and moulded by the public convenience and necessities. Thus the requirement of the common law that private grants must be made to a definite person, natural or artificial, is disregarded, because it would, if applied to dedications, frequently be detrimental to the public welfare. So, although the subject-matter of the dedication be land, interests therein can regularly be parted with by the owner and acquired by the public without the solemnity of a seal, or even the formality of a writing. So, also, the usual rules of law applicable to individuals respecting the necessary duration of adverse possession or of prescriptive user to give a right by possession or prescription, are here modified from considerations of public utility. A consummated intent on the part of the owner to dedicate is all that is required, and such intent may be shown by parol evidence of declarations and of acts *in pais* which unequivocally establish it. It may, we think, truly be affirmed, that the doctrines of our law on this subject as fashioned and settled by judicial tribunals, though in many respects seemingly anomalous, are characterized by practical wisdom, and are beneficent in their operation. Rightfully applied they work no injustice to the supposed dedicator, since they draw the line with enlightened and considerate care between a just measure of his rights on the one hand and the rights of the public on the other.

Ashland v. Chicago & N. W. R. Co., 105 Wis. 398. But the right to dedicated lands may be lost to a municipality under the principles of *equitable estoppel*, as where lands were dedicated for a street, and a house which encroached thereon was built in conformity with lines given by the city authorities and was maintained for more than twenty years. *Krause v. El Paso*, 101 Tex. 211; 106 S. W. Rep. 121. More fully, Index — *Streets*.

If, however, the *absolute fee* is vested in the municipality by deed for *specific purposes*, *e. g.*, for a market, without any provision for a reverter and without condition subsequent, it has been held that no reverter takes place on the abandonment of the uses to which the lands were dedicated, the only right of the grantor or his representatives being to enforce the specific use. *Hand v. St. Louis*, 158 Mo. 204. Index, *Reverter*; *Streets*.

CHAPTER XXIV

STREETS

	Section		Section
Prefatory	1120	Power to compel Building of Sidewalks	1147
Streets defined; Statutory Construction	1121	Construction of Drains and Sewers	1148
Public Nature of Streets and Extent of Legislative Control	1122	Right of City to use or dispose of Soil	1149
True Nature of a Public Street; Respective Rights of the Abutter and of the Public	1123	Street Uses: Parkways, Bicycle Paths	1150
Same Subject; Result of the New York Cases stated	1124	Power is Continuing and Discretionary	1151
Abutter's Easements; Effect of Later New York Decisions	1125	Liability for Change of Grade	1152
Nature of the Abutter's Rights in the Streets	1126	Right of Lateral Support	1153
Abutter's Easements; How far protected by Fourteenth Amendment of Federal Constitution	1127	Municipal Control over Uses; Right to make Sewers, Drains, &c.	1154
Legislative Power over Streets	1128	Nature and Extent of Public Rights in City Streets	1155
Delegation of Power to Municipality	1129	Right of City to construct Cisterns in Streets for Public Uses	1156
Obstruction; Remedy of Public by Indictment and in Equity	1130	Bridges; Duty of Repair; Municipal Control	1157
Obstructions; Liability of Author of Obstruction; Remedy	1131	Municipal Power to construct Free Bridges over Streets	1158
Jurisdiction in Equity at Instance of Abutters	1132	Bridge Approaches and Elevated Viaducts	1159
Obstruction; Remedy of Corporation; Ejectment	1133	Vacation of Streets	1160
Remedy of Abutter	1134-1135	Extent of Power over Street Uses	1161
Effect of Fee being in the Abutter or the Municipality	1136	Ordinances on the Subject	1162
Ejectment; Effect of Judgment or Decree against Municipal Corporation	1137	Public Nature of Streets; Paramount Legislative Control	1163
Control of Highways within Municipal Limits	1138-1139	Legislative Power; Right or Privilege to use Streets	1164
Same Subject; General Law and Special Charter Provisions construed	1140-1141	Open to all Suitable and Proper Uses; Steam-threshing Machine	1165
Power to establish and open Streets	1142	Regulation of Traffic	1166
Appropriation to Street Uses of Lands Subject to Private Easements	1143	Hack Stands	1167
Power to improve and pave Streets	1144	Necessary and Temporary Obstructions to Use of Street are Justifiable	1168
Power to improve and graduate	1145	Temporary Obstructions for Loading and Unloading Goods	1169
Power to pave Streets: "Pavement" defined	1146	Temporary Obstructions by Building Material	1170
		Municipal Control over Use of Streets by Deposit of Building Materials	1171
		Same Subject	1172-1173
		Public Displays, Shows, Exhibitions, &c.	1174

	Section		Section
Erection of Public Buildings in Street	1175	Same Subject; Massachusetts Cases	1185
Appropriation to Private Uses	1176	Awnings	1186
Obstructions; Fruit, Candy, and Market Stands	1177	Prescription and Adverse Possession; Statute of Limitations	1187-1188
Openings in Sidewalks; Vaults under Sidewalks and Streets	1178-1179	No Title by Adverse Possession as against the Public	1189
Areas, Cellar-ways, and Vaults Stepping Stones, Hitching Posts, Shade Trees, &c.	1180	Same Subject; Civil Law Doctrine	1190
Porches, Bay-windows, Cornices, and Ornamental Projections	1181	Statutes of Limitation; Estoppel; Illinois Doctrine	1191
Abutter's Rights in Respect of Doors, Shutters, Iron Gratings, &c.; Usage	1182	Adverse Possession of Streets; West Virginia	1192
Abutter's Rights; Porches and Bay-windows in or over Streets	1183	Adverse Possession of Streets and Highways	1193
	1184	Same Subject; The Author's Views and Suggestions as to the True Doctrine	1194

§ 1120 (654). **Prefatory.** — Municipal corporations in this country sustain most important relations to *streets and highways within their limits*. By statute or charter they are usually authorized to open, establish, alter, and vacate streets. Land may be dedicated for streets and ways, as we have elsewhere shown.¹ The authorities of these corporations are usually invested with the capacity to acquire property for streets for the public use and convenience, by the exercise of the power of eminent domain.² Streets, when dedicated and accepted by the corporation, or acquired by purchase or otherwise, are usually placed under the control of the corporation, with power to improve, grade, pave, regulate, &c. In some of the States there are statutes that the fee in the streets shall be in the municipality in trust for the public, while in other States the fee is considered to be in the adjoining proprietor, the public having only an easement (so called) therein. The right to acquire public streets by dedication,³ and the power to condemn property for this purpose by the exercise of the delegated right of eminent domain, have been elsewhere considered,⁴ and the liability of municipal corporations, in respect to defects and want of repair of the public streets within their limits, is reserved for treatment in another place.⁵

§ 1121. **Streets Defined; Statutory Construction.** — No satisfactory and generally accepted definition of the term "street" seems to have been reached by the courts. It is apparent that every street is a highway which every person may use at pleasure for purposes

¹ *Ante*, chap. xxiii., on Dedication, § 1070 *et seq.*

² *Ante*, chap. xxii., on Eminent Domain, § 1010 *et seq.*

³ *Ante*, chap. xxiii., § 1070 *et seq.*

⁴ *Ante*, chap. xxii., § 1010 *et seq.*; *post*, § 1161.

⁵ *Post*, chap. xxxii., on Actions,

of travel, conforming, of course, to all proper police regulations;¹ and for the purposes of legal nomenclature, at least, it would seem that the most generally accepted definitions of a street simply import that it is a *public highway within an incorporated municipality*.² The *urban character* of streets is sufficient, in the judicial construction of statutory provisions, to limit the term "street" to the public highways of incorporated municipalities;³ but when a question arises whether a statutory provision applying by its terms simply to "highways," extends to and includes the "streets" of an incorporated municipality, much greater difficulty is experienced.

¹ *People v. Chicago & N. W. R. Co.*, 118 Ill. 520; *Bell v. Foutch*, 21 Iowa, 119, 131; *Barrett v. Brooks*, 21 Iowa, 144; *St. Charles v. Nolle*, 51 Mo. 122.

The term *street* does not mean private ways, nor does it apply to roads or ways owned by private corporations. *State v. Moriarty*, 74 Ind. 103, 104; *Quinn v. Paterson*, 27 N. J. L. 35, 42; *Wilson v. Allegheny City*, 79 Pa. 272, 277; *Commonwealth v. Boston, B. & G. R. Co.*, 135 Mass. 550. The term "street" when used in a pleading sets forth, by implication, the public character of the place without an express averment that it is a *public street*. *Indianapolis v. Keeley*, 167 Ind. 516, 521; *Ottawa v. McCreery* 10 Kan. App. 443; *State v. Mathis*, 21 Ind. 277. See also *Hamlin v. Norwich*, 40 Conn. 13, 25. "Webster defines a street to be a city road, and a highway to be a public road; with respect to the use there can be no doubt that they are both public." *Mobile & O. R. Co. v. State*, 51 Miss. 137, 140.

² *Sachs v. Sioux City*, 109 Iowa, 224, 228.

"A street is a public thoroughfare or highway, in a city or village." 2 *Bouv. Law Dict.* title "Street." *Duval County v. Jacksonville*, 36 Fla. 196, 224; *Read v. Camden*, 54 N. J. Law, 347, 373; *Ottawa v. McCreery*, 10 Kan. App. 443, 445; *Carli v. Stillwater St. R. & T. Co.*, 28 Minn. 373, 375; *Heiple v. East Portland*, 13 Ore. 97, 103.

"The words 'streets and alleys' relate exclusively to the ways or thoroughfares of towns and cities." *Per Elliott, J.*, in *Debolt v. Carter*, 31 Ind. 355, 367. "'Street' is a general term, and includes all urban ways which can be and are generally used for the ordinary purposes of travel." *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 493. The word "street" has been defined

as "a public way or road, whether paved or unpaved, in a village, town, or city, ordinarily including a sidewalk or sidewalks and a roadway, and having houses or town lots on one or both sides; a main way, in distinction from a lane or alley." *Century Dict.* title "Street." See also *Stroud's Judicial Dict.* title "Street." *State v. Harrison*, 162 Ind. 542, 545. "A street is not only a public highway, over and upon which all the citizens of the land have a right to pass and repass at pleasure, but it is a public highway of a city, town, or village." *State v. Moriarty*, 74 Ind. 103, 104; *Pittsburgh, C. C. & St. L. R. Co. v. Hays*, 17 Ind. App. 261, 271.

"Though all public roads and all streets are public highways, yet neither all public highways nor all public roads are streets, or city or town highways." *State v. Putnam County*, 23 Fla. 632; *Duval County v. Jacksonville*, 36 Fla. 196, 218; *State v. Moriarty*, 74 Ind. 103, 104; *Pittsburgh, C. C. & St. L. R. Co. v. Hays*, 17 Ind. App. 261, 270; *Sachs v. Sioux City*, 109 Iowa, 224, 227. To the effect that a street is a public highway, see *Chicago Union Traction Co. v. Stanford*, 104 Ill. App. 99, 103; *Conner v. New Albany*, 1 Blackf. (Ind.) 43; *Indianapolis v. Croas*, 7 Ind. 9; *State v. Mathis*, 21 Ind. 277; *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178, 182; *State v. Berdetta*, 73 Ind. 185; *State v. Moriarty*, 74 Ind. 103; *Sims v. Frankfort*, 79 Ind. 446; *White v. Chicago, St. L. & P. R. Co.*, 122 Ind. 317, 326; *Indianapolis v. Higgins*, 141 Ind. 1; *Sachs v. Sioux City*, 109 Iowa, 224; *Theobald v. Louisville, N. O. & T. R. Co.*, 66 Miss. 279, 285.

³ *Debolt v. Carter*, 31 Ind. 355, 367; *State v. Hall*, 22 N. H. 384; *State v. Stevens*, 36 N. H. 59, 63.

The practice has grown up in legislation of some of the States of referring to rural ways as highways as distinguished from streets, the thoroughfares of cities, towns, and villages.¹ But this practice is by no means so uniformly adopted and followed, even within the limits of any single State, that it affords an absolute guide or criterion for judicial construction. When, therefore, the courts have been obliged to construe the term "highways" for the purpose of determining its applicability to the "streets" of a city, town, or village, they have been compelled to fall back upon a consideration of the nature of the statutory enactment, the evil sought to be remedied, the public benefit to be achieved, and other circumstances, which may tend to throw light upon the legislative intent. Under such circumstances, judicial construction of the term "highways" has been far from uniform and, except as affording a series of precedents, fails to furnish an absolute guide in the administration of municipal affairs.²

¹ *Debolt v. Carter*, 31 Ind. 355, 367; *State v. Harrison*, 162 Ind. 542, 545; *Pittsburgh, C. C. & St. L. R. Co. v. Hays*, 17 Ind. App. 261, 270; *Cleaves v. Jordan*, 34 Me. 9; *State v. Beeman*, 35 Me. 242, 245; *State v. Bunker*, 59 Me. 366, 370; *Waterford v. Oxford County*, 59 Me. 450, 452; *Wells v. County Com'rs*, 79 Me. 522; *Matter of Woolsey*, 95 N. Y. 135, 140; *Matter of Burns*, 155 N. Y. 23, 28.

² *Streets and alleys distinguished*. An alley sixteen feet wide, without sidewalks, running through the centre of a block, is not a street or highway within the meaning of a statute requiring saloons to front on a street or highway, although the alley may have been designated by the common council as a street on the petition of the property owners. *State v. Harrison*, 162 Ind. 542, 545. See also *Face v. Ionia*, 90 Mich. 104.

It has been said that the word "highway" will include "street" unless the statute itself indicates a different intention. *Indianapolis v. Higgins*, 141 Ind. 1, 11. But any such general implication must be applied with great care. The term "highway" in a statute authorizing the construction of telephone lines was construed to include the streets and alleys of cities and incorporated towns. *Chamberlain v. Iowa Tel. Co.*, 119 Iowa, 619.

In *Mississippi*, a statute requiring signs at railroad crossings of "high-

ways" was, under the terms of the particular enactment, construed to apply only to rural highways. *Mobile & O. R. Co. v. State*, 51 Miss. 137, 140; *Illinois Cent. R. Co. v. State*, 71 Miss. 253. But another statute of the same State making provision for railroad crossings above or under grade at "highways" was, upon a construction of the terms of the enactment, held not to be limited to rural highways, but also to include streets in cities. *Hamline v. Southern R. Co.*, 76 Miss. 410. See also *Canton v. Canton Cotton Warehouses Co.*, 84 Miss. 268, 289.

Constitutional prohibitions against local or special laws for laying out, opening, and working highways, have been held not to apply to the streets of a city, but to be limited to the public roads and highways of rural districts. *Lafayette v. Jenners*, 10 Ind. 74, 79; *Matter of Woolsey*, 95 N. Y. 135, quoted *infra*; *Matter of Burns*, 155 N. Y. 23, rev'g 16 N. Y. App. Div. 507; *East Portland v. Multnomah County*, 6 Oreg. 62, 65; *Simon v. Northrup*, 27 Oreg. 487. This constitutional provision does not include or apply to a water way which is declared by statute to be a public highway. *Matter of Burns*, 155 N. Y. 23, rev'g 16 N. Y. App. Div. 507. While a navigable river is a highway for the passage of vessels, that part of it within the boundaries of a city is not one of its highways so as to im-

§ 1122 (656). **Public Nature of Streets and Extent of Legislative Control.** — Public streets, squares, and commons, unless there be

pose on the city the duty of removing obstacles and keeping it safe for navigation. While the legislature may impose this duty upon the municipality, the legislative intent to do so must clearly appear. *Coonley v. Albany*, 132 N. Y. 145, aff'g 57 Hun (N. Y.), 327. In the absence of a statute imposing the duty, a city is under no obligation to protect lands or property within its limits from the overflow of a river. *O'Donnell v. Syracuse*, 184 N. Y. 1, 9, rev'g 102 N. Y. App. Div. 80; *Betham v. Philadelphia*, 196 Pa. 302. See also *Wilson v. Waterbury*, 73 Conn. 416; *Prime v. Yonkers*, 192 N. Y. 105, rev'g 116 N. Y. App. Div. 699.

Legislative power over wharves and highways. An act of the legislature of Louisiana establishing a Board of Commissioners for the port of New Orleans, consisting of five members to be appointed by the governor, giving the said Board of Commissioners power to regulate the commerce and trade of the harbor of New Orleans which had been gradually extended until it reached beyond the limits and jurisdiction of the city of New Orleans, and power to take charge of and administer the public wharves of the port of New Orleans, to construct new wharves, &c., levying the expenses upon the shipping for the use of the wharves, the declared aim of which legislation was to develop and expand the commerce of the port by removing obstacles placed in the way of advancement, by consolidating the divided authority of the three parishes and consequent fees which injuriously affected the traffic of the port. It was objected, among other things, that the act violated Article 46 of the Constitution of Louisiana which prohibited the General Assembly from passing any local or special law creating corporations. In passing upon this important act the court held, among other things, that the said act creating the Board of Commissioners did not create a corporation or body politic within the meaning of the Constitution; that inasmuch as the function of the Board to administer the public wharves was one chiefly of administration, that the legislature had the power to pass an act to administer

the affairs of the public wharves and levees through agents, to be appointed as it might direct, and that such appointment of the Board by the Governor did not violate Article 253 of the Constitution which gave the citizens of the city of New Orleans the right to appoint "the several public officers necessary for the administration of the police of the city." The court also held that the banks of the rivers are for the use of the general public, and that the act creating the commission did not violate Article 46 of the Constitution because it provided for the maintenance of wharves and landings and approaches thereto, which counsel urged were public highways. The court on this point said: "The constitutional prohibition applies to 'roads,' 'highways,' 'streets,' or 'alleys,' and does not embrace landings and levees. They are *loci publici*, and are, at times, referred to as public places on which there may be 'highways.'" "Highways" as used in the Constitution does not include rivers or their banks. The court also held that the legislation in question did not deprive the city of her property without due process of law, denying that the city had a private interest in the banks of rivers, which are for the use of the general public. The court said: "The act empowers this board to administer the public wharves of the port, and invests it with certain duties. The matter is, we think, one chiefly of administration. The legislature had the power to pass an act to administer the affairs of the public wharves and levees through agents." *Duffy v. New Orleans*, 49 La. An. 114. See Index, *Charter; General Laws; Special Acts; Wharves*. See further as to the construction and application of the constitutional provision prohibiting the creation of corporations by special law, *State v. Flower*, 49 La. An. 1199; *State v. Kohnke*, 109 La. 838, 845; *New Orleans Port Com'rs. v. New Orleans & S. F. R. Co.*, 112 La. 1011, 1018.

In *Matter of Woolsey*, 95 N. Y. 135, 140, in declaring that a constitutional prohibition of special legislation for "laying out, opening, altering, working, or discontinuing roads, highways or alleys" did not apply to "city

some special restriction, when the same are dedicated or acquired, are for the *public* use, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the State represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the tendency of more recent judicial opinion) to certain private and property rights and easements of the abutting owner, full and paramount authority over all public ways and public places.¹ "To the commonwealth here," says Chief Justice Gibson, "as to the king in England, belongs the franchise of every highway as a trustee for the public; and

streets," the court said: "The words employed in the Constitution, viz., 'roads, highways and alleys,' on their face do not include streets, as that term is usually understood. In common parlance, the word 'streets' is supposed to relate entirely to the avenues and thoroughfares of cities and villages, and not roads and highways outside of municipal corporations, and it would be placing a very liberal construction on this word to hold that it meant a highway or a road within the meaning of the Constitution, when it is not named or included within its express terms." A statute requiring railroad companies to maintain cattle guards at all "road crossings" was held to include crossings of streets in villages and cities. *Brace v. New York Cent. R. Co.*, 27 N. Y. 269, 271. *Marvin, J.*, said: "Strictly, a street is a paved way or road, but the term is used for any way or road in a city or village. It is defined by Bouvier (Law Dict.) as 'a road in a village or city;' and see Webster's Dictionary. Thus, a highway is a road, and a street is a road; and as the statute requires railroad corporations to construct and maintain cattle guards at all road crossings, it includes streets in villages and cities." "A street is a way upon land, more properly a paved way, lined or proposed to be lined, by houses on each side. It is *confined to land*, and ends on the shore or bank of the land, at the border of the water." *United States v. Bain*, 3 Hughes, 593. See also *Reed v. Erie*, 79 Pa. 346, 352. A statute making it an offence to drive over the sidewalk of a "town" also

makes it an offence to drive over the sidewalk of a "city," although the word "city" be not used therein. The word "town" as here used is generic and includes cities. *Indianapolis v. Higgins*, 141 Ind. 1.

In *England*, presence of buildings and improvements seems to be the distinguishing feature of city streets. A street has been defined to be "a roadway with buildings on each side." *Per Selborne, L. C.*, in *Robinson v. Barton-Eccles*, L. R. 8 App. Cas. 798, 801. "The word 'street,' where popularly used, means a thoroughfare, bounded on one or both sides by houses." *Per Brett, M. R.*, in *Portsmouth v. Smith*, L. R. 13 Q. B. Div. 184; *Jessel, M. R.*, in *Taylor v. Oldham*, 46 L. J. Ch. 105, 109; L. R. 4 Ch. Div. 395, 408.

¹ *Fort Smith v. Scruggs*, 70 Ark. 549; *Chicago v. Rumsey*, 87 Ill. 348, 355; *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, quoting text; *Harder's Storage Co. v. Chicago*, 235 Ill. 58, quoting text; *LaHarpe v. Elm Township Co.*, 69 Kan. 97; *New England T. & T. Co. v. Boston Terminal Co.*, 182 Mass. 397; *Cheney v. Barker*, 198 Mass. 356, 363; *United R. & Canal Co. v. Jersey City*, 71 N. J. L. 80; *East Portland v. Multnomah County*, 6 Oreg. 62; *Multnomah County v. Sliker*, 10 Oreg. 65; *Portland & W. V. R. Co. v. Portland*, 14 Oreg. 188, 196; *Simon v. Northup*, 27 Oreg. 487, citing text; *Huddleston v. Eugene*, 34 Oreg. 343, quoting text; *Brand v. Multnomah County*, 38 Oreg. 79, 91, quoting text. See also cases cited in the next note.

streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads, laid out by the authority of the quarter sessions."¹ The legislature has power to determine where and when streets shall be constructed, their width and mode of improvement, and its action in these respects cannot be reviewed by the courts. It may adopt and sanction an improvement or expenditure which it could previously have authorized, and it may authorize an assessment for an improvement after the improvement is made.²

§ 1123 (656 a). **True Nature of a Public Street; Respective Rights of the Abutter and of the Public.** — The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand, and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period in our legal history that these two distinct rights have, separately and in their relations to each other, come to be understood and defined with precision.³ The injustice to the abut-

¹ *Per Gibson, C. J., O'Connor v. Pittsburgh*, 18 Pa. St. 187, 189. See further, as to legislative power over public streets and their uses, *Phila. & Trenton Railroad Case*, 6 Whart. (Pa.) 25; *Com'rs, &c. of Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Stuber's Road*, 28 Pa. St. 199; *Stormfeltz v. Manor Turnp. Co.*, 13 Pa. St. 552; *Baird v. Rice*, 63 Pa. St. 489; *Gray v. Iowa Land Co.*, 26 Iowa, 387; distinguished from *Warren v. Lyons City*, 22 Iowa, 351; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Reading v. Commonwealth*, 11 Pa. St. 196; *Woodruff v. Neal*, 28 Conn. 168; *James River, &c. Co. v. Anderson*, 12 Leigh (Va.), 276; *Woodson v. Skinner* (sale of commons), 22 Mo. 13; *Bailey v. Philadelphia, W. & B. R. Co.*, 4 Harring. (Del.) 389; *Mercer v. Pittsburgh, Ft. W. & C. R. Co.*, 36 Pa. St. 99; *Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 455; *Pacific R. Co. v. Leavenworth*, 1 Dillon C. C. R. 393; *Litchfield v. Vernon*, 41 N. Y. 123; *Metropolitan Board of Health v. Heister*, 37 N. Y. 661, 672; *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314; *Barney v. Keokuk*, 94 U. S. 324; s. c. 4 Dillon, 593, 599; *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, approving text; *Stack v. East St. Louis*, 85 Ill. 377; *Stone v. Fairbury, P. & N. W. R. Co.*, 68 Ill. 394; *Indianapolis B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Cairo & V. R. Co. v. People*, 92 Ill. 777; *N. Y. Elevated Railway cases, post*, §§ 1259-1261; *Grand Rapids Electric L. & P. Co. v. Grand Rapids Edison El. L. & F. G. Co.*, 33 Fed. Rep. 659. The legislature may transfer the control of streets to park commissioners to be improved and used for park purposes, provided that such purposes are not inconsistent with their ordinary use as streets, *People v. Walsh*, 96 Ill. 232; *supra*, §§ 1103, 1104; or to some other governmental agency. *Simon v. Northup*, 27 Oreg. 487, citing text.

² *Lennon v. New York*, 55 N. Y. 361, 365; *Mead, In re*, 74 N. Y. 216; *Sackett, Douglas, and De Graw Streets, In re*, 74 N. Y. 95; *Sinton v. Ashbury*, 41 Cal. 525. Even though the improvements are expensive, extraordinary, extravagant, and hurtful rather than beneficial. *Brooklyn Commissioners of Assessment, In re*, 18 Alb. L. J. 199; see *ante*, chap. iv., as to extent of legislative power. See Index, tit. *Curative Acts*.

³ *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148; *N. Y. Cable Co. v. New York*, 104 N. Y. 1; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268; *N. Y. Dist. Ry. Co., In re*, 107

ting owner arising from the exercise of unrestrained legislative power over streets in cities was such that the abutter necessarily sought legal redress, and the discussions thence ensuing led to a more careful ascertainment of the nature of streets, and of the rights of the adjoining owner in respect thereof. It was seen that he had in common with the rest of the public a right of passage. But it was further seen that he had certain rights not shared by the public at large, special and peculiar to himself, and which arose out of the *very relation of his lot to the street in front of it*; and it has been held as shown below that these rights, whether the bare fee of the streets was in the lot-owner or in the city, were rights of property, and as such ought to be and were as sacred from legislative invasion as his right to the lot itself.¹ In cities the abutting owner's property is essentially dependent upon sewer, gas, and water connections; for these such owner has to pay or contribute out of his own purse. He has also to pay, or contribute towards, the cost of sidewalks and pavements. These expenditures, as well as the relations of his lot to the street, give him a special interest in the street in front of him, distinct from that of the public at large. He may make, as of right, all proper uses of the street subject to the paramount right of the public for all street uses proper, and subject also to reasonable and proper municipal and police regulation. Such rights in the abutter are held in New York and by the courts of some other States to be property rights, and like other property rights under the protection of the Constitution.²

N. Y. 42; *Ivins v. Trenton*, 68 N. J. L. 501, citing text.

The opinion of *Danforth, J.*, in *Story's Case*, *supra*, will be found especially instructive. In *Lahr's Case*, *supra*, *Ruger, C. J.*, states with great care and clearness the doctrine of the Court of Appeals of New York as to the property rights of abutting lot-owners in the streets in front of their lots. *Post*, §§ 1124, 1127 and note, 1168, and note and case of *Fritz v. Hobson*, there cited. As to highways, Chancellor *Kent* correctly states that: "They [that is, the abutting owners] may have every use and remedy that is consistent with the servitude or easement of a way over it, and with police regulations." ³ *Kent's Com.* 433. Mr. Justice *Danforth* in the *Story Case*, 90 N. Y. 161, says: "The public purpose of a street requires of the soil the surface only. [But *quære?*] Very ancient usage permits the introduction under it of sewers and water pipes, and upon it posts for

lamps." Undoubtedly, as the author thinks, we must add the pipes, &c., laid under the surface, which are required by the various new agencies adopted in civilized life, such as gas, electricity, steam, and other things capable of that mode of distribution. Lord Justice *Bramwell*, in *Coverdale v. Charlton*, L. R. 4 Q. B. Div. 104, says in substance: "Street" comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for doing to it what is usually done in or under streets. *Post*, §§ 1135, 1136, 1154, 1168, 1179.

¹ *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 302, quoting text.

² That certain rights of the abutter in the streets are *property rights*, the Court of Appeals of New York has frequently decided. We refer particularly to *Gilbert's Matter of Gilbert El. R. Co.*, 70 N. Y. 361; to the great judgment of

§ 1124 (656 b). **Abutter's Easements; Result of the New York Cases stated.** — In some of the streets of the city of New York the fee is in the abutter, in others the fee is in the city; under the statute, however, it is not an absolute, but a qualified fee, viz., in trust for street uses proper. This qualification is important, and is so regarded in the adjudications. This subject of the abutter's rights has undergone in New York, in the cases relating to surface railways (both steam and horse railways), to elevated railways, to underground railways in streets, and to viaducts in streets, the most thorough examination, and it is difficult, if not impossible, to reconcile the grounds of the earlier with those of the later judgments of the Court of Appeals, at least so far as the earlier cases make certain rights of the abutter to depend upon whether the bare fee of the soil is in him, or in the public in trust for street uses. To this extent the law, even in New York, cannot perhaps be said to be thoroughly settled. Certainly it is not in many of the other States. We deduce from the later decisions of the Court of Appeals of New York the following doctrines; viz., that the abutting owners

Mr. Justice *Danforth*, speaking for the court in *Story's Case*, 90 N. Y. 122; to the careful and exhaustive judgment of the court delivered by Chief Judge *Ruger*, in the sequel to that case known as *Lahr's Case*, 104 N. Y. 268; to the still later judgment, clear and luminous, written by Mr. Justice *Finch*, in *Matter of New York District Railway Co.*, 107 N. Y. 42. Chief Judge *Ruger* in *Lahr's Case* said: "The abutter, though limited by deed to the side of the street, owns an easement in the bed of the street, which is an interest in real estate constituting property in the sense of the Constitution." Again, he said that "if the city has the fee it is a qualified fee, held in trust under the statute for a certain use, namely, for street purposes, all other uses residing with the owner from whom the land was taken." The third proposition which the Chief Judge in that case enunciated, as derived from the prior judgments of the court, is expressed in this language: "The ownership of such an easement is an interest in real estate constituting property within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor before it can be lawfully taken from its owner for a public use." See *Index, Railroads in Streets*, and chap. xxv., *infra*.

In *Sadler's Case*, 104 N. Y. 229, the court held that the public could not take gravel *below the grade line* of a street to use on the street *elsewhere*, and that the abutter could restrain the removal of the gravel, on the principle that he owns the soil of the street and has the right to the use of it for all purposes but street purposes proper. And in the *New York District Ry. Case*, *supra*, the court distinctly decided that a railway to be built *beneath the surface* of a street in a city is a railway within the meaning of the amendment to the Constitution of January 1, 1875, and can only be authorized to be constructed in the manner prescribed by that amendment. In *McCarthy v. Syracuse*, 46 N. Y. 194, which was an action against the city for flooding from a defective sewer a vault which the plaintiffs had constructed under the street in front of their store, the Court of Appeals held that plaintiffs were entitled to recover, because they had a right to use the space under the street as they might any other part of their property, so long as they did no injury to the street. *Post*, §§ 1135, 1136, 1168, note, and case of *Fritz v. Hobson* there cited.

Special constitutional limitation on legislative power over streets, see *post*, § 1223.

have *private rights* in the streets in front of them, such as the right of access, of light, and of air, which are protected by the Constitution, and hence not subject to the absolute and unlimited power of the legislature. If they own the fee to the centre line of the streets, their rights therein are legal in their nature. If they only own the fee to the line of the street, their rights in the street of access, light, and air are in the nature of equitable easements in fee, but in extent are substantially the same as where the fee is in them subject to the public use. In either case the abutter is entitled as of right, subject to municipal and public regulation, to make any beneficial use of the soil of the street which is consistent with the prior and paramount rights of the public therein for street purposes proper. The right of the public to use the streets, not only for travel and passage, but for sewer, gas, water, and steam pipes, and the like purposes, is, of course, paramount to any private or proprietary rights of the abutter.¹

¹ See cases cited in last preceding section. As to abutter's easement of access, &c., see *post*, §§ 1127 and note, 1135, 1137, 1160, 1168, 1221, 1245, 1259. *Pence v. Bryant*, 54 W. Va. 263, 270, citing text.

In *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576, 587, *Peckham, J.*, thus summarized the theory on which the easements of abutters have been held to exist and to be taken or impaired by the construction of elevated railroads in New York City: "Their ownership of the land is bounded by the exterior lines of the street itself. Hence when, under legislative and municipal authority, the railroad structure was built, it was supposed by many there was no liability to abutting owners, because no land of theirs was taken, and any damage they sustained was indirect only, and, therefore, *damnum absque injuria*. When the courts acquired possession of the question, and it was seen that abutting land, which before the erection of the road was worth, for instance, ten thousand dollars, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work. It has now decided that, although the land itself was not taken,

yet the abutting owner, by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street. These rights of obtaining for the adjacent lands facilities of light, &c., were called easements, and were held to be appurtenant to the land which fronted on the public street. These easements were decided to be property, and protected by the Constitution from being taken without just compensation. It was held that the defendants, by the erection of their structure and the operation of their trains, interfered with the beneficial enjoyment of these easements by the adjacent land owner and in law took a portion of them. By this mode of reasoning, the difficulty of regarding the whole damage done to the adjacent owner as consequential only (because none of his property was taken), and, therefore, not collectible from the defendants, was overcome. The interference with these easements became a taking of them *pro tanto*, and their value was to be paid for, and in addition the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which owners sustained from the building and operation of the defendant's road. For the purpose of permitting such a recovery, the taking of property had to be shown."

§ 1125. **Abutter's Easements; Effect of Later New York Decisions.** — That an abutter who has no title to the fee of the street has certain easements, or incorporeal rights in the nature of easements, in the street upon which his premises abut *for the purposes of light, air, and access*, and that such right constitutes property which cannot be taken or destroyed wholly or partially without just compensation, has been accepted by some other courts as well as those of New York.¹ While the later decisions of the New York Court of Appeals have not modified the nature or extent of such easements or incorporeal rights, they have defined more clearly and distinctly the nature and characteristics of these rights. It is now settled by the decisions of that court that the easements of abutters in a street, the fee of which is vested in the public, do not originate by a grant in terms of these incorporeal rights, and their existence need not be established by conveyances in specific terms granting such right, or by adverse possession by an abutting owner, for the right is incapable of such possession as against the city. The private rights in a street, appurtenant to abutting lots, *arise by operation of law from contiguity*, like rights for the adjacent and subjacent support of land, and their existence is to be presumed.²

¹ *Burkam v. Ohio & M. R. Co.*, 122 Ind. 344, 345; *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577; *Lostutter v. Aurora*, 126 Ind. 436; *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; *Kane v. New York El. R. Co.*, 125 N. Y. 164; *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157; *Hughes v. Metropolitan El. R. Co.*, 130 N. Y. 14; *Egerer v. New York Central & H. R. R. Co.*, 130 N. Y. 108.

"That the lot owners abutting on a street have a private and distinct interest or easement in the street is a well established doctrine of law. This interest is distinguished from the rights of the general public in that it becomes an interest legally adhering to the contiguous grounds and the buildings thereon by affording more convenient facilities for their use. This incorporeal right appendant, the advantage of the street to the owner of lot, and to the buildings, improvements, walks, trees, &c., as the owner may have adjusted them to the street as existing, is a valuable property right which the law recognizes. This right cannot be appropriated and taken from him against his consent without compensation." *Rensselaer v. Leopold*, 106

Ind. 29. A private easement may exist in a way which is also a public highway; and it does exist whenever the lands are so situated with respect to the highway that the use of the latter is necessary for access to the land. In such case the owner of the land can maintain a suit for damages for obstruction of the highway. *Ross v. Thompson*, 78 Ind. 90.

² *Hughes v. Metropolitan El. R. Co.*, 130 N. Y. 14, 26. See also *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; *De Geofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698.

In *Kane v. New York El. R. Co.*, 125 N. Y. 164, the railroad company claimed that Pearl Street in the City of New York was originally laid out and opened as a *public street under the Dutch régime*, and it was claimed that, under the law of Holland, the title of the municipality in the street was absolute, and that the abutter had no property right or easement therein, which was taken or affected by the diversion of the street to other uses pursuant to legislative and municipal authority. The court, however, held that, conceding that under the Civil Law, which was the law of Holland during its occupation of Manhattan

These easements are *purely incorporeal rights*, having in themselves only a nominal value, and dependent for substantial value upon the effect which their destruction has upon the abutting property.¹ Being incorporeal, they are necessarily appurtenant to the abutting property, and *cannot exist severed* from or independently of it.² Hence, upon a sale of the property, the appurtenant easements or incorporeal rights *pass to the grantee by the conveyance*, and this is the rule, although they may have been, previously affected or impaired by the construction of an elevated railroad or other structure without compensating the owner for the property taken.³ But if the property be *conveyed with a reservation* in the conveyance of the right of the grantor to compensation for the property so taken or impaired, the grantee acquires title to the property and holds the same subject to a trust for the benefit of his grantor to receive and pay over to the grantor any sums awarded as compensation for the easements taken or destroyed.⁴ Being purely incorporeal,

Island, the sovereign is vested with the absolute title to the soil of all streets and highways within his dominion, that no private rights or easement existed therein, and that an owner of land adjacent to a street acquires no right by reason of adjacency or from the fact that he has built upon the street in reliance upon its continued existence to have it kept open as a street or way; conceding also that the English crown succeeded to the rights and powers of the States General as to all streets laid out during the Dutch occupation, yet these rights have been so modified by grant, covenant, and legislation as to vest in the abutting owners rights in such streets in the nature of easements of which they may not be deprived without compensation; that the city of New York owns the fee of the lands occupied by its streets at any period under a tenure in trust for street uses; that as to streets then existing the trust was declared in the *Dongan Charter*, which vested the title in the municipality; that the streets opened by the Dutch were included in the grant and so were impressed with and held under the trust; and that the trust declared by the charter of 1813 as to streets opened under it, attached to all streets then in existence, and the city held the same thereafter upon the same trust and tenure as the new streets opened under that charter; that the trust so created is

not only for the benefit of the public at large, but for the special benefit of abutting owners, and it is to be presumed that upon the faith that the streets shall be forever kept open, such owners have acted in improving and building on their adjoining land; that the legislature has no power to abrogate this trust or authorize its violation by devoting a street to other and inconsistent purposes without making compensation to abutting owners.

¹ *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576, 588.

² *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436; *Kernochan v. New York El. R. Co.*, 128 N. Y. 559, 568; *Pegram v. New York El. R. Co.*, 147 N. Y. 135, 146; *Foot v. Metropolitan El. R. Co.*, 147 N. Y. 367, 374; *Shepard v. Manhattan R. Co.*, 169 N. Y. 160, aff'd 48 N. Y. App. Div. 452; *Western Union Tel. Co. v. Shepard*, 169 N. Y. 170, 179.

³ *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436.

⁴ *Western Union Tel. Co. v. Shepard*, 169 N. Y. 170, 179. Notwithstanding a *reservation of the right to damages past and present*, caused to abutting property by the maintenance of an elevated railroad, the grantee of the property may maintain an action to enjoin the continued operation of the railroad until compensation be paid. *McGean v. Metropolitan El. R. Co.*, 133 N. Y. 9.

the easements of the abutter *may be abandoned or extinguished* by acts showing an intention to abandon and extinguish the same, as by consenting to the construction of an elevated railroad or other structure taking or impairing the abutter's easements.¹ Furthermore, these easements, although rights appurtenant in a public street, *are private property, and may be destroyed by adverse possession* of the street for other than street uses pursuant to legislative authority. Thus, where it appears that the structure or erection within the lines of the street by which these easements are taken or impaired is erected under legislative and municipal grants giving authority to erect, maintain, and operate it, with apparent authority to appropriate the easements of abutting owners so far as necessary therefor, the entry upon the street without leave or license from the abutting owner, with the continued maintenance and operation of the structure within the street for the prescriptive period, is necessarily hostile and adverse to the abutter, forms a sufficient foundation for adverse possession, and confers a title upon the persons so maintaining and operating the structure, by legislative authority, to so much of the easements of the abutter as is taken or impaired thereby.²

§ 1126. **Nature of the Abutter's Rights in the Streets.** — Although the property rights of an abutter are usually spoken of as easements, or rights in the nature of easements, of light, air, and access, in streets the fee of which is in the municipality, yet the tendency of the court in New York, it has been said in the case cited in the note, is not to limit the abutter to rights of light, air, and access. It has been stated that, as a general rule, *whatever renders a street more valuable to the people at large* renders it more valuable to the

¹ *White v. Manhattan R. Co.*, 139 N. Y. 19, 26. In *White v. Manhattan R. Co.*, 139 N. Y. 19, 25, *Peckham, J.*, who delivered the opinion of the court, said, "The easements of abutting owners in New York City, who are without title to any portion of the streets upon which their lands abut, differ somewhat in their origin from ordinary easements. They have not been created by grant or covenant, but it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a contract between the public and

the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be devoted to other and inconsistent uses. Whatever the means by which the easements were created they are in their nature the same as if they had been created by grant."

² *Hindley v. Manhattan R. Co.*, 185 N. Y. 335, rev'g 103 N. Y. App. Div. 504; *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; *Lewis v. New York & H. R. Co.*, 162 N. Y. 202, 223; *Scallon v. Manhattan R. Co.*, 185 N. Y. 359, rev'g 112 N. Y. App. Div. 262; *Bremer v. Manhattan R. Co.*, 191 N. Y. 333, modifying 113 N. Y. App. Div. 905.

abutting owner, for he has all of their rights of user, besides other rights which are peculiar to himself. While the control of the street, regardless of where the title may be, of necessity is in the public authorities, and they may grade and improve it even to his detriment, still he has special rights therein which are a species of property that cannot be taken from him without compensation awarded according to the law of the land.¹ It was further pointed out that no adequate reason is given for an attempt to limit the rights of abutters to the easement of light, air, and access; that there is no distinction in principle between these benefits which are incidental to a street and any other incidental advantage which adds to the value of abutting land; that the law should not extend protection to the one and withhold it from the other. The easement of the abutter, as for convenience it may be called, consists in the right to have the street kept open, and includes all the incidental advantages which may fairly be implied from that right. It is the proximity of the street, the situation of the abutting land with reference to an open street, which gives to an abutting owner the special right to the enjoyment and use of whatever is permitted or intended by the public authorities as part of the street. These easements are created by operation of law when streets are opened, and they are presumed to be paid for by taking the benefits into account when land is procured for the purpose. Such benefits are co-extensive with the use to which the street may be by law devoted. They frequently

¹ *Per Vann, J.*, in *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 316. The learned Justice added, "Among his rights are those of light, air, and access, each long resisted, but now well-established as safe from the onslaught of wrong-doers, even including those who erect an elevated railroad in a street with the sanction of law. *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; *Kane v. New York Elev. R. Co.*, 125 N. Y. 164. But during the long struggle which saved these rights of the abutting owner, he did not always win, for the necessary annoyance caused by a use of the street authorized by law, such as the *noise of a train* passing on an elevated railway, gives him no right to permanent damages, unless some part of his land is taken. *American Bank Note Co. v. N. Y. Elev. R. Co.*, 129 N. Y. 252. This was so held upon the ground that where the use is authorized [by statute]

and is for the benefit of the public, he must endure the discomfort incidental to a lawful use and essential to the public welfare. But *whatever pollutes the air he breathes, such as smoke and gas, shuts the light from his windows, or hinders access to his door, such as an elevated railroad structure and the trains thereon, must be reckoned for, even by the technical wrong-doer acting with some sanction but not the full sanction of law. In settling the law to this extent, general expressions, have sometimes been used by the court, indicating as its opinion that these easements of light, air, and access are the only rights which an abutting owner has in a public street of which he owns no part. Courts settle the law by passing upon actual questions, not by advancing abstract theories, and the words of exclusion should be limited to the facts of the case in hand when they were used, as was doubtless the intention."*

induce owners of land to donate or dedicate a part thereof for the purpose of a street. If the street is improved so as to be more useful, or ornamented so as to be more beautiful, the public is benefited generally, and the abutter is benefited specially. So long as a *hitching post* or a *shade tree* is physically and legally a part of the street, the abutter is entitled to all the special benefits which flow therefrom to his lot, free from any interference by a wrong-doer, but subject to removal by the municipal government. The easement extends to all parts of the street which enlarge the use and increase the value of the adjacent lot. It is not limited to light, air, and access, but includes all the advantages which spring from the situation of the abutter's land upon the open space of the street. These rights exist whether he owns the fee of the street or not. As they are dependent upon the street and cannot exist without it, they are a part of it, and thus become an *integral part of the estate* of the abutting owner, subject to interference of no one except the representatives of the public. Hence, it was held that although the abutter might not own the fee of the street, yet he had a *special interest or easement in shade trees* growing in front of his property which entitled him, to recover damages from a gas-light company for negligently destroying the trees by permitting gas to escape from its mains.¹

§ 1127. **Abutter's Easements; How far protected by Fourteenth Amendment of Federal Constitution.**— We have referred above to the limitations upon the power of State governments contained in the *Fourteenth Amendment* to the Federal Constitution, prohibiting any State from depriving any person of property without due process of law.² Is the *easement of an abutter* in the public streets a *property right within the meaning of this Amendment*, so that it is under the protection of the general government as against invasion by the States? The easements or rights of abutters in public streets are the creatures of the law of the State. The same law which declares the easements defines, qualifies, and limits them, and the question of the existence of such easements is usually for the final determination of the State court. It has authority to declare that the abutting land owner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or

¹ Donahue v. Keystone Gas Co., 181 N. Y. 313. In such a case the abutting owner is rightfully entitled to recover damages for the negligent act of the defendant gas company, but this does not, as the author ventures to suggest,

necessarily imply that the abutter has an *easement* in the sense of a *property right* in the shade tree which is protected by the Constitution as property.

² Ante, §§ 301, 302.

it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on the public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting and often, in the same State, irreconcilable in principle. The courts have modified or overruled their own decisions; and each State has in the end fixed and limited by legislation or judicial decision the rights of abutting owners in accordance with its own view of the law and public policy. The Federal Courts have neither the right nor the duty to reconcile these conflicting decisions, nor to reduce the laws of the various States to a uniform rule and to announce and enforce them. When, therefore, upon the construction of the law of a State, a court decides that an abutter has no easement which is taken or impaired by the uses to which the city streets are applied, and that therefore no property of the abutter has been taken, the Federal Courts, as a general rule, are obliged to hold that no violation of the Fourteenth Amendment is shown.¹ But it is apparent that this rule is not so absolute and sweeping as to exclude the jurisdiction of the Federal Courts under all circumstances and conditions. That abutters have an easement or right in the nature of an easement in the public street upon which the property abuts, and that such easement or right is property, is recognized by decisions of certain State courts. When these decisions recognize the existence of this *property*, it comes within the protection of the Fourteenth Amendment, and the Federal Courts are charged with the duty of enforcing that protection in a proper case. That this is so is illustrated by the decisions of the Supreme Court of the United States in the cases involving the Fourth Avenue Viaduct of the New York and Harlem Railroad Company in New York City. By a long series of decisions the courts of the State of New York had recognized and enforced certain easements of abutting owners entitling them to protection against the maintenance and operation of elevated railroads in the city streets in front of abutting premises, but when the legislature by mandatory legislation directed that a railroad which had previously been constructed and operated in an open cut in the centre of the avenue should be elevated and placed upon a viaduct or elevated

¹ *Sauer v. New York City*, 206 U. S. 536, 548, aff'g 180 N. Y. 27. The *power to grade streets* conferred by statute is not necessarily exhausted by one exercise thereof; and where no federal question is involved the Supreme Court of the United States must accept

the interpretation, &c., of the highest court of a State of a local statute as to the extent of the power conferred by statute upon a municipality to change the grade of streets. *Mead v. Portland*, 200 U. S. 148, aff'g 45 Oreg. 1.

railroad in the centre of the street, the Court of Appeals of the State of New York held that as the elevation was effected by the positive command of the State, it was therefore made by virtue of the power of the State to manage and regulate the use of the city streets and denied compensation to the owners of abutting property for damages caused by the change in the construction and operation. On error to the Supreme Court of the United States this decision was reversed, that court assuming jurisdiction to consider and determine whether any property or contract right of the abutting owner had been impaired or affected by such elevation, and finding under the previous decisions of the State courts that such contract or property right existed, and that it had been so affected, reversed the determination of the State court.¹

§ 1128 (657). **Legislative Power over Streets.**—By virtue of its authority over public ways, the *legislature may authorize acts to be done in and upon them*, or legalize obstructions therein, which

¹ Muhlker v. New York & H. R. Co., 197 U. S. 544, rev'g 173 N. Y. 549; but *quere* whether the judgment of the Court of Appeals of New York was not right, and whether it ought not to have been accepted and followed by the Supreme Court of the United States for the reasons stated in the dissenting opinion of Mr. Justice Holmes, and by Mr. Justice Moody, in *Sauer v. New York City*, 206 U. S. 536. See also *Birrell v. New York & H. R. Co.*, 198 U. S. 390. It is to be noted that in these decisions the Supreme Court of the United States assumed jurisdiction not only under the provisions of the Fourteenth Amendment, but also under the provisions of the Federal Constitution which prohibit the enactment of any law impairing the obligation of a contract. After referring to the easements which were recognized as existing in the above cited cases of *Story v. New York Elevated R. Co.*, 90 N. Y. 122, and *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, the court pointed out that the rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property devoted to street uses and declared (197 U. S. 570) that "When the plaintiff acquired his title, those cases were the law of New York, and assured to him that his easements of light and air were secured by contract

as expressed in those cases, and could not be taken from him without the payment of compensation." It added that this was the ground of its decision; that the court was not called upon to discuss the power or the limitations upon the power of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. The decision was rendered by a divided court, the opinion of Mr. Justice McKenna being concurred in by Justices Harlan, Brewer, Brown, and Day. Chief Justice Fuller and Justices Holmes, White, and Peckham dissented.

Respecting the New York decisions in the Elevated Railroad Cases, the author ventures to make the following observations: That the abutter has certain special rights in the street in addition to those of the public at large, such as the right of access, light, and air, subject to legitimate legislative control, is a proposition that cannot reasonably be denied. Nor can it be denied that if the construction and operation of an elevated railroad in the streets interfere with the enjoyment of these rights and lessen the value of the abutter's property, the legislature ought as a matter of jus-

would otherwise be deemed nuisances.¹ As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed that whatever the legislature may constitutionally authorize to be done is of course lawful, and of such acts, done pursuant to the authority given, it cannot be predicated that they are nuisances: if they were such without, they cease to be nuisances when having the sanction of, a valid statute.² As respects the public or the municipalities themselves, there is, in the absence of special constitutional restriction, no limit upon the power of the legislature as to the uses to which streets may be devoted.³ What limitations exist upon the power as respects the original proprietor of property dedicated to the public use, or the adjoining owner or others, is a subject which is elsewhere considered in this chapter.⁴ Statutes authorizing or legiti-

tice to require that the abutter be compensated to the extent of such diminished value. But that such rights of the abutter are easements in the legal sense that they are *property* or *proprietary* rights, and that it is beyond the constitutional power of the legislature to authorize the construction and operation of an elevated railroad on the street in front of the abutter's property by the municipality or by a private corporation for public use, without making compensation to the abutter, is a proposition of debatable soundness in the absence of special constitutional provisions to that effect. Erecting the rights of the abutter into rights of property (in the constitutional sense) and beyond legislative control was in New York a new creation or invention of the Court of Appeals and a substantial limitation of the power of the legislature over streets and their uses as that power in England and in this country had been asserted and declared in many adjudged cases. In these observations we intend only to suggest that the doctrine of the New York courts in the *Story* and *Lahr* cases above, ought not to be considered as settled, at least in other jurisdictions, without further consideration.

The erection over or across a public street of an elevated viaduct by a city for public travel, and not devoted to the exclusive use of a private transportation company, is a legitimate street use, and is to be distinguished

from the *Story* and *Lahr* cases. *Sauer v. New York City*, 206 U. S. 536, aff'g 180 N. Y. 27. See Index, *Abutter*; *Constitutional Provisions*; *Eminent Domain*; *Railroads in Streets*.

¹ *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641; *Hoey v. Gilroy*, 129 N. Y. 132; *Wormser & Brown*, 149 N. Y. 163, 171. The control of the streets in the *city of Washington* and the power to grant the use of them for other than ordinary purposes is primarily vested in Congress. *District of Columbia v. Baltimore & P. R. Co.*, 114 U. S. 453.

² See § 1122, *supra*, and cases there cited; *Angell on Highways*, § 237; *First Bapt. Church v. Utica & S. R. Co.*, 6 Barb. (N. Y.) 313; *Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 455; *Northern Transportation Co. v. Chicago*, 99 U. S. 635; text cited and approved in *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413; *Atlanta v. Gate City Gas L. Co.*, 71 Ga. 106; *Irwin v. Great So. Telephone Co.*, 37 La. An. 63; *Kirtland v. Macon*, 66 Ga. 385; *Cummins v. Seymour*, 79 Ind. 491; *Kumler v. Silsbee*, 38 Ohio St. 445 (steam-heating pipes).

³ *Columbus v. Union Pac. R. Co.*, 137 Fed. Rep. 869, 873, quoting text *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, citing text; *Chicago v. Illinois Steel Co.*, 66 Ill. App. 561, quoting text. See also *post*, § 1161.

⁴ *Ante*, §§ 1123, 1124; *post*, §§ 1245, 1168, and *New York Elevated Railway cases*, *post*, §§ 1259-1261.

mating acts and obstructions upon the highways which would otherwise be nuisances are *strictly construed, and must be closely pursued*, and the authority given must be exercised with proper care.¹

§ 1129 (658). **Delegation of Power to Municipality.** — The legislature, instead of exercising directly this authority as to the uses of streets and public places, may authorize it to be exercised by local or municipal authorities.² An act of the legislature, *legalizing, for*

¹ Angell on Highways, § 237; *Hughes v. Providence & W. R. Co.*, 2 R. I. 493; *Bordentown & S. A. Turnp. Co. v. Camden & A. R. Co.*, 17 N. J. L. 314; *Walker v. Denver*, 76 Fed. Rep. 670, 672, citing text. In virtue of its authority over highways and over streets, which are, in effect, highways, the legislature may establish a *turnpike gate in the streets* of a city. But as such a privilege would embarrass public trade and convenience, the intention of the legislature must be plainly expressed. *Stormfeltz v. Manor Turnp. Co.*, 13 Pa. St. 552, 555; *infra*, § 1129, note; *Milarkey v. Foster*, 6 Oreg. 378.

² *Infra*, §§ 1161, 1280; *Sinton v. Ashbury*, 41 Cal. 525; *Northern Transp. Co. v. Chicago*, 99 U. S. 635; *Montgomery v. Parker*, 114 Ala. 118; *Kirkwood v. Newbury*, 122 N. Y. 571; *Hoey v. Gilroy*, 129 N. Y. 132; *Jorgensen v. Squires*, 144 N. Y. 280; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 22.

Legislative authority to build tunnel under street, and what it implies. A city is not liable to the adjoining owner for consequential injuries sustained by him by reason of the construction, under legislative authority, of a tunnel under a street intersected by a river, where the authority has not been transcended and no negligence is shown, and there has been no invasion of the plaintiff's property, although the obstructions in the street may have interfered with the owner's access to his property, and were of such a nature as to have been nuisances, causing special damage, if they had not been warranted by legislative authority; and it is immaterial, in such a case, "whether the fee of the street is in the State or in the city or in the adjoining lot-holders." Authority to build the tunnel carries with it all that is necessary for the exercise of the power, and

a lot-owner, although he suffers special damage of a consequential nature, has, in such case, no private action, unless it is given by the legislature. *Northern Transp. Co. v. Chicago*, *supra*; *Chicago v. Rumsey*, 87 Ill. 348; s. c. 10 Chicago Legal News, 333; *post*, §§ 1675, 1677.

Toll-gates in streets. In a suit in equity in the name of the State, to enjoin the setting up a new toll-gate structure in place of a former one erected and removed by a plank-road company, the complaint being that the intended erection would be a public nuisance, the Supreme Court of *Michigan* held, in *People v. Detroit & Howell Pl. Rd. Co.*, 37 Mich. 195, that when the State gave the company the right to build their road from a point *in the city*, and to erect gates according to their reasonable discretion, but subject to the condition that none should be placed *in the city*, it contemplated the city as it then was in respect to limits, and meant that the privilege given *within the city* should not extend so far as to allow gates to be set up there, and, on the other hand, that the restriction should be confined territorially to the then fixed and determined bounds of the city. The State could not have designed that as fast as it might enlarge the city boundaries the defendant's franchises, covering the right to place toll-gates, should be correspondingly annihilated, and the gates themselves, thereby brought within the limits, be instantly converted into a public nuisance; citing *Hall v. State*, 20 Ohio, 8; *Somerville v. O'Neil*, 114 Mass. 353; *Barber v. Rorabeck*, 36 Mich. 399. That in view of the power and privilege given by the charter, the gates ought to be regarded, for the purpose of this case, as though their site were directly designated by the State. The impediment could not

*the time being, encroachments on the public streets, may be repealed at pleasure, — being a mere revocable license, — unless something was done or suffered in consideration of the act so as to invest it with the qualities of a contract.*¹ How far a city can by contract or ordinance authorize an irrevocable use of its streets by others for public uses, depends upon its charter, and is a subject elsewhere considered.²

§ 1130 (659). **Obstruction; Remedy of Public by Indictment and in Equity.** — The principle that streets and public places, or the uses thereof, speaking generally, belong to the public is one of great importance. Because they are public, whether the technical fee be in the adjoining owner, in the original proprietor, or in the municipality in trust for the public use, *any unauthorized obstruction of the public enjoyment is an indictable nuisance.*³ And the proper

have become unlawful by the mere flow of time; and the fact that the State itself, since the location of the gate, has allowed railroads to cross near the site, and has thereby consented to the incidents which naturally happen in consequence of the concentration and combination of different ways, will hardly entitle it to turn round and assail the defendant's gate as a public nuisance. What the State validly authorizes it cannot prosecute as a nuisance; citing *First Baptist Church v. Utica & S. R. Co.*, 6 Barb. (N. Y.) 313, and cases cited; *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646; *People v. Denslow*, 1 Caines (N. Y.), 177; *Cooley's Const. Lim.* 594. *Supra*, § 1128, note; *infra*, § 1131, note.

¹ *Reading v. Commonwealth*, 11 Pa. St. 196; *Detroit v. Detroit & E. Pl. R. Co.*, 12 Mich. 333.

² *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.), 415; *ante*, §§ 245, 584, and note, 784, note.

"This regulation and control [of street uses] is usually delegated to the local authorities by general laws, and sometimes by special laws. But the legislature remains all the time the supreme authority in regard to all public rights and interests. The authority which it delegates it may at any time resume, and then it may exercise it as it deems best." *Per Knowlton, C. J.*, in *New England T. & T. Co. v. Boston Terminal Co.*, 182 Mass. 397, 399.

³ *Demopolis v. Webb*, 87 Ala. 659,

citing text; *Costello v. State*, 108 Ala. 45; *Smith v. McDowell*, 148 Ill. 51; *State v. Berdetta*, 73 Ind. 185; *New Orleans v. Gravier*, 11 Mart. (La.) 662; *Herbert v. Benson*, 2 La. An. 770; *Davis v. Bangor*, 42 Me. 522; *People v. Carpenter*, 1 Mich. 273; *People v. Jackson*, 7 Mich. 432; *State v. Vandalia*, 119 Mo. App. 406; *Runyon v. Bordine*, 2 J. S. Green (N. J.), 472; *Smith v. State*, 23 N. J. L. 712; s. c. *ib.* 130; *Attorney-General v. Heishon*, 18 N. J. Eq. 410; *Morris Canal & B. Co. v. Fagin*, 22 N. J. Eq. 430; *State v. Godwin*, 145 N. Car. 461, 464; *State v. Cincinnati Gas, &c. Co.*, 18 Ohio St. 262; *Reading v. Commonwealth*, 11 Pa. St. 196; *Commonwealth v. Rush*, 14 Pa. St. 186; *Heckerman v. Hummel*, 19 Pa. St. 64; *State v. Wilkinson*, 2 Vt. 480; *State v. Atkinson*, 24 Vt. 448; *Pence v. Bryant*, 54 W. Va. 263.

Nuisances and obstructions: A railroad company is indictable for a nuisance if, without lawful authority, it erects and continues a *building in a public highway or street*; *State v. Morris & E. R. Co.*, 23 N. J. L. 360; *Milhau v. Sharp*, 27 N. Y. 611, 625; or uses a street crossing as a place of storage or deposit for its cars. *Mason v. Ohio Riv. R. Co.*, 51 W. Va. 183. See also *post*, § 1233. General grant held to confer such right. *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10. Where a private person takes possession of a public common or square, or encloses it, or otherwise wholly excludes the public, such act is

officer of the commonwealth may proceed, in the name of the public, by bill in equity, for an injunction or relief, or by other appropriate action or proceedings, to vindicate the rights of the public against encroachment of denial by individuals.¹ So where, by its charter or constituent act, a municipality has the usual control and supervision of the streets and public places, *it may, in its corporate name*, institute judicial proceedings to prevent or remove obstructions thereon.² So, too, it may in proper cases invoke *the aid of a court*

ipso facto a nuisance, and the court should so charge the jury as a matter of law. And it is no defence that the public inconvenience was more than counterbalanced by the public benefit. *State v. Woodward* (indictment for enclosing public common), 23 Vt. 92; *State v. Atkinson*, 24 Vt. 448. *Rex v. Ward*, 4 Ad. & El. 384, settled and put at rest this principle in England. A public common may, in such case, be described as a public highway.² *Chitty Crim. Law*, 389; *State v. Atkinson*, 24 Vt. 448. The erection and maintenance of a *permanent building across a public street*, thereby closing it against travellers, constitutes a public nuisance which is subject to indictment and abatement by the State. *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218.

Under the *Indiana* statute, a corporation may be prosecuted criminally for obstructing a public highway. *State v. Baltimore, O. & C. R. Co.*, 120 Ind. 298. In an action to vindicate the public right, it is not necessary to establish that damage results from the obstruction. *Smith v. McDowell*, 148 Ill. 51, 68.

Proper judgment: Where a defendant is indicted and convicted for erecting a building which encroaches upon a public street, *the proper judgment* is that the nuisance be abated, and that the defendant pay a fine. *Smith v. State*, 23 N. J. L. 712. "This judgment," said the learned reporter, who was one of the counsel in this case, "is according to the old and well-settled authorities (citing them). The form of entry, framed from *Rastell's Entries*, 411, was as follows: 'Therefore, it is considered that the nuisance aforesaid be wholly removed and abated, and that the walls, erections, and buildings above mentioned be taken away and removed, and that the aforesaid common and public highway be opened to its right and lawful

width, as it was until the erection of said nuisance, at the proper costs and expenses of the said defendant; and that he do pay a fine of five dollars,' &c." *State v. Morris & E. R. Co.*, 23 N. J. L. 360.

¹ *State v. Mobile*, 5 Port. (Ala.) 279; *Demopolis v. Webb*, 87 Ala. 659, 667, citing text; *First Nat. Bank v. Tyson*, 133 Ala. 459, 473; *Alabama W. R. Co. v. State*, 155 Ala. 491; 46 So. Rep. 468; *Burlington v. Schwartzman*, 52 Conn. 181; *Columbus v. Jaques*, 30 Ga. 506; *Augusta v. Reynolds*, 122 Ga. 754; *Smith v. McDowell*, 148 Ill. 51, 69, citing text; *Shaubut v. St. Paul & S. C. R. Co.*, 21 Minn. 502, 506; *People v. Vanderbilt*, 26 N. Y. 287; *People v. Vanderbilt*, 28 N. Y. 396; *Moyamensing Com'rs v. Long*, 1 Pars. (Pa.) 145; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Commonwealth v. Rush*, 14 Pa. St. 186; *Heckerman v. Hummel*, 19 Pa. St. 64; *post*, § 1577 *et seq.* If the fact of encroachment is disputed and doubtful, it should be settled at law; if the bill be retained, an issue may be directed to try the fact. *Attorney-General v. Heishon*, 18 N. J. Eq. 410.

A city holds, by statute in *Illinois*, the fee of its streets in trust for the benefit of all the corporators, and in case of violation of such trust by an excess or abuse of power, and in bad faith, by public officers, resulting in an injury to the rights and property of an individual, it can, by its representative, the municipal authorities, maintain an action for recovery of the possession of or for an injury to the street. A court of equity has in such cases jurisdiction to grant relief. *Quincy v. Jones*, 76 Ill. 231; *Carter v. Chicago*, 57 Ill. 283; *Cosby v. Owensboro & R. R. Co.*, 10 Bush (Ky.), 288. See also *Peoria v. Johnston*, 56 Ill. 45.

² *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498; *Smith v. McDowell*, 148 Ill. 51, citing text; *Cheek v. Aurora*, 92 Ind. 107, approving text; *Val-*

of equity to enforce and safeguard the public right by restraining unlawful encroachments and obstructions.¹ And it has also been held that *any citizen and tax-payer* has the right to *mandamus* to compel the public officials to perform their duty of removing unlawful incumbrances, obstructions, and nuisances from the public streets.²

§ 1131 (660). **Obstructions; Liability of Author of Obstruction; Remedy.** — The king cannot license the erection or commission of a nuisance;³ nor in this country can a municipal corporation do so by virtue of any inherent or general powers. A building, or other structure of a like nature, erected upon a street without the sanc-

paraiso v. Bozarth, 153 Ind. 536; Dubuque v. Maloney, 9 Iowa, 450, 460, *per Stockton*, J., *arguendo*; Herbert v. Benson, 2 La. An. 770; Winona v. Huff, 11 Minn. 119; Mankato v. Willard, 13 Minn. 13; Heitz v. St. Louis, 110 Mo. 618, 626, citing text; Dummer v. Jersey City, 20 N. J. L. 86; Watertown v. Cowen, 4 Paige (N. Y.), 510; Brooklyn Steam Transit Case, 78 N. Y. 524, 531; New York Cable Co. v. New York, 104 N. Y. 1, 38, 43; Pittsburgh v. Scott, 1 Pa. St. 309; West Seattle v. West Seattle Land & Imp. Co., 38 Wash. 359; *post*, § 1577, chap. xxxi.

Where a commissioner of highways wrongfully asserts that the plaintiff's house encroaches upon the highway, plaintiff may maintain an action and obtain an injunction restraining the commissioners from interfering with his building. Flood v. Van Wormer, 147 N. Y. 284, *aff'g* 70 Hun (N. Y.), 415. The question whether the use to which it is proposed to put the street by the obstruction is of greater benefit to the public than the use as a street is immaterial. West Seattle v. West Seattle Land & Imp. Co., 38 Wash. 359.

Right of municipal corporation to file bill to restrain execution sale of lots and squares dedicated to educational, religious, and public uses, affirmed by a majority of the court in Cox v. Griffin, 18 Ga. 728. See M. E. Church v. Hoboken, 33 N. J. Law, 13. It has been held in Louisiana that a municipal corporation, without the institution of any judicial proceedings, may pull down and remove houses and obstructions in the public streets, and is not liable to the owner therefor. Daublin v. New Orleans, 1 Martin (La.), 184. And see Herbert v. Benson, 2 La. An. 770.

¹ Pearson v. Birmingham, 155 Ala. 631; 47 So. Rep. 80; Burlington v. Schwartzman, 52 Conn. 181; Owensboro v. Hope, 128 Ky. 524; 110 S. W. Rep. 272; Springfield v. Robberson Ave. R. Co., 69 Mo. App. 514; Jersey City v. Central R. Co., 40 N. J. Eq. 417; Oxford v. Willoughby, 181 N. Y. 155, *aff'g* 87 N. Y. App. div. 609; Haverstraw v. Eckerson, 192 N. Y. 54, *aff'g* 124 N. Y. App. Div. 18; Hempstead v. Ball El. L. Co., 9 N. Y. App. Div. 48; Eau Claire v. Matzke, 86 Wis. 291; Wauwatosa v. Dreutzer, 116 Wis. 117. See also as to remedy of municipality in equity, Detroit v. Detroit & M. R. Co., 23 Mich. 173; Metropolitan City R. Co. v. Chicago, 96 Ill. 620; Reed v. Birmingham, 92 Ala. 339.

A suit in equity may be maintained by village trustees to compel the removal from the streets of disused electric light poles and wires. Hempstead v. Ball El. L. Co., 9 N. Y. App. Div. 48; *infra*, § 1131.

² People v. Maher, 141 N. Y. 330; People v. Keating, 168 N. Y. 390, *rev'g* 62 N. Y. App. Div. 348; People v. Hawxhurst, 123 N. Y. App. Div. 65; People v. Ahearn, 124 N. Y. App. Div. 840, 845. But if the statute confers on the mayor discretionary power to direct the city engineer to take summary proceedings to remove an encroachment, the exercise of the discretion will not be coerced by *mandamus*. The mayor is justified in refusing to give a direction to exercise the power of summary removal, if he deems it to the interests of the city that other remedies should be resorted to. People v. Maher, 141 N. Y. 330.

³ Viner Abr. Nuisance, F.

tion of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express or plain power to this end conferred upon them by charter or statute.¹ The usual power to regulate and con-

¹ *State v. Mobile*, 5 Port (Ala.), 279; *Demopolis v. Webb*, 87 Ala. 659; *Mobile v. Louisville & N. R. Co.*, 124 Ala. 132, 139, quoting text; *First Nat. Bank v. Tyson*, 133 Ala. 459, 472, quoting text; *Marini v. Graham*, 67 Cal. 130 (obstruction of sidewalk); *Columbus v. Jaques*, 30 Ga. 506; *Pagames v. Chicago*, 111 Ill. App. 590; *Smith v. McDowell*, 148 Ill. 51, 67, quoting text; *Valparaiso v. Bozarth*, 153 Ind. 536; *Hall v. Breyfogle*, 162 Ind. 494, 500; *Gould v. Topeka*, 32 Kan. 485; *Flemingsburg v. Wilson*, 1 Bush (Ky.), 203; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *State v. Morris & E. R. Co.*, 23 N. J. L. 360; *State v. Laverack*, 34 N. J. L. 201; *Attorney-General v. Heishon*, 18 N. J. Eq. 410; *McDonald v. Newark*, 42 N. J. Eq. 136, approving text; *People v. Maher*, 141 N. Y. 330; *Commonwealth v. Rush*, 14 Pa. St. 186; *Samuels v. Nashville*, 3 Sneed (Tenn.), 298.

As to *wharves and depot buildings* in public streets, see *Barney v. Keokuk*, 94 U. S. 324; s. c. 4 Dillon, 593, 599. *Ante*, §§ 261-274, 1076, 1077. Unauthorized *toll-gate*. *Milarkey v. Foster*, 6 Oreg. 378, with note. *Supra*, § 1128, note; § 1129, note. *Disused electric light poles* and wires constitute unlawful obstructions which it is the duty of the corporation to remove. *Hempstead v. Ball Electric Light Co.*, 9 N. Y. App. Div. 48; *supra*, § 1130. The *abutments of an overhead railroad bridge* encroaching upon a street, though constructed under agreement with the municipal authorities, are removable as a nuisance. *Elyria v. Lake Shore & M. S. R. Co.*, 23 Ohio Cir. Ct. 482.

The following are unlawful obstructions to city streets: *Truck standing* in the street at night, *Farley v. New York City*, 152 N. Y. 222; *road scraper* left on a highway, *Whitney v. Ticonderoga*, 127 N. Y. 40; *flag or banner* suspended over street in such a manner as to be dangerous, *Hewison v. New Haven*, 37 Conn. 475; *openings* made and left in streets or sidewalks, *Scammon v. Chicago*, 25 Ill. 424; *Runyon v. Bordine*, 14 N. J. L. 472; *Beatty v. Gilmore*, 18 Pa. 463. As to power of

municipality to regulate temporary excavations, see *Cook v. North Bergen*, 72 N. J. L. 118; *Stowe v. Kearney*, 72 N. J. L. 106. *Making a speech* in a public street is not a nuisance *per se*, but may become so by obstructing a public way. *Fairbanks v. Kerr*, 70 Pa. St. 86.

A *purpresture*, or permanent encroachment by the adjoining owner, is in law a nuisance, and the public have a remedy by indictment or in equity. *Smith v. State*, 23 N. J. L. 712; *Ib.* 130; *Moyamensing Com'rs v. Long*, 1 Pars. (Pa.) 145; *State v. Morris & E. R. Co.*, 23 N. J. L. 360; *Attorney-General v. Heishon*, 18 N. J. Eq. 410; *Clark v. Commonwealth*, 14 Bush (Ky.), 166. See also *Driggs v. Phillips*, 103 N. Y. 77.

Respecting nuisances upon streets and highways, Mr. Justice Appleton says: "But nuisances may obviously be committed upon a highway by its unlawful use, for which those committing may be liable civilly to such as may suffer therefrom special damage, and be punished criminally, as thereby annoying the travelling public generally." Where the charter of a town gives it power to abate nuisances, the use of this term refers to the general law to determine what acts or things are such. In relation to streets and highways, "the carrying an unreasonable weight with an unusual number of horses (*Rex v. Egerly*, 3 Salk. 183); the driving a carriage through crowded streets with dangerous speed (*United States v. Hart, Pet.* [Circuit Court] 390); the selling by a constable at auction, in the public thoroughfares (*Commonwealth v. Millman*, 13 Serg. & Rawle (Pa.), 408); the placing at a window the effigy of a bishop, labelled, 'Spiritual Broker,' thereby drawing crowds to the shop (*Rex v. Carlile*, 6 Carr. & P. 636); the keeping coaches at a stand in the street, awaiting customers (*Rex v. Cross*, 3 Campb. 224); the loading and unloading of wagons in the street (*Rex v. Russell*, 6 East, 427); the congregating of carts for the reception of slops from the distilleries (*People v. Cunningham*, 1 Denio (N. Y.) 524); the collecting

trol streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by erections made for his exclusive use and advantage, such as *porches* extending into the streets, or *flights of stairs* leading from the ground to the upper stories of buildings standing on the line of the streets.¹ The person erecting or maintaining a nuisance upon a public street, alley, or place, is liable to the adjoining owner or other person who suffers *special damage* therefrom.² *Special injury* must always be shown to entitle such adjoining owner to maintain an action.³

crowds in the streets by using violent and indecent language to those passing in the street, thereby obstructing their free passage (*Barker v. Commonwealth*, 19 Pa. St. 412; *Rex v. Sarmon*, 1 Burr. 516), have severally been held nuisances, as annoying the whole community, and incommoding and endangering the travelling public." *Per Appleton, J.*, in *Davis v. Bangor*, 42 Me. 522. A borough under its police power may pass an ordinance to prevent obstruction of a sidewalk by persons lounging, loafing, or congregating thereon and provide for summary punishment. *Commonwealth v. Challis*, 8 Pa. Super. Ct. 130; *Morristown v. Moyer*, 67 Pa. 355.

¹ *People v. Carpenter*, 1 Mich. 273. Chief Justice *Whipple*, in this case, denies that such a use of the streets can be authorized by the legislature, since it would destroy the vested rights of property owners under the dedication; but this is an extreme view. *Commonwealth v. Blaisdell*, 107 Mass. 234; *McClellan v. Weston*, 49 W. Va. 669, quoting text; *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, quoting text; *infra*, § 1183.

A city has exclusive jurisdiction over its streets and alleys, not for the purpose of appropriating them in perpetuity to the use of private individuals, but to keep them open and free to all. *Wood v. Mears*, 12 Ind. 515; *People v. Cunningham*, 1 Denio (N. Y.), 524; *Hart v. Albany*, 9 Wend. (N. Y.) 571. And where the owners of a building leased the same to the city, and the condition was that they were to construct an *iron stairway on the outside of the building, occupying for that purpose five feet of the adjoining alley*, and by the contract the city granted to said parties a perpetual right to maintain such stairway, the stairway

was held a public nuisance, and that the city had no power to contract for such a structure in such a place. The common council of a city can only contract by ordinance, resolution, or order, and an illegal and void contract cannot form the groundwork of an estoppel. *Pettis v. Johnson*, 56 Ind. 139.

² *Whaley v. Wilson*, 112 Ala. 627; *First Nat. Bank v. Tyson*, 133 Ala. 459, quoting text; *Harniss v. Bulpitt*, 1 Cal. App. 140; *Anisfield Co. v. Grossman*, 98 Ill. App. 180; *Cincinnati, R. & M. R. Co. v. Miller*, 36 Ind. App. 26; *Forbes v. Detroit*, 139 Mich. 280; *Simis v. Brookfield*, 34 N. Y. Supp. 695; *Hall v. McCaughey*, 51 Pa. St. 43; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *Evans v. Chicago, St. P. M. & O. R. Co.*, 86 Wis. 597. It has been held in Michigan that an *alley* is not to be regarded as a public highway, so that an obstruction thereof will be held to be a public wrong. *Paul v. Detroit*, 32 Mich. 110; *Bagley v. People*, 43 Mich. 355. But the obstruction of a right of egress by an alley is a special injury giving an abutter a right to nominal damages. *Bannon v. Murphy* (Ky.), 38 S. W. Rep. 889.

³ *Barrows v. Sycamore*, 150 Ill. 588; *Morris & E. R. Co. v. Newark Passenger R. Co.*, 51 N. J. Eq. 379; *Hays v. Columbiana Tel. Co.*, 21 Ohio Cir. Ct. 480; *Guilford v. Minneapolis & St. L. R. Co.*, 94 Minn. 108; *Ray v. Colby* (Neb.), 97 N. W. Rep. 591; *Wilson v. West & Slade Mill Co.*, 28 Wash. 312.

What adjoining owner must show to maintain an action for damages. *Abbott v. Mills*, 3 Vt. 521; *McLauchlin v. Charlotte & S. C. R. Co.*, 5 Rich. (S. C.) Law, 583; *Runyon v. Bordine*, 14 N. J. L. 472, holding that where a ditch was dug in an alley in front of

§ 1132 (661). **Jurisdiction in Equity at Instance of Abutters.** — As to the *right to relief in equity*, it may be considered as settled that a party entitled to a right of way over a street may be protected in the enjoyment thereof by restraining the erection of obstructions thereon; but the mere allegation of irremediable mischief from the acts complained of is insufficient; *facts* must be stated to show that the apprehension of injury is well founded.¹ The abutter must

the plaintiff's lot, trespass on the case was the proper form of action; *Heckerman v. Hummel*, 19 Pa. St. 64; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; and see learned opinion of *Putnam, J.*, as to what constitutes special or particular damages. *Haynes v. Thomas*, 7 Ind. 38; *Black v. Philadelphia & R. R. Co.*, 58 Pa. St. 249; *Shaubut v. St. Paul & S. C. R. Co.*, 21 Minn. 502; *Pettis v. Johnson*, 56 Ind. 139. An adjoining owner cannot treat as a nuisance and fill up sewer constructed by municipal authority; his remedy is by action. *McGregor (city of) v. Boyle*, 34 Iowa, 268; *post*, §§ 1737-1746. A person obstructed in the prosecution of his business for five days, by an unauthorized *toll-gate* across a public highway, may recover his damages from the author of the nuisance. *Milarkey v. Foster*, 6 Oreg. 378; *ante*, § 1128, note; § 1129, note. See *post*, §§ 1259-1261, as to right of abutting owners to maintain actions at law and in equity against elevated railway companies occupying the public streets.

Right of abutters in respect of public squares: Where the municipal corporation does not own an absolute estate, but holds property — as, for example, a public square — in trust for the use of the inhabitants, the right of adjoining lot-owners is such that without their consent the legislature cannot authorize the corporation to change the character of the dedication; as, for example, to make a lease of it for ninety-nine years, and to apply the avails to the improvement of the landing. *Le Clercq v. Gallipolis*, 7 Ohio, Pt. 1, 218; *Haynes v. Thomas*, 7 Ind. 38. See *ante*, chap. xxi., on Dedication, §§ 1097-1106. See Index, title *Abutter*.

¹ *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 468; *White v. Flannigain*, 1 Md. 525; *Roman v. Strauss*, 10 Md. 89 (obstructing alley by railroad track);

Longworth v. Sedevic, 165 Mo. 221; *Davis v. New York*, 14 N. Y. 506; *People v. Vanderbilt*, 26 N. Y. 287; *People v. Vanderbilt*, 28 N. Y. 396; *Milbau v. Sharp*, 27 N. Y. 611; *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, quoting text.

The Supreme Court of *Illinois* holds the strict doctrine that, ordinarily, equity will not entertain jurisdiction of a bill where one citizen claims that another has erected buildings in the public streets, and seeks their abatement as a nuisance. To justify the interposition of equity in such cases, it should appear that the remedy at law is, for some reason, insufficient. *Dunning v. Aurora*, 40 Ill. 481. And such is the view in *New Jersey*. *Higbee v. Camden & A. R. & T. Co.*, 20 N. J. Eq. 435; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530. Compare *Bechtel v. Carslake*, 11 N. J. Eq. 500. See *Bunnell's Appeal*, 69 Pa. St. 59. *Coast Line R. Co. v. Cohen*, 50 Ga. 451. In this case the court holds that a court of equity will not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, no private injury or threatened injury being alleged to such citizens or to their property. In such a case, the nuisance, being purely a public one, can only be restrained by the public on information filed by a public officer, to wit, by the solicitor-general for the circuit. It is not sufficient that one of the parties is a lot-owner on the street, no specific injury to the property being alleged, but only a general allegation that damage will result to said lot. *Ib.* The author prefers the view taken of this subject in *White v. Flannigain*, 1 Md. 525, where the court, having regard to the nature and uses of a street in a populous place, and considering any obstruction which denies the exercise of the right to use it as working irreparable mischief to the street *as a street*, sustained the equity jurisdic-

also show that *he suffers special damage* by the wrongful obstruction of the street or by its diversion to uses other than those to which streets may legitimately be devoted. If the injury is only such as is sustained by the public in general, redress must be obtained by some proceeding in behalf of the public, and not by private and individual action. But if the private and special injury to the abutter be shown, injunctive relief will in proper cases be granted.¹

tion; but to entitle the plaintiff to an injunction, the facts showing the special injury, — the situation of his property, &c., — should be stated. *Elwell v. Greenwood*, 26 Iowa, 377; *Macon v. Franklin*, 12 Ga. 239; *People v. Vanderbilt*, 26 N. Y. 287; *Milhau v. Sharp*, 27 N. Y. 611, 625; *Cooper v. Alden*, Harring. Ch. (Mich.) 72; *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601; *Bechtel v. Carslake*, 11 N. J. Eq. 500; *Parsons v. Atlanta University Trs.*, 44 Ga. 529; *Payne v. McKinley*, 54 Cal. 532.

A railway erected upon a public street for a *temporary purpose*, by permission of the municipal corporation, may be a public nuisance; but, if so, it is to be abated by a proceeding on behalf of the State; an owner of abutting land cannot, it was held, enjoin the construction of such a road; but *quaere*. *Garnett v. Jacksonville, St. A. & H. Ry. Co.*, 20 Fla. 389; *post*, § 1585, note; *Potter v. Menasha*, 30 Wis. 492.

Several distinct owners cannot join in a bill. *Hinchman v. Paterson H. R. Co.*, 17 N. J. Eq. 75. But where the defendant is alleged to have no power to use the street and the question is common to all the abutters, their joinder in the suit would not seem to the author to make the bill multifarious. *But that such joinder is permissible*, see *Belknap v. Trimble*, 3 Paige Ch. 576; *Oakley v. Williamsburgh*, 6 Paige Ch. (N. Y.) 262; *Catlin v. Valentine*, 9 Paige Ch. (N. Y.) 575; *Peck v. Elder*, 3 Sandf. (N. Y.), 126; *Wetmore v. Story*, 22 Barb. (N. Y.) 414; *Doolittle v. Broome County Sup.*, 18 N. Y. 155; *Cady v. Conger*, 19 N. Y. 256; *Milhau v. Sharp*, 27 N. Y. 611; *Gillespie v. Forrest*, 18 Hun. (N. Y.), 110; *Rainey v. Herbert*, 3 U. S. App. 592; 55 Fed. Rep. 443.

A lot-owner has no right to raise or lower the sidewalk or street in front of him, when built to an established

grade, without the consent of the municipal corporation having control of this matter; and an adjoining lot-owner, or, it seems, any other citizen having the right to use the streets, may, under the laws of *Louisiana*, without proving actual damage, enjoin such alteration. *Duffey v. Tilton*, 14 La. An. 283.

Although the *soliciting of passengers by expressmen and hotel runners in front of a railroad station* is a public nuisance, the railroad company not being deprived of free access to the street in front of its depot, or hindered or interrupted in its business, is not so specially injured as to be entitled to an injunction. *Pittsburgh, Ft. W. & C. R. Co. v. Cheevers*, 149 Ill. 430.

¹ *Hart v. Buckner*, 2 U. S. App. 488; *Fitzgerald v. Barbour*, 3 U. S. App. 565; *Rainey v. Herbert*, 3 U. S. App. 592; 55 Fed. Rep. 443; *Whaley v. Wilson*, 112 Ala. 627; *First Nat. Bank v. Tyson*, 133 Ala. 459; *Roberts v. Mathews*, 137 Ala. 523; *Weiss v. Taylor*, 144 Ala. 440; *First Nat. Bank v. Tyson*, 144 Ala. 457; *Harniss v. Bulpitt*, 1 Cal. App. 140; *Robbins v. White*, 52 Fla. 613; *Barrows v. Sycamore*, 150 Ill. 588; *Anisfield Co. v. Grossman*, 98 Ill. App. 180; *Martin v. Marks*, 154 Ind. 549; *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218; *Cincinnati, R. & M. R. Co. v. Miller*, 36 Ind. App. 26; *Young v. Rothrock*, 121 Iowa, 588; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *Forbes v. Detroit*, 139 Mich. 280; *Long v. Minneapolis*, 61 Minn. 46; *Gundlach v. Hamm*, 62 Minn. 42; *Johnson v. Andengaard*, 100 Minn. 130; *Guilford v. Minneapolis & St. L. R. Co.*, 94 Minn. 108; *Ray v. Colby* (Neb.), 97 N. W. Rep. 591; *Morris & E. R. Co. v. Newark Passenger R. Co.*, 51 N. J. Eq. 379; *Adler v. Metropolitan El. R. Co.*, 138 N. Y. 173; *Wakeman v. Wilbur*, 147 N. Y. 657; *Ackerman v. True*, 175 N. Y. 353, rev'g 71 N. Y. App. Div. 143; *Hatfield v. Straus*, 189 N. Y. 208, aff'g 117 N. Y. App. Div. 671; *Simis*

Individual owners of lots *adjacent to a public square*, the value of which is affected by an illegal diversion of the uses of the public place, have such rights and interests that they may maintain a bill in equity to enforce the trust or to restrain the appropriation of the public square by the original proprietors, or by others, to their private use, or to any use inconsistent with the purpose for which it was dedicated.¹

v. Brookfield, 34 N. Y. Supp. 695; *Lavery v. Hannigan*, 52 N. Y. Super. Ct. 463; *People v. Ahearn*, 124 N. Y. App. Div. 840; *Hays v. Columbiana Tel. Co.*, 21 Ohio Cir. Ct. 480; *Hall v. McCaughey*, 51 Pa. St. 43; *Clymer v. Roberts*, 220 Pa. 162; *Gray v. Charles & W. C. R. Co.*, 81 S. Car. 370; *Wilson v. West & Slade Mill Co.*, 28 Wash. 312; *Pence v. Bryant*, 54 W. Va. 263; *Evans v. Chicago, St. P. M. & O. R. Co.*, 86 Wis. 597; *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1; *Milwaukee Boiler Co. v. Wadhams Oil Co.*, 126 Wis. 32.

A public nuisance as to a person who is specially injured thereby in the enjoyment or value of his lands, becomes also a private nuisance; and the person *specially injured* has a right of private action to enjoin the continuance of the nuisance. *Ackerman v. True*, 175 N. Y. 353, rev'g 71 App. Div. 143. In *New York* the doctrine of *laches*, as affecting the right of one property owner to enjoin an encroachment by another, is founded upon principles of estoppel; and if there be no element of estoppel, the mere fact of delay in seeking redress will not bar relief. *Ackerman v. True*, 175 N. Y. 353, 362; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 153. In a suit by one property owner to *enjoin an encroachment* upon the street by an adjoining owner, the extent of the injury is not generally considered as very important. It should be substantial, of course, and not merely nominal, and the fact that numerous persons have been injured by the act is no ground for a denial of the relief. *Wakeman v. Wilbur*, 147 N. Y. 657, 663; *Ackerman v. True*, 175 N. Y. 353, 361.

It has been said that the courts have gone very far and to the limit in declining to require parties who have made *temporary erections* which encroach upon the streets to remove them, where no damage or injury was sustained by the party invoking the aid of the court, and even that prin-

ciple should not be extended, especially in a case where the defendant has erected the main wall of his house on a portion of the street. *Ackerman v. True*, 175 N. Y. 353, 365. A person who, by reason of a fence in a public way, is compelled to draw logs by another way, is *specially damaged* by the obstruction of the highway and entitled to maintain an action for an injunction. *Wakeman v. Wilbur*, 147 N. Y. 657. In *Billard v. Erhart*, 35 Kan. 611, it was held that the owner of a city lot is not entitled, as a matter of right, to an *injunction against the obstruction of a sidewalk* when the obstruction is not opposite or contiguous to the plaintiff's lot, since the injury and nuisance complained of does not differ in kind from that sustained by the public. A similar ruling appears to have been made in *Robinson v. Brown*, 182 Mass. 266.

¹ *LeClercq v. Gallipolis*, 7 Ohio, Part 1, 218; approved, *Huber v. Gazley*, 18 Ohio, 18, 27; *Brown v. Manning*, 6 Ohio, 298, 305. These cases, distinguished from *Smith v. Heuston*, 6 Ohio, 101, in which it was ruled that individual lot-owners around a square conveyed to the county for "the use of public county buildings," including a court-house, have not such special interest as will enable them to maintain a bill to enjoin the county authorities from leasing portions of the square to individuals, the court saying: "If the rights of the county are violated or threatened, redress must be sought in the name of the county or its acknowledged agents." See *Chapman v. Gordon*, 29 Ga. 250; *Indianapolis v. Croas*, 7 Ind. 9; *Haynes v. Thomas*, 7 Ind. 38; *Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Cook v. Burlington*, 30 Iowa, 94; *Rutherford v. Taylor*, 38 Mo. 315; *Lutterloh v. Cedar Keys*, 15 Fla. 306; *Seguin v. Ireland*, 58 Tex. 183; *Harris County v. Taylor*, 58 Tex. 690; *ante*, § 1106. Non-adjacent property owners upon square cannot com-

§ 1133 (662). **Obstruction; Remedy of Corporation; Ejectment.** —

A municipal corporation entitled to the possession and control of streets and public places may, in *its corporate name*, recover the same *in ejectment*. Where it possesses the fee, although in trust for public uses, there are no technical obstacles in the way of maintaining such an action against the adjoining proprietor or whoever may wrongfully intrude upon, occupy, or detain the property. And where the adjoining proprietor retains the fee, the courts have overcome the technical difficulty by regarding the right to the possession, use, and control of the property by the municipality as a legal, and not a mere equitable right.¹ But power of summary forcible

plain of its being closed up by the municipal authorities. *Kettle v. Fremont*, 1 Neb. 329.

"It has been so often and uniformly held by the Supreme Court of *Louisiana* that *public places* within the limits of a corporation cannot be appropriated to private use, and that individual corporators, as well as the officers of the corporation [and the corporation in its own name], have the right to prevent such appropriation, and to sue for the demolition and removal of buildings erected on them by individuals, that the question can no longer be considered an open one." *Per Rost, J., Herbert v. Benson*, 2 La. An. 770. In this case the court sustained the action of the plaintiff seeking to abate as a nuisance a warehouse erected by the defendant on the bank of a river within the corporate limits and in front of the plaintiff's house. *New Orleans v. Gravier*, 11 Mart. (La.) N. S. 662, also holds that any inhabitant has this right. It has been held that no one has a right to occupy the street in front of another's house to carry on a trade or business, and the adjoining owner may, if necessary, use force to remove one who so occupies the street; therefore, where a cabman refused to drive away his cab from in front of a hotel, and was removed by a policeman at the request of the owner of the hotel, the policeman was not guilty of an assault. *Vander-smith's Case*, 10 Pa. Law J. 523.

As to rights of adjoining owner. *Nelson v. Godfrey*, 12 Ill. 22, 23; *Indianapolis v. Croas*, 7 Ind. 9; *Ib.* 38; *Milbau v. Sharp*, 27 N. Y. 611; *Cooper v. Alden, Harring. Ch.* (Mich.) 72; *Alden v. Pinney*, 12 Fla. 348; *Price v. Thompson*, 48 Mo. 363; *Parsons v. Atlanta University Trs.*, 44 Ga. 529;

Cosby v. Owensboro & R. R. Co., 10 Bush (Ky.), 288; *Shaubut v. St. Paul & S. C. R. Co.*, 21 Minn. 502; and see *Patterson v. Duluth*, 21 Minn. 493; *Severy v. Central Pac. R. Co.*, 51 Cal. 194; *Gilbert's Case*, 70 N. Y. 361; *Story v. New York El. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268; *Sadler's Case*, 104 N. Y. 229; *N. Y. Dist. R. Co., Matter of*, 107 N. Y. 42; *McCarthy v. Syracuse*, 46 N. Y. 194; *post*, §§ 1259, 1260; *ante*, §§ 1123, 1124; *Branahan v. Cinc. Hotel Co.*, 39 Ohio St. 333 (using public street for a *hack-stand* held illegal and enjoined, though used under authority of a city ordinance).

In *Kansas* it is held that the mere fact that *private lots fronting upon public grounds* are thereby increased in value does not create a trust in such public grounds which the owners of the lots can enforce in equity; but that where the owners of lands dedicate a portion thereof to public uses, as parks, or otherwise, and after such dedication sell and convey lots in the remaining portion, fronting on such public grounds, to others, who erect lasting and valuable improvements thereon, a trust is created therein which may be enforced in equity by those lot-owners. *Franklin County Com'rs v. Lathrop*, 9 Kan. 453; *ante*, chap. xxiii. on Dedication, §§ 1094, 1103, 1104.

¹ *Dummer v. Jersey City* ("market ground"), 20 N. J. L. 86; *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 540; *Greenwich v. Easton & A. R. Co.*, 24 N. J. Eq. 217; 25 N. J. Eq. 565; *Robins v. McGehee*, 127 Ga. 431, 435; *Chester v. Wabash, C. & W. R. Co.*, 182 Ill. 382; *Cleveland v. Cleveland, C. C. & St. L. R. Co.*, 93 Fed. 113, 117,

removal of obstructions from streets, conferred by statute upon the city authorities, can only be exercised by ordinance to the extent

citing text; *Fulton v. Mehrenfeld*, 8 Ohio St. 440; *Asbury Park v. Hawkshurst*, 67 N. J. L. 582. See New York Elevated Railway cases, cited *post*, §§ 1259-1261; *Lewis Em. Dom.* § 647, and cases; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; *Winona v. Huff* ("public square"), 11 Minn. 119; *Klinkener v. Mc Keesport Sch. Dist.*, 11 Pa. St. 444; *Hannibal v. Draper* ("church ground"), 15 Mo. 634; *Bath T. Com's v. Boyd* ("town commons"), 1 Ire. (N. C.) Law, 194; *Hoboken M. E. Church v. Hoboken* (ejectment by city for public "square"), 33 N. J. L. 13; *Weeping Water v. Reed*, 21 Neb. 261 (also ejectment for "public square"). The text quoted and approved. *Chicago v. Wright*, 69 Ill. 318, 322; *California City v. Howard*, 78 Mo. 88. Where a corporation has a legal title to the soil of the commons or public streets, it may maintain ejectment to recover the possession thereof. *Savannah v. Steamboat Co.*, R. M. Charlt. (Ga.) 342. *Law, J.*, expressed, *arguendo*, the opinion that where the public or corporation have an easement only, and not the fee, the remedy for a violation of the right is not by private action, but by public prosecution. Under the statutes of *Wisconsin*, a city cannot maintain ejectment to recover a public street or alley. *Racine v. Crotsenberg*, 61 Wis. 481.

For an injury which an individual or a corporation suffers in common with the public generally, equity will not relieve. *Denver & S. R. Co. v. Denver City R. Co.*, 2 Colo. 673; *post*, §§ 1229, note, 1261.

Construction of Canadian Municipal Act vesting highways, streets, &c., in the municipality, gives only a qualified right to the municipality. The municipal act of *Upper Canada* contains the provision that "every public road, street, bridge, or other highway in a city, township, town, or incorporated village shall be vested in the municipality." 55 Vict. ch. 42, § 527. The word "highway" is here used in its broadest sense, as including all public ways. It is made to include not only public roads, streets, and bridges, but other highways. See *Fort Edward & Ft. M. Pl. R. Co. v. Payne*, 17 Barb. (N. Y.) 567; *Perrysville & Z. Pl. R. Co. v. Thomas*, 20 Pa. St. 91; *Benedict v. Goit*, 3 Barb. (N.

Y.) 459; *Perrysville & Z. Pl. R. Co. v. Ramage*, 20 Pa. St. 95; *Perrysville & Z. Pl. R. Co. v. Pineman*, 20 Pa. St. 99. The roads of *joint stock companies* are not included in the act (*St. Catharines v. Gardner*, 20 Upper Can. C. P. 107; s. c. in appeal, 21 Upper Can. C. P. 190; see also *Port Whitby, L. S. & H. R. Co. v. Whitby*, 18 Upper Can. Q. B. 40; *Queen v. Brown & Street*, 13 Upper Can. C. P. 356), unless purchased or otherwise legally acquired by the municipalities in which situate. *Queen v. Paris*, 12 Upper Can. C. P. 445; *Queen v. Louth*, 13 Upper Can. C. P. 615; see also *Totten v. Halligan*, 13 Upper Can. C. P. 567; *Sarnia v. Great Western R. Co.*, 21 Upper Can. Q. B. 59, 62; *Fitzgibbon v. Toronto*, 25 Upper Can. Q. B. 137; *Thurlow v. Bogart*, 15 Upper Can. Com. Pl. 1; *Wellington County v. Wilson*, 14 Upper Can. Com. Pl. 299; s. c. 16 Upper Can. Com. Pl. 124; *Harr. Munic. Man.* (5th. ed.) 482, 483; *Biggar, Munic. Man.* (Canada, 1900) p. 821. A municipal corporation may, it would seem, resort to equity in proper cases, to restrain an illegal interference by a railroad or other company with streets which are placed under municipal control. *Attorney-General v. Bytown & Nepean Road Co.*, 2 Grant (Canada) R. 626; *post*, § 1229, note. A road or bridge may have originated in the convenience or for the protection of individuals, and yet afterwards become of public right a *public road or bridge*. *King v. Northampton*, 2 M. & S. 262; *Rossin v. Walker*, 6 Grant (Canada), 619; *Queen v. Boulton*, 15 Upper Can. Q. B. 272; *O'Brien v. Trenton*, 6 Upper Can. C. P. 350; *Daniel v. North*, 11 East, 375, note; *Queen v. East Mark*, 11 Q. B. 877; *Queen v. Petrie*, 4 E. & B. 737; *Malloch v. Anderson*, 4 Upper Can. Q. B. 481; *Queen v. Spence*, 11 Upper Can. Q. B. 31; *Queen v. Gordon*, 6 Upper Can. C. P. 213; *Queen v. Glamorgan-shire*, 2 East, 356, note; *King v. West Yorkshire*, 5 Burr. 2594; *Queen v. Yorkville*, 22 Upper Can. C. P. 431; *Houfe v. Town of Fulton*, 29 Wis. 296. Every individual in the community has an equal right to use a public road, street, or bridge. The municipal corporations cannot be deemed proprietors, and as such entitled

that their right is clear, and only in such a manner that it does not invade such rights as from their nature need to be first lawfully determined by adjudication. The power cannot be used to determine the rights of private property, and whenever it is used to that end it is illegal.¹

§ 1134 (663). **Remedy of Abutter.** — Where the public acquires only the use, and *the fee remains in the original proprietor or abutter*, the latter is considered to be the owner of the soil for all purposes not inconsistent with the public and municipal rights, and may maintain actions accordingly: Thus it has been held that he *may maintain ejectment* against an individual who, without lawful authority, erects a private building upon a public square under a lease from the local authorities, they having no power to authorize such a use. The recovery is, of course, subject to the public easement. It does not fall within the plan of this work to treat at length of the rights of action of the original proprietor or adjoining owner, but they will be found discussed in the cases and authorities cited below. We remark only with respect to streets and public places in cities that ejectment by the adjoining owner seems to be a singularly inapt remedy for an illegal use or occupation thereof.² Where

to control the possession, any more than any other corporation or person interested in the streets, roads, or highways. *The property vested in the municipal corporations by the Act is a qualified one*, to be held and exercised for the benefit of the whole body of the corporation. They hold as trustees for the public, and not by virtue of any title which confers possession sufficient to maintain an action of ejectment (*Sarnia v. Great Western R. Co.*, 21 Upper Can. Q. B. 59), but may, it seems, sue for injuries done to roads or bridges within their jurisdiction. See *Thurlow v. Bogart*, 15 Upper Can. C. P. 1; *Wellington County v. Wilson*, 14 Upper Can. C. P. 299; s. c. 16 Upper Can. C. P. 124; *Queen v. Fitzgerald*, 39 Upper Can. Q. B. 297; but see *Vespra v. Cook*, 26 Upper Can. C. P. 182. See *Story v. New York El. R. Co.*, 90 N. Y. 122, 156; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268. Defendants, if intending to deny property or possession when sued by a municipal corporation as proprietors of a road claiming property or exclusive possession, should, by plea, put in issue the right of property of the plaintiffs. *Sarnia v. Great*

Western R. Co., 17 Upper Can. Q. B. 65; *Biggar, Munic. Man.* (Canada, 1900), p. 819-822.

It is not necessary, in order to enable a city to maintain ejectment, that it should have passed an ordinance regulating or defining the obstruction. *Hawkshurst v. Asbury Park*, 65 N. J. Eq. 496.

¹ *New York & L. B. R. Co. v. South Amboy*, 57 N. J. L. 252; *Vantilburgh v. Shann*, 24 N. J. L. 740; *Austin v. Murray*, 16 Pick. (Mass.) 126; *State v. Jersey City*, 34 N. J. L. 33; *State v. Cadwalader*, 36 N. J. L. 283, 287; *Avis v. Vineland*, 55 N. J. L. 285; *Dawes v. Hightstown*, 45 N. J. L. 127. See also *Dawes v. Hightstown*, 45 N. J. L. 500, and *Childs v. Nelson*, 69 Wis. 125.

² *Barney v. Keokuk*, 94 U. S. 324, s. c. 4 Dillon, 593; *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, citing and approving text; *Stiles v. Curtis*, 4 Day (Conn.), 328; *Peck v. Smith*, 1 Conn. 103; *Woodruff v. Neal*, 28 Conn. 168; *Brakken v. Minneapolis & St. L. R. Co.*, 29 Minn. 41; *Bissell v. N. Y. Cent. R. Co.*, 23 N. Y. 61; *Sherman v. McKeon*, 38 N. Y. 266; *Northern Pac. R. Co. v. Lake*, 10 N.

the fee is in the public the abutter may maintain the appropriate actions at law and in equity to enforce his special rights and easements in the streets.¹

Dak. 541 (building erected in street); *Cooper v. Smith*, 9 Serg. & Rawle (Pa.), 26; *Tillmes v. Marsh*, 67 Pa. St. 512; *Bolling v. Petersburg*, 3 Rand. (Va.) 563; *Warwick v. Mayo*, 15 Gratt. (Va.) 528; *Pomeroy v. Mills* (public square), 3 Vt. 279; See also *Coatsworth v. Lehigh Val. R. Co.*, 156 N. Y. 451, aff'g 24 N. Y. App. Div. 273. The owner of the fee may maintain ejectment to oust a railroad company which has laid its tracks in the street without authority of law. *St. Columbus Church v. North Jersey St. R. Co.* (N. J. Eq.), 70 Atl. Rep. 692.

An action for the recovery of the possession of real estate may be maintained against a railroad company occupying such real estate, being a street in a city, by virtue of an unauthorized grant from the city council. *Sharpe v. St. Louis & S. W. R. Co.*, 49 Ind. 296. Where a city took land, by proceedings in condemnation under its charter, for a street, and built a sewer therein, but did not pay the price awarded, and the owner subsequently brought ejectment and recovered judgment, and obtained a *hab. fac. poss.*, the city was held entitled to equitable relief, and an injunction was awarded on terms of payment of the award and interest, and costs of the ejectment. *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97. City authorities were held to have jurisdiction to entertain a petition filed by an abutting owner to have removed from a street a fence which obstructed his passage. *Carlisle v. Wilson*, 110 Ga. 860.

In *Massachusetts*, the adjacent proprietor owns to the middle of the street, subject to the public easement. *Boston v. Richardson*, 13 Allen (Mass.), 152, 153; *White v. Godfrey*, 97 Mass. 472; *Bliss v. Ball*, 99 Mass. 597; s. p. *Bissell v. New York Cen. R. Co.*, 23 N. Y. 61; *Pennsylvania R. Co. v. Pittsburgh Grain Elev. Co.*, 50 Pa. St. 499; *Moore v. Johnston*, 87 Ala. 220. The same principle applies in *California*. *San Francisco v. Spring Valley W. W.*, 48 Cal. 493.

Ejectment by abutter against railway company. In *Carpenter v. Oswego &*

S. R. Co., 24 N. Y. 655, it was decided that *ejectment* would lie in favor of the owner of the fee in land subject to a public easement, — for example, a street, — against a party appropriating it to private occupation, such as the laying down therein, by a railroad company, of its track and rails. And it was thus held, notwithstanding it was argued that no judgment which the plaintiff could obtain would give him a right to the premises, as the public would still be entitled to use them as a street. s. p. *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Sherman v. McKeon*, 38 N. Y. 266. In *Cincinnati v. White*, 6 Pet. (U. S.) 431, it was declared to be the opinion of the court that where the dedication is complete, and the rights of the public have attached, the owner of the soil, though retaining the naked legal title, cannot recover in ejectment. The reason given for this ruling has much force. It is, that ejectment is a possessory action, and that whatever deprives the plaintiff of the right of possession will deprive him of the remedy by ejectment. Exclusive possession of the land cannot, it was said, consistently with the rights of the public, be delivered to the plaintiff in execution of a judgment of recovery. The doctrine of Lord Mansfield, in *Goodtitle v. Alker*, 1 Burr. 133, "that *ejectment* will lie by the owner of the soil for land which is subject to a passage over it as the king's highway," was regarded by the court, or at least by the judge delivering the opinion, in *Cincinnati v. White*, 6 Pet. (U. S.) 431, 442, as unsound; although it was not denied that *trespass* would lie, as a recovery in damages would not be inconsistent with the public right. *Post*, §§ 1259-1261. So in *Kentucky*, where the fee of the streets is in the adjacent proprietor, subject to the public easement, it is held that the municipal corporation cannot maintain ejectment against the holders of the legal title, but must resort to indictment or injunction. *West Covington v. Freking*, 8 Bush (Ky.), 121; *Perry v. New Orleans, M. & C. R. Co.*,

¹ See *post*, §§ 1259-1261. See Index, *Abutter; Equity*.

§ 1135 (664). **Same Subject.** — Where, however, the *fee or legal title* passes from the original proprietor, as in some of the States it is declared it shall, in statutory dedications, and in cases where land is acquired for streets and public purposes by the exercise of the right of eminent domain, such proprietor or the adjoining owner cannot maintain an action for injuries to the soil, or ejection, but he nevertheless has a remedy for any special injury to his rights by the unauthorized acts of others.¹

§ 1136 (664 a). **Effect of Fee being in the Abutter or the Municipality.** — An examination of the cases cited in the preceding sections will show that many of them *assert or assume that im-*

55 Ala. 413, citing and approving text. See American note to *Dovaston v. Payne*, 2 Smith Lead. Cas. 185, where this subject is discussed. *Redfield v. Utica & S. R. Co.*, 25 Barb. (N. Y.) 54; *Hunter v. Sandy Hill*, 6 Hill (N. Y.), 407. That *trespass* would lie in such a case is well established. *Wager v. Troy Union R. Co.*, 25 N. Y. 526, and authorities cited in Mr. Justice *Sunderland's* opinion, p. 540. See also *Mahon v. N. Y. Cent. R. Co.*, 24 N. Y. 658; *Fletcher v. Auburn & S. R. Co.*, 25 Wend. (N. Y.) 462; *Weisbrod v. Chicago & N. W. R. Co.*, 21 Wis. 602; *Bissell v. N. Y. Cent. R. Co.*, 23 N. Y. 61; *post*, §§ 1245, 1259–1261, chap. xxxi., § 1570 *et seq.*

Remedy in equity; rights of abutters and of municipality: Though the party has a remedy at law for the trespass or nuisance, yet as the injury is of a continuing nature, he may go into equity, have an injunction to prevent a multiplicity of suits, and recover damages as incidental to this relief. *Williams v. N. Y. Cent. R. Co.*, 16 N. Y. 97, 111. *Post*, §§ 1259–1261. The sound and settled rule in *New York* is that a railway company cannot exercise the right of eminent domain and occupy the streets or construct a railway therein, unless (a) it has a corporate existence *de jure*; unless (b) it has a valid and subsisting grant to that effect; and unless (c) it has strictly pursued and performed all the prescribed terms and conditions of its powers in this respect. Each of these three elements is essential to give a railroad company such authority. There are many cases to this effect. See, among others, *Brooklyn Steam Transit Co. v. Brooklyn*,

78 N. Y. 524, 531; *New York Cable Co. v. New York*, 104 N. Y. 38, 43.

If an appropriation of a street, even by legislative and municipal sanction, unreasonably abridges the right of adjacent lot-owners to use the street as a means of ingress and egress, they are thereby deprived of a property-right without compensation, and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use, for the recovery of such immediate and direct damages as the owner may sustain. *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush (Ky.), 382.

¹ *Illinois & M. Canal Trustees v. Havens*, 11 Ill. 554; *Hunter v. Middleton*, 13 Ill. 50; *Moses v. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 516; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467; *New Albany & S. R. Co. v. O'Daily*, 13 Ind. 353; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-Second Street, &c. R. Co.*, 50 N. Y. 206; *Schurmeier v. St. Paul & P. R. Co.*, 10 Minn. 82; affirmed, 7 Wall. (U. S.) 272; *Cooley, Const. Lim.* 556, and see note. The laying off and recording a town plat, or of an addition thereto, has, under the statute of *Iowa*, the effect to vest in the corporation the fee simple title to, and exclusive right of dominion over, the streets and alleys thus dedicated to the public use. In such case neither the original proprietor nor his grantee has the right to the subterraneous *deposits of coal* within the limits of such streets, and the corporation may maintain an action against him for coal mined and taken by him from beneath the same. *Des Moines v. Hall*, 24 Iowa, 234.

portant differences as to the nature and extent of the rights of the abutter and of the municipality exist, depending upon the question whether the fee is in the one or the other. The later and better considered judgments hold that it is comparatively unimportant, as respects the relative rights of the abutting owner and the public in and over streets, whether *the bare fee* is in the one or the other. If the fee is in the public, the lawful rights of the adjoining owners are in their nature *equitable* easements; if the fee is in the abutter, his rights in and over the street are in their nature *legal*; but, in the absence of controlling legislative provision, the extent of such rights is, in either event, substantially, perhaps precisely, the same.¹

§ 1137 (665). **Ejectment; Effect of Judgment or Decree against Municipal Corporation.**—It fairly results from the view taken in this chapter of the nature of the rights of the public at large in streets and public places, that a *judgment in ejectment* by the proprietor of land against a city corporation where the disputed question was as to the ownership of the soil, does not conclude or affect the right of the public to the easement of a street or public place, since the public is, in these respects, represented by the commonwealth, and such a judgment is *res inter alios acta* as to the public right.² In California, the court went even further in protection of

¹ *Barney v. Keokuk*, 94 U. S. 324 (s. c. below, 4 Dillon, 593), where the Supreme Court of the United States said (p. 340): "On the general question as to the rights of the public in a city street we cannot see any material difference in principle, with regard to the extent of those rights, whether the fee is in the public or in the adjacent land-owner, or in some third person." See also *Story v. New York El. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268; and *Donahue & Keystone Gas Co.*, 181 N. Y. 313, citing text. Qualified nature of fee in the public. 104 N. Y. 291. The judgment of Mr. Justice *Danforth* in *Story v. New York El. R. Co.*, *supra*, and of Chief Judge *Ruger* in *Lahr v. Metropolitan El. R. Co.*, *supra*, present this subject with great ability and clearness, and are, perhaps, the most valuable discussions of it to be found in the reports. See *ante*, §§ 1123, 1124; *post*, §§ 1259–1261.

"The dedication (under the statute) passed the fee in all streets marked

upon it to the county in which the city [of Detroit] was situated. But this was only in trust for street purposes. We attach no special importance to the fact that the title passed instead of a mere easement. The purpose of the statute is not to give the county the usual rights of a proprietor, but to preclude questions which might arise respecting the public uses, other than those of mere passage, to which the land might be devoted." *Per Cooley, J.*, in *Backus v. Detroit*, 69 Mich. 110.

² *Warwick v. Mayo*, 15 Gratt. (Va.) 528; *Bolling v. Petersburg*, 3 Rand. (Va.) 563. On the ground, which is hardly tenable, outside of *Louisiana* or where the question is not influenced by the doctrines of the civil law, that the municipal authorities, as respects public squares and streets, represent not only the corporation but also the public, Mr. Justice *Rost* was of opinion that a final judgment against a corporation was also a judgment against the public, and conclusive upon individuals.

the rights of the public, and decided not only that there was no power in the municipality to mortgage property held for the public use, but that a *decree of foreclosure* of such a mortgage did not estop the public, or even the municipality, the decree and mortgage being equally null and ineffectual.¹

§ 1138 (676). **Control of Highways within Municipal Limits.**—Throughout the United States township, county, or other local authorities have the general control and supervision over the ordinary public highways, while in cities, villages, and incorporated towns this power, as respects streets, is usually conferred upon the corporate authorities. Whether the jurisdiction and power in the one is excluded by the charter of the other, *depends upon the intention of the legislature* to be gathered from the course of legislation on the subject in the particular State and with reference to the particular municipality.² It may, however, be said that, as a general rule, a grant to a city, incorporated village, or incorporated town of the power to control and regulate the streets confers exclusive authority over the streets; and that the creation of a city, village, or incorporated town, or the extension of its limits, *vests in the municipality the power and jurisdiction* to regulate and control highways which have hitherto been under the control of the county or township organization, and *transfers to the city*, village, or incorporated town the duty of maintaining and repairing them, unless the statute otherwise provides.³ The *conversion of a county road* or rural

Xiques v. Bujac, 5 La. An. 499, *per Rost, J.* But in the same case, Mr. Justice Preston expressed the opinion, which is believed to be the correct one, that a judgment against the right of a city to public property will not bar an individual not a party to the suit, and who is interested in maintaining the dedication.

¹ Branham v. San Jose, 24 Cal. 585. The State of California has no proprietary interest in the streets of a city dedicated to public use; and where it grants to a private corporation an easement over the streets, not common to the public at large, it merely grants in its sovereign capacity a franchise, and not any proprietary interest in the streets. San Francisco v. Spring Valley W. W. Co., 48 Cal. 493.

² State v. Putnam County, 23 Fla. 682, citing text; Clark v. Commonwealth, 14 Bush (Ky.), 166, 169, citing

text; Oliver v. Newberg, 50 Oreg. 92; 91 Pac. Rep. 470, citing text.

³ McCain v. State, 62 Ala. 138; Fitzgerald v. Saxton, 58 Ark. 494; Hughes v. Arkansas & O. R. Co., 74 Ark. 194, 199; Mead v. Derby, 40 Conn. 205; Almand v. Atlanta Consol. St. R. Co., 108 Ga. 417; Polk County v. Cedertown, 110 Ga. 824; Genesee v. Latah County, 4 Idaho, 141; Ottawa v. Walker, 21 Ill. 605; Lancaster Highway Com'rs v. Baumgarten, 41 Ill. 254; Snell v. Chicago, 133 Ill. 413; Shields v. Ross, 158 Ill. 214, 221; State v. Mainey, 65 Ind. 404; Lake Shore & M. S. R. Co. v. Whiting, 161 Ind. 76; Frankfort v. Coleman, 19 Ind. App. 368; Gallaher v. Head, 72 Iowa, 173; McGrew v. Stewart, 51 Kan. 185; Park v. Orth (Ky.), 73 S. W. Rep. 1015; Blocker v. State, 72 Miss. 720; Cascade County v. Great Falls, 18 Mont. 537; Lee v. McCook, 82 Neb. 26; 116 N. W. Rep. 955;

highway into a city street by bringing it within the limits of the municipality does not impose an *additional servitude* on the land

Keyport v. Cherry, 51 N. J. Law, 417, aff'd 52 N. J. L. 544; *In re Public Road*, 54 N. J. L. 539; McNeal Pipe & Foundry Co. v. Lippincott, 57 N. J. L. 540, aff'd 58 N. J. L. 407; Atlantic Coast El. R. Co. v. Griffin, 64 N. J. L. 513; Salsbury v. Gaskin, 66 N. J. L. 111; Slocum v. Neptune, 68 N. J. L. 595; Haverstraw v. Eckerson, 192 N. Y. 54, aff'g 124 N. Y. App. Div. 18; Steubenville v. King, 23 Ohio St. 610; Wabash R. Co. v. Defiance, 52 Ohio St. 262; s. c. 10 Ohio Cir. Ct. 27; East Portland v. Multnomah County, 6 Oreg. 62, 65; Huddleston v. Eugene, 34 Oreg. 343; Oliver v. Newburg, 50 Oreg. 92; 91 Pac. Rep. 470; State v. Jones, 18 Tex. 874; Norwood v. Gonzales County, 79 Tex. 218, 222. See also Brown v. Hines, 16 Ind. App. 1; Shawnee County v. Topeka, 39 Kan. 197.

Further as to power of county or township authorities with respect to roads and highways within the limits of incorporated towns and cities, see Pope v. St. Luke's Par. R. Com'rs, 12 Rich. (S. Car.) Law, 407; Sharett's Road, 8 Pa. St. 89; Pennsylvania R. Co. v. Duquesne Bor., 46 Pa. St. 223; Mercer Bor. Road, 14 Serg. & R. (Pa.) 447; Newville Road, 8 Watts (Pa.), 172; Easton Road, 3 Rawle (Pa.), 195; Milton Road, 40 Pa. St. 300; Knowles v. Muscatine, 20 Iowa, 248; McCullom v. Black Hawk County, 21 Iowa, 409.

When complete jurisdiction over a subject has been given to a city, as, for instance, the improvement of streets, the general laws of the State in regard to roads and road labor in counties and road districts cease to be applicable as soon as the city exercises its powers. East Portland v. Multnomah County, 6 Oreg. 62, 65. The care, management, and control of the public ways devolve upon the local municipal government in which they are situated. Palmer v. Larchmont El. Co., 158 N. Y. 231, 234.

In *Illinois*, a statute conferring on the commissioners of highways the authority to maintain roads within their towns, as towns exist in that State, will not be so construed as to authorize the exercise of such authority over highways within the limits of a city, and a tax levied by such commis-

sioners for the repair or improvement of a public road or street lying within the limits of a city is illegal. Ottawa v. Walker, 21 Ill. 605; Lancaster Highway Com'rs v. Baumgarten, 41 Ill. 254; People v. La Salle County, 111 Ill. 527; People v. Chicago & N. W. R. Co., 118 Ill. 520; Snell v. Chicago, 133 Ill. 413, 441; Shields v. Ross, 158 Ill. 214, 221.

The legislature may transfer the control of the city streets from the common council of a city to other officers of the city, e. g., the board of estimate and apportionment in New York City. Wilcox v. McClellan, 185 N. Y. 9, 18, aff'g 110 N. Y. App. Div. 378. See also Reis v. New York City, 188 N. Y. 58, 67. The legislature in *Illinois* may transfer the control of certain streets to park commissioners to be improved and used for park purposes, provided that such purposes are not inconsistent with their ordinary use as streets. People v. Walsh, 96 Ill. 232; West Chicago Park Com'rs v. McMullen, 134 Ill. 170; McCormick v. South Park Com'rs, 150 Ill. 516; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 25; Chicago v. Carpenter, 201 Ill. 402. Park commissioners may be vested by the legislature with the same powers in respect to parks and streets leading thereto as are conferred upon cities, and in such case their powers are not concurrent with the city, but exclusive. Where a balcony is proposed to be projected over into a street, their permission is necessary, and when it is refused it is no answer that such structures have been repeatedly allowed by the city, plans having in each case been submitted to and approved by the city authorities. McCormick v. South Park Com'rs, 150 Ill. 516.

The legislature may expressly continue the jurisdiction of the county over county roads which are also within the limits of a city. For an example of this, see Deering v. Cumberland County, 87 Me. 151. See also Simon v. Northup, 27 Oreg. 487, 501. Municipal charter held not to divest county authorities of their jurisdiction over part of the road lying within the limits of the town. Baldwin v. Green, 10 Mo. 410. Under the special act incorporating Bennington, it was held that the trustees of the village had not the exclusive authority

occupied by the road, which requires additional compensation to be made to the owner of the fee as for a taking of property within the meaning of the Constitution. The fact that under the charter or laws applicable to the city, the owner of the fee becomes liable to a special assessment for the improvement of the way does not alter the rule.¹

to lay out highways within its limits, but that the general law upon the subject was still applicable. *Bennington v. Smith*, 29 Vt. 254.

¹ *Huddleston v. Eugene*, 34 Oreg. 343; *Oliver v. Newberg*, 50 Oreg. 92; 91 Pac. Rep. 470; *McGrew v. Stewart*, 51 Kan. 185.

Plank and turnpike roads. In *Illinois*, it is held that, on the extension of the city limits, the city becomes vested with the control of a turnpike road which is thereby brought within the city, and the right to exact tolls thereon ceases. *Snell v. Chicago*, 133 Ill. 413. But it is elsewhere held that a turnpike company whose road, by extension of the municipal limits, becomes a portion of a city street, may erect toll-gates within the city limits and collect tolls thereat, notwithstanding the fact that it is brought within the city. *Conestoga & B. S. V. Turnpike Co. v. Lancaster*, 151 Pa. 543; *Providence & A. Turnpike Co. v. Scranton*, 175 Pa. 290. But even in *Illinois*, the limits of the city cannot be extended by ordinance for the sole purpose of depriving the turnpike company of the control of its road. This was so held in a case where the city by ordinance attempted to annex a narrow strip of land six miles long on each side of the turnpike. The ordinance was held void. *Belleville v. St. Clair County Turnpike Co.*, 234 Ill. 428. When a toll-gate is maintained within a city, the city may contract with the turnpike company to undertake the maintenance of the turnpike road, if the turnpike company removes the gate and waives its right to exact tolls. *Providence & A. Turnpike Co. v. Scranton*, 175 Pa. 290. It has been held that when a *turnpike road* is brought within the city limits the city has power to make such municipal regulations for police purposes as it may deem expedient, and it has jurisdiction to regulate, grade, and pave it, and to assess the cost thereof upon abutting owners. *Parker v. New Brunswick*, 30 N. J. L. 395; s. c. 32 N. J. L. 548. See also *Fayetteville &*

S. R. & Turnpike Co. v. Fayetteville, 37 N. Y. Misc. 223. The city may also *construct a sidewalk along the turnpike* and may assess the expense thereof upon abutting lands. *Elmendorf v. Albany*, 17 Hun (N. Y.), 81. The city may *construct a sewer in a turnpike*, and assess the cost thereof on the abutting owners. *Lewis v. Schmidt*, 19 Ky. Law Rep. 1315; 43 S. W. Rep. 433; *Huelefeld v. Covington*, 22 Ky. Law Rep. 1188; 60 S. W. Rep. 296. The use, *as a street*, by citizens of a municipality within which it lies, *of a turnpike or plank road*, gives it the character of a street to the degree that its existence as such cannot be questioned by any party other than the turnpike or plank-road company. *Simmons v. Passaic*, 42 N. J. L. 524. But it has been held that the *power to vacate, alter, or relay streets* only extends to public streets and highways, and does not authorize the alteration of a road owned by a turnpike or other corporation. *Quinn v. Paterson*, 27 N. J. L. 35. See also to the same effect, *Wilson v. Allegheny City*, 79 Pa. 272; *Breed v. Allegheny City*, 85 Pa. 214.

Toll-bridge highways and turnpike roads are both public highways established by public authority and are to be regarded as public easements; and persons who have been paid damages for property taken in the construction of either, are not entitled to additional damages when it is made a free highway by public authority. *State v. Maine*, 27 Conn. 641, 648; *State v. Sufield & T. Bridge Co.*, 81 Conn. 56; 70 Atl. Rep. 55.

Where a *plank road was laid out over an existing street or highway of a city*, that fact did not change the character of the street so that it ceased to be a highway, nor did it deprive the highway authorities of the city of their supervision and control over it. While the public, in consideration of the payment of tolls, is relieved from keeping it in repair, and the duties in that respect, to some extent, are imposed upon the plank road company, yet the public authorities are not

§ 1139 (677). **Same Subject.** — In Tennessee it was held, in an early case, that the *county court* had no power to lay off roads through *incorporated towns*; Because, 1. The act of assembly authorizing them to lay off such *roads* within a county as they shall deem proper does not literally extend to *streets*. 2. Every incorporated town supposes the existence of lots and streets, and its erection into a town by the legislature creates a state of private interest distinct from the body of the county, and this should be regulated by the townspeople. 3. The magistrates composing the county court are from the county, at least most of them, and consequently cannot be expected to know the interest of the corporation, and if they did they might feel inimical to it.¹ So, by statute in Texas, the counties had general authority to keep in repair the public highways therein, and an incorporated town, by its charter, had the right to improve its streets and alleys; and the question arose, whether the county or town authorities had power to keep in repair streets or highways within the corporate limits of the town. The court, to prevent conflict of jurisdiction, held that the incorporated town had exclusive control of the streets and highways

ousted of their jurisdiction, especially in particulars not in conflict with its purposes or rights. Accordingly, under such circumstances the legislature may authorize the municipal corporation to pave the street and to assess the plank road company therefor, although it owns no land crossing or bordering upon the improved thoroughfare. *People v. Cummings*, 166 N. Y. 110, rev'g 53 N. Y. App. Div. 36. See also *Matter of Rochester El. R. Co.*, 123 N. Y. 351. See generally as to *municipal control over turnpike roads* constructed in the streets of a city, *Danville v. Boyle County*, 106 Ky. 608; *State v. Passaic Turnpike Co.*, 27 N. J. L. 217; *State v. Hoboken*, 30 N. J. L. 225; *Chambersburg v. Manko*, 39 N. J. L. 496; *Milesburg v. Green*, 22 Weekly N. C. (Pa.) 180. As to power of municipality over plank road in street, see *McKay v. Detroit & E. Plank Road Co.*, 2 Mich. 138; *Detroit v. Detroit & E. Plank Road Co.*, 12 Mich. 333; *State v. Jersey City*, 26 N. J. L. 444. In *New York*, public roads constructed by turnpike or other corporations under special charters or general statute are to be treated as public highways on the dissolution of the companies which constructed them, and the abandonment of the roads by

such companies. After abandonment, it is the duty of the municipal authorities to maintain the highway in repair. *People v. Queens County*, 151 N. Y. 190, aff'g 91 Hun (N. Y.), 241.

¹ *Cowan's Case*, 1 Overton (Tenn.), 311. "A highway is not a street, either technically or in common parlance; so judicially settled." *Indianapolis v. Croas*, 7 Ind. 9; *Lafayette v. Jenners*, 10 Ind. 74, 79. But a street is of course a highway, in the sense that it is free for every person to use it for the purpose of travel, conforming, of course, to all proper police regulations; and the right of passage is one which the municipal authorities cannot abridge or deny. *Bell v. Foutch*, 21 Iowa, 119, 131; *Barrett v. Brooks*, 21 Iowa, 124; *St. Charles v. Nolle*, 51 Mo. 122; *People v. Chicago & N. W. Ry. Co.*, 118 Ill. 520.

Public roads and streets are distinct thoroughfares, managed and controlled by distinct municipal authorities, and a statute punishing a purpresture of the one will not be extended to the other, in the absence of any words in the statute showing that such other was intended to be included. *Clark v. Commonwealth*, 14 Bush (Ky.), 166.

therein.¹ So it is held in Indiana, that the general statutes of the State in relation to "public highways" do not apply to the *streets* and *alleys* of an incorporated town or city.²

§ 1140 (678). **Same Subject; General Law and Special Charter Provisions construed.** — On the principle of the foregoing cases, it is held that a *general State law*, authorizing counties and townships to impose the burden of road labor only on persons between twenty-one and fifty years of age, *does not limit the express charter power of a city* to impose such burden upon all persons over twenty-one years of age, and hence it may require persons over fifty years of age to perform road labor.³

¹ *State v. Jones*, 18 Tex. 874.

² *Indianapolis v. Croas*, 7 Ind. 9. So, in *New Jersey*, it is held that the general road acts of the State do not apply to incorporated places having special power to regulate and improve streets. *Cross v. Morristown*, 18 N. J. Eq. 305; *State v. Morristown*, 33 N. J. Law, 57. A similar ruling has been made in *Kentucky*. *Clark v. Commonwealth*, 14 Bush (Ky.), 166. Where, upon the incorporation of a city, it was given control over the public highways within its limits, to the exclusion of the county and the charter, in a provision relating to obstructions, enumerated "public highways, streets, &c.," thus recognizing the two classes of ways, it was held that the transfer of control did not change the highway into a street so as to make abutting owners liable for assessments for improving it as a street by paving, grading, &c. *Heiple v. East Portland*, 13 Oreg. 97. But in *Illinois* a highway or public road becomes a street when a town is incorporated covering territory which includes it, and the rights and obligations of the town and of the public are the same as if it had been laid out by the town after its incorporation. *Palatine v. Kreuger*, 121 Ill. 72.

³ *Fox v. Rockford*, 38 Ill. 451. See *O'Kane v. Treat*, 25 Ill. 557, as to exemption of cities under charters from road taxes levied by township and county authorities. In general, the jurisdiction of a city or town over its streets is exclusive, as to road labor, of the general laws of the State relating to public or county roads. *Ib.*; *Ottawa v. Walker*, 21 Ill. 605.

Road labor may be constitutionally imposed by statute unless the power of

the legislature be specially limited. *Sawyer v. Alton*, 4 Ill. 130; *Skinner's Ex. v. Hutton*, 33 Mo. 244. See chapter on Taxation, *post*.

Until the town the plat of which is recorded becomes incorporated, the streets are under the control of the county authorities, who cannot enlarge or diminish their width, but may direct how much thereof shall be worked or improved. *Waugh v. Leech*, 28 Ill. 488. Streets need not be recorded in the county records. *Townsend v. Hoyle*, 20 Conn. 1.

Free and toll bridges: Unless authorized by statute, a county cannot use county funds to aid in the construction of *toll bridges*, or to aid a private individual in the construction of a free bridge. *Colton v. Hanchett*, 13 Ill. 615; *Clark v. Des Moines*, 19 Iowa, 199. In *Iowa*, counties have been held, under the legislation of that State, to have power to aid in the construction of *free* bridges, erected with the sanction of the proper municipal authorities, for public use, upon public lines of travel, within incorporated towns or cities. *Bell v. Fouth*, 21 Iowa, 119; *Barrett v. Brooks*, 21 Iowa, *Ib.* 144; see *ante*, § 885.

Rights of city as the purchaser of a *toll bridge*, and particularly as to the right to replace old bridge by a new one. *Scott v. Des Moines*, 34 Iowa, 552.

As to liability in *Iowa of county* for defective bridges *within* city limits. *McCullom v. Black Hawk County*, 21 Iowa, 409. A city was held not to be exempt from liability in respect of a defective culvert built by it in one of the streets of the city, by reason of the culvert having been paid for by money appropriated by the county. *Van Pelt*

§ 1141 (679). **Same Subject.** — On the other hand, power, by charter, conferred upon a city to lay out new highways, and to alter, enlarge, and extend highways within its limits, was held not to divest by implication or implied repeal the jurisdiction of the county court over the same subject given by general statutes.¹ So it is held, in Ohio, that general powers being conferred upon the commissioners of the county to lay out and establish roads within the limits of the county, they are thereby authorized, unless their authority is especially restricted in the acts of incorporation, to lay out and establish *county* roads, whose *termini* are wholly within, or which run through, an incorporated town or city, — these corporations, unless expressly exempted, being subject to the operation and control of the general laws of the State.²

§ 1142. **Power to establish and open Streets.** — The *power to lay out, establish, and open streets* and highways is conferred upon the municipality for the *public benefit*, and cannot be exercised solely for the use and benefit of private individuals.³ This power is *legislative* in its nature, and may be exercised either directly by the legislature, subject always to any constitutional restrictions, or by the municipality under authority delegated to it by statute. It is *essentially political and discretionary* in its nature.⁴ Being legislative

v. Davenport, 42 Iowa, 308; *post*, chap. xxxii.

¹ *Norwich v. Story*, 25 Conn. 44. Duty of repair held to rest on the *town*, and not the city, the former being made liable by statute, and the latter not. *Guthrie v. New Haven*, 31 Conn. 308.

As to right of city to recover a street from an incorporated turnpike company after the expiration of its charter, see *St. Clair County Turnp. Co. v. Illinois*, 96 U. S. 63.

² *Wells v. McLaughlin*, 17 Ohio, 99; *Butman v. Fowler*, 17 Ohio, 101; *Swan's Ohio Stat.* 796.

³ *Kansas City v. Hyde*, 196 Mo. 498.

⁴ *Matter of First Street*, 66 Mich. 42, 52; *Minneapolis & St. L. R. Co. v. Hartland*, 85 Minn. 76, 79; *State v. Minneapolis Park Com'rs*, 100 Minn. 150; *Albright v. Fisher*, 164 Mo. 56; *State v. Gates*, 190 Mo. 540; *Kansas City v. Hyde*, 196 Mo. 498, 506; *Seymour v. Salamanca*, 137 N. Y. 364; *Matter of Delavan Avenue*, 167 N. Y. 256, aff'g 54 N. Y. App. Div. 629.

Although the action of the municipal authorities in laying out a street across a railroad is usually an act in a political

or governmental capacity and is not the exercise of a judicial function, yet the legislature in delegating the authority may make the action of the municipality *subject to review by the courts*. *Matter of Delavan Ave.*, 167 N. Y. 256, aff'g 54 N. Y. App. Div. 629. No private action lies against a municipality for *omission to exercise its power* to lay out and open streets, although it may be made to appear that the public interests require the exercise of the power. *Seymour v. Salamanca*, 137 N. Y. 364.

In *Massachusetts*, it has been held that municipal authorities, in opening and laying out streets pursuant to statutory authority, acted not as officers or agents of the *city*, but as *public* officers vested with *quasi-judicial* functions, and deriving their power directly from the legislature. *Brimmer v. Boston*, 102 Mass. 19; *Taber v. New Bedford*, 135 Mass. 162.

The legislature may authorize the *extension* of a driveway over *navigable waters* so long as navigation, commerce, and the right of fishery are not interfered with; but if they are interfered

and political in its nature, it is not within the power of the municipality to limit or control its future exercise by any stipulation or agreement, as by an agreement that it will not in the future open or extend a street in any particular place or part of the city.¹

§ 1143. **Appropriation to Street Uses of Lands subject to Private Easements.** — When the owner of a tract of land divides it into

with, then the driveway violates the trust upon which lands under waters are held and cannot be authorized. *People v. Kirk*, 162 Ill. 138, 151. See also *Columbia & P. S. R. Co. v. Seattle*, 6 Wash. 332. Power to "project or extend a street" has reference to the prolongation of an existing street. Hence, "power to project or extend its streets over and across any tide lands within its corporate limits and along or across the harbor areas of such cities," does not authorize the city to lay out an entirely new street. *Seattle & M. R. Co. v. State*, 7 Wash. 150. Under such authority it is contemplated that the street shall be in a direct line, and the same width as the existing street; and the city cannot run a street over the tide lands at an angle to an existing street. *Ilwaco v. Ilwaco R. & N. Co.*, 17 Wash. 652. But in *Locust Street*, 153 Pa. 276, it was held that power to extend a street authorized the construction of a street in the same general direction, although commencing at an offset on a cross street eighty-seven and one-half feet from the existing street.

Power to open streets construed as synonymous with power to lay out and establish streets. *Hannibal v. Hannibal & St. J. R. Co.*, 49 Mo. 480. Power to open and extend streets includes power to construct. *Matthiessen & W. Sugar Ref. Co. v. Jersey City*, 26 N. J. Eq. 247. As to the power to open and extend streets across railroad tracks see *ante*, § 1020. The term "alter" when used in a statute conferring authority to lay out and open streets "and to cause any street already laid out to be vacated, opened, altered, widened," &c., relates to a change of the location of the street, and does not authorize a change of grade. *Manufacturers' Land & Imp. Co. v. Camden*, 71 N. J. L. 490. The opening and widening of streets held to be "municipal affairs" within the meaning of the provisions of the California Constitution as to the

adoption of freeholders' charter. *Byrne v. Drain*, 127 Cal. 663. See Index, *Freeholders' Charter*.

¹ *Wabash R. Co. v. Defiance*, 167 U. S. 88, 100; s. c. 52 Ohio St. 262; *Kreigh v. Chicago*, 86 Ill. 407; *Marseilles v. Howland*, 124 Ill. 547, 556; *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 563; *Brimmer v. Boston*, 102 Mass. 19; *Somerville v. Dickerman*, 127 Mass. 272; *First Street, Matter of*, 66 Mich. 42; *Leggett v. Detroit*, 137 Mich. 247, 251; *State v. Minneapolis Park Com'rs*, 100 Minn. 150; *New York, N. H. & H. R. Co. v. New Rochelle*, 29 N. Y. Misc. 195; *Roanoke Gas Co. v. Roanoke*, 88 Va. 810.

"The right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety, and morals of its inhabitants." *Per Mr. Justice Brown*, in *Wabash R. Co. v. Defiance*, 167 U. S. 88, 97. *Infra*, § 1145. See Index, *Constitutional Provisions; Taxation*. Where a strip of land had been donated to the municipality on the stipulation that it *should always be maintained as a parkway free of expense* to the abutters by whom it was conveyed to the city, it was held that the agreement was *ultra vires* in so far as it attempted to limit the power of the municipality to discontinue the use or change it under statutory authority. *State v. Minneapolis Park Com'rs*, 100 Minn. 150. See *ante*, chap. iv. The legislature may provide that the necessity or expediency of opening a street shall be submitted to a jury. Under such a statute it has been held that the verdict of the jury is final and conclusive and will not be set aside unless it appears to be clearly contrary to the evidence. *Fohl v. Sleepy-Eye Lake*, 80 Minn. 67; *Minneapolis & St. L. R. Co. v. Hartland*, 85 Minn. 76, 79.

streets, blocks, and lots, and sells lots with reference to a plat or map or deeds bounding upon the streets, he devotes the land to use as a street at least as between himself and his grantees who have purchased lots. His grantees acquire an easement in the strip of land for use as a highway in order to have access to and from the lots purchased. They are entitled to have it kept open as a street for their benefit; and thereafter the owner holds the title to the fee encumbered by an easement for the benefit of the grantees of the lots which he has sold.¹ The rights which the several grantees of the purchased lots on both sides of the street thus acquire impress upon the land all the characteristics of a public street, though it may not have been completely dedicated by the owner to that purpose, or accepted by the public authorities as a highway.² The municipality by virtue of legislative authority may lay out a public street over the strip of land thus devoted to street uses, and may acquire by condemnation the necessary rights in the strip for that purpose. The compensation to be paid to the owner of the soil will depend upon the nature and character of the estate taken by the city. If the title to the street be not reserved by the original owner, but be vested in the owners of the lots abutting on the street, the ownership of the fee of the land has been held to have a *substantial value to the abutting property owner*, in the degree of control it gives him over the uses to which the street may be put. It vests him with the right to defend against and to enjoin a use of, or an encroachment upon the street, under legislative or municipal authority, for purposes inconsistent with those uses to which streets should be, or have been ordinarily subjected, unless just compensation is provided to be made. Ownership of the land in the street is subject only to the public easement therein as a highway. In the absence of a provision for compensation, the taking of the street for some new or additional and inconsistent use would be illegal. But if the abutting owner does not own the fee of the land in his street, he has no such right to compensation and is remediless against a taking of the street under legislative or municipal sanction for other uses, except such uses be unreasonable, and not in their nature so improper as to obstruct free passage upon the street, or to amount to a nuisance, or to deprive him of the enjoyment of easements of light, air, and access. Hence, the fee of the street may be valuable to the abutting owner, and that value is sufficient to justify an award of *substantial compensation* to him, when the muni-

¹ See *ante*, §§ 1083, 1084; Index, *Dedication*.

² *Matter of Adams*, 141 N. Y. 297, 300.

cipality takes the fee, and not merely an easement for street uses.¹ But if the owner has parted with all the lands abutting on the street and no longer has any rights outside the street to protect by reason of his ownership of the fee, it would seem that these considerations do not necessarily apply, and under such circumstances an *award of nominal damages* may be justified when the fee of the street is taken by the city for street purposes.² If, however, the city does not attempt to appropriate the fee of the land for street uses, but *merely an easement*, then the public easement is merely superinduced upon and added to the private easement which already exists in favor of the owners of the different lots, and under such circumstances an award of only nominal damages is not only justified, but is usually required by the circumstances.³

¹ *Buffalo v. Pratt*, 131 N. Y. 293, 299; *Matter of New York City (Trinity Ave.)*, 81 N. Y. App. Div. 215, 221; *Matter of New York City (Foster Ave.)*, 89 N. Y. App. Div. 490, 493; *Matter of 94th Street*, 22 N. Y. Misc. 32, 37. See also *Hymes v. Esty*, 133 N. Y. 342, 346; *Coatsworth v. Lehigh Val. R. Co.*, 115 N. Y. App. Div. 7.

² In *Matter of Buffalo*, 189 N. Y. 163, rev'g 116 App. Div. 555, the city sought to acquire title to the bed of the Buffalo River, between certain limits, for the purpose of improving the navigation of the river. The owner of the bed of the river had previously conveyed all of the land abutting on the river upon either side thereof. The commissioners appointed in proceedings to condemn the fee of the bed of the river awarded to the owner only nominal damages. On appeal therefrom the Court of Appeals held that the commissioners might be justified in making such award. It pointed out that the owner had parted with all his abutting lands; that the case was free from the element that the joint ownership of the bed and the abutting lands gave to the title to the bed of the river a substantial value; and held that upon disputed evidence an award of nominal damages was justified.

³ *Olean v. Steyner*, 135 N. Y. 341; *Matter of Adams*, 141 N. Y. 297, 301; *Matter of Fox Street*, 54 N. Y. App. Div. 479, 487; *Matter of East 187th Street*, 78 N. Y. App. Div. 355, 358; *Stetson v. Bangor*, 60 Me. 313; *Bartlett v. Bangor*, 67 Me. 460, 469; *Stetson v. Bangor*, 73 Me. 357; *People v. Gloversville*, 128 N. Y. App. Div. 44;

Danforth v. Bangor, 85 Me. 423, 428; *Chapin v. Maine Cent. R. Co.*, 97 Me. 151, 158. See also *Miller v. Newark*, 35 N. J. L. 460, 463. In *Olean v. Steyner*, 135 N. Y. 341, 346, *Finch, J.*, said, "It is quite evident that the public right taken, deducting therefrom the value of the private easement, leaves only a nominal injury, because the added burden is itself but technical and nominal. The real burden is in no manner increased by absorbing the private in the public right, or substituting the latter in the room and stead of the former, since as burdens on the land they are substantially identical. In the case of city streets, where under the statute the fee is taken, we have recently held that substantial damages should be awarded (*Buffalo v. Pratt*, 131 N. Y. 293, 297), but here the fee is not taken, but an easement for a highway only, which is merely the equivalent of the private easement displaced. The change alters the control, but does not increase the burden."

In *Pennsylvania*, dedication is held to operate as a relinquishment of all claims for damages for taking the land for street purposes. When streets are laid out upon a map or plan and sales are made with reference thereto, the owner of the land designated on the plan as a street is not entitled to compensation for the taking thereof. *Quicksall v. Philadelphia*, 177 Pa. 301; *Osterheldt v. Philadelphia*, 195 Pa. 355. As to the effect of dedication by platting and sale in *Pennsylvania*, see *ante*, § 1090, note. In *Denver v. Clements*, 3 Colo. 484, it was held that as under a common-law dedication, the fee remains

The rights or interests of an abutting owner who holds only an easement in a strip of land, which entitles him to have it maintained as a street or road, are not damaged in consequence of the taking of the fee of such road or street as a street or highway. After it is thus taken and maintained by the public authorities, the abutting owner's easement still remains unimpaired. He has all the right in the road or highway that he had before enjoyed, and no property of his is taken by the proceeding.¹

§ 1144 (797). **Power to improve and pave Streets.** — In the absence of a statutory obligation to that effect, a municipality which acquires property for public purposes is *not bound to improve it immediately* upon its acquisition, nor is it bound immediately to throw it open to the public use for which it is obtained, or to exercise a degree of care in its maintenance before its improvement beyond that which is chargeable to a private owner of property similarly situated.² When lands are acquired for streets, the municipality may improve only *so much of the width* as it may deem necessary for the use of the public.³ The power to open and improve streets

in the owner and the mere opening of the street does not deprive the owner of the fee, no property is taken from the owner by the opening of the street, and he is not entitled to compensation.

Where an easement in land has been taken for a toll bridge or turnpike road, the owner is not entitled to additional damages when either is made a free highway by public authority. *State v. Maine*, 27 Conn. 641, 648; *State v. Suffield & T. Bridge Co.*, 81 Conn. 56; 70 Atl. Rep. 55.

¹ *Matter of 116th Street*, 1 N. Y. App. Div. 436, 439; *Allen v. Chicago*, 176 Ill. 113, 121; *Clayton v. Gilmer County Court*, 58 W. Va. 253. Land was dedicated by deed for a *private way*, and houses were built and lots sold abutting on the way. Upon the *laying out of a public street over the private way*, the only compensation to which the owner of the soil is entitled is the value of the additional easement in the public resulting from the laying out of the street; in other words, the value of the land included in the private way is not to be computed as if it were property free from encumbrance, but only as affected by the taking of an easement for the public in addition to the easement for a private way. This is the rule, although by statute the

owner of the soil and the owner of easements in the private way may be authorized to join in a petition for the assessment of damages when the jury is required to assess the damages as to an entire estate and as if it were the sole property of one owner in fee simple. *Boston Chamber of Commerce v. Boston*, 195 Mass. 338.

² *Birch v. New York City*, 190 N. Y. 397. See also *Parsons v. New York City*, 107 N. Y. App. Div. 324, *aff'd* 184 N. Y. 604.

But in *Massachusetts*, the rule appears to be that the public authorities must construct a street within a reasonable time after it is laid out; and that this duty can be enforced by *mandamus*. But the issuance of the writ is discretionary, and the court will refuse it when sufficient grounds for the delay in construction appear, *e.g.*, if it is shown that the city is obliged temporarily to suspend the construction of streets owing to its financial condition. *Richards v. Bristol County*, 120 Mass. 401; *Metcalf v. Boston*, 158 Mass. 284; *Como v. Worcester*, 177 Mass. 543, 546; *McCarthy v. Boston St. Com'rs*, 188 Mass. 338; *Aspinwall v. Boston*, 191 Mass. 441.

³ *Topliff v. Chicago*, 196 Ill. 215;

is legislative in its origin and must be conferred upon the municipality by a statutory enactment.¹ The opening of a street or any other municipal improvement may be authorized by the legislature without any consent or request or petition of abutting owners, who may be assessed therefor, and *without any hearing as to the expediency or necessity of the improvement.*² The power to improve and pave streets is usually conferred in express terms and carries with it everything that is *a necessary incident* of the express power conferred.³ The power to *pave streets* includes the power to furnish

Metcalf v. Boston, 158 Mass. 284; *McArthur v. Saginaw*, 58 Mich. 357; *Herndon v. Salt Lake City*, 34 Utah, 65; 95 Pac. Rep. 646. But it has been said that in the *business portions* of a city, or where travel and the convenience of the public require it, the whole width of the street must generally be made and maintained in a reasonably safe condition, and that whether a sufficient width has been paved for safe passage is ordinarily a question for the jury as a matter of fact. *Herndon v. Salt Lake City*, 34 Utah, 65; 95 Pac. Rep. 646.

Although abutters have a right of access to the highway, there is no obligation on the municipality to construct the highway its *full width to the line of the abutting lots*, or to construct approaches connecting the lots with the highway. *Metcalf v. Boston*, 158 Mass. 284, 285; *Attorney-General v. Mayor of Boston*, 186 Mass. 209, 212.

¹ "What [the legislature] of the State could itself do in laying out, opening, and grading streets and avenues, it could authorize the local legislature to do with all its own discretion." *Hubbard v. Sadler*, 104 N. Y. 223, 228. The legislature in *New York* may authorize commissioners named in the statute to lay out and improve the city streets, instead of conferring authority therefor on the municipal officers. *Matter of Woolsey*, 95 N. Y. 135.

² *Londoner v. Denver*, 210 U. S. 373; s. c. 33 Colo. 104. The abutter is only entitled to a hearing upon the assessment itself. *Ibid.* See also *Goodrich v. Detroit*, 184 U. S. 432; *Index, Taxation*. The fact that a property owner has paved a street to suit his convenience does not prevent the municipality from exercising its statutory power to pave. *Parsons v. Columbus*, 50 Ohio St. 460.

If there is a *valid and existing contract with a railroad company to pave* either the entire roadway or a portion of the roadway, although with a different material, an ordinance for paving a street, the cost to be paid by a special assessment upon the property benefited, is a fraud upon the property owners, and the court will set aside the assessment. Where the contract with the railroad company only relates to the paving of a part of the width of the street, the court cannot separate the legal from the illegal, and will annul the whole proceeding. *Sawyer v. Chicago*, 183 Ill. 57; *McFarlane v. Chicago*, 185 Ill. 242; *Chicago v. Nodeck*, 202 Ill. 257; *American Hide & Leather Co. v. Chicago*, 203 Ill. 451; *Chicago v. Newberry Library*, 224 Ill. 330. Ordinance directing repaving with asphalt at the expense of the property owners when the existing macadam pavement was in good condition held to be void as unreasonable. *Chicago v. Brown*, 205 Ill. 568.

It has been held that the city council, under its power to regulate and control the streets, *may fix the width of the carriageway and sidewalk* of a designated street and may determine how much space shall be given to each, but it cannot improve the whole width of a dedicated street as a carriageway without any sidewalk. An abutting owner is entitled to have a reasonable space set apart for sidewalk, and the council cannot act arbitrarily. *Georgetown v. Hambrick*, 127 Ky. 42; 104 S. W. Rep. 997. But compare *Attorney-General v. Boston*, 142 Mass. 200, where it was held that under authority to construct sidewalks a city may remove a sidewalk at its discretion.

³ Of a clause in a city charter giving the board of public works of a city

and to do all that is necessary, usual, or fit for paving;¹ and on this ground it has been held that the expense of *grading* a street preparatory to paving is incident to paving, and the expense properly included in the assessment.² And in Pennsylvania it is decided that the power to pave includes the power to furnish, or require the party at whose expense it is done to pay for, *curbstones*.³ And so as to

"exclusive control of the construction, improvement, repair, and cleaning of streets," *Finch, J.*, said in *Matter of Watertown Board of Public Works*, 144 N. Y. 440, 444: "*Construction* is a broad term authorizing the making of new streets; *improvement* permits new work upon streets already constructed; and *repair* relates to the restoration of an existing condition. The four terms used cover the whole subject, from the making of the new street to its final and ordinary maintenance." The power to lay out, open, and establish new streets carries the necessary incidental *power of grading* and otherwise improving the streets. *Brunswick v. King*, 91 Ga. 522. Power to pave or improve *streets* is held to include the power to pave and improve *sidewalks*. *Hendersonville v. Webb*, 148 N. Car. 120; 61 S. E. Rep. 670; *Kokomo v. Mahan*, 100 Ind. 242. What is "repaving" of a street as distinguished from "repairing," see *McCaffrey v. Omaha*, 72 Neb. 583.

Under power to *repair highways*, it was held that a *new bridge might be built*, when necessary to connect two portions of a highway interrupted by an intersecting stream. *Huggans v. Riley*, 125 N. Y. 88. See also *Mather v. Crawford*, 36 Barb. (N. Y.) 564. In *Schneider v. Menasha*, 118 Wis. 298, it was held that the power to pave and repair city streets, authorized the city to *purchase a quarry outside its limits* for the purpose of obtaining paving stone. But in Virginia, a contrary view is adopted. *Duncan v. Lynchburg* (Va.), 34 S. E. Rep. 964; *Donable v. Harrisonburg*, 104 Va. 533. The *power to construct a highway* does not authorize the local authorities to lay a *ditch or drain* through the lands of a private person for the purpose of conducting water from the highway and discharging it there. The power of the local authorities is confined to erecting banks to prevent water from coming from the highway, or to so construct the highway as to turn water off it on the adjoining lands

without doing any unreasonable injury. *Franklin v. Fisk*, 13 Allen (Mass.), 211; *Daley v. Watertown*, 192 Mass. 116.

¹ *Schenley v. Commonwealth*, 36 Pa. St. 29, 30, 60; *McNamara v. Estes*, 22 Iowa, 246; *ante*, § 819. Power to *pave a city street* includes as a necessary incident authority to grade, curb, and drain it. *Redersheimer v. Bruning*, 113 La. 343.

² *Allen v. Davenport*, 107 Iowa, 90, citing text; *Williams v. Detroit*, 2 Mich. 560; *State v. Elizabeth*, 30 N. J. L. 365; *Dodsworth v. Cincinnati*, 18 Ohio Cir. Ct. 288; *Schenley v. Commonwealth*, 36 Pa. 29; *Deer v. Sheraden Borough*, 220 Pa. 307, 310, citing text; *ante*, § 819.

Power "to open and improve streets" authorizes the city to *alter the grade* or change the level of the land on which the street is laid out. *Methodist Episcopal Church v. Wyandotte*, 31 Kan. 721; *Barnes v. Parsons*, 77 Kan. 311; 94 Pac. Rep. 151. A similar construction is placed on power to cause streets "to be kept open and in repair." *Smith v. Washington*, 20 How. (U. S.) 135; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 101; s. c. 52 Ohio St. 262, 290. But when the *power to grade* and the *power to pave* are conferred in separate clauses, and the expense of grading is payable from a general tax and the expense of paving is payable by special assessment, the powers were construed to be separate and independent. *Barnes v. Parsons*, 77 Kan. 311; 94 Pac. Rep. 151. Under the usual charter authority to regulate grade and improve streets, the city has no power to grade and improve a *private road* the title to which is in the abutting owners. *Culver v. Yonkers*, 80 N. Y. App. Div. 309, aff'd 180 N. Y. 524.

³ *Schenley v. Commonwealth*, 36 Pa. 29. In this case the city of Allegheny was authorized "to grade and pave streets, sidewalks," &c., and to levy a special tax upon the lots fronting thereon to defray the expense.

trimming and guttering; these were held to be included in the power to *macadamize*.¹ But charter authority to grade, pave, and improve the streets must be limited to the clear intent of the legislature. Hence authority conferred upon a city "to grade, pave, repair, or otherwise improve its streets," does not authorize a city to lay out a street railway therein for the purpose of being leased to private persons. The laying of a street railway in a street cannot be considered a part of the pavement of the street or of the improvement thereof.² Similarly, power to establish, widen, and extend streets, and to grade, pave, repair, and otherwise improve them, does not authorize the construction of a bridge over a railroad track for the purpose of securing a safe crossing.³

§ 1145 (685). **Power to improve and graduate.** — That the use of the streets for travel may be made safe and convenient, the legislature usually confers upon the municipal authorities the power, in express terms, to *graduate and improve* them,⁴ and supplies the means to carry the power into effect by requiring the inhabitants to perform labor upon the streets, or to pay specific taxes for that purpose, or taxes that may be so appropriated by the corporation. In another

The question was made that the cost of *curbstones* was not a legitimate charge upon the lot-owners. But the court held otherwise, observing that "the power to pave includes the power to furnish and do all that is necessary, usual, or fit for paving. How can the court say, as a legal proposition, that curbstones were neither necessary, customary, nor fit for such a work? Common observation shows that it is usual to employ curbstones when streets, sidewalks, or foot-ways are paved, and that they are among the ordinary means used. But whether they are or not was a question for the jury." See also *Williams v. Detroit*, 2 Mich. 560; *Steckert v. East Saginaw*, 22 Mich. 104; *Dean v. Borchsenius*, 30 Wis. 236.

In *Pennsylvania*, it is held that the establishment of a paper grade by the municipality confers no right on a property owner to enter on the highway and change the natural grade thereof. The streets are in charge of the municipal authorities, and the actual grading can be done only by their authority exercised in the manner prescribed by law. *Kittanning v. Thompson*, 211 Pa. 169.

¹ *McNamara v. Estes*, 22 Iowa, 246; *Williams v. Detroit*, 2 Mich. 560. The substitution of new curbstones and gutters in a street was held to be "*repairs*." *People v. Brooklyn*, 21 Barb. 484; *post*, §§ 1442, 1447. Construction of special charter provision as to macadamizing. *New Haven v. Whitney*, 36 Conn. 373. "Local improvement" defined, and held to extend to the opening or enlarging of a street. *Astor v. New York*, 62 N. Y. 580.

² *Attorney-General v. Detroit*, 148 Mich. 71. See also *Regina v. Train*, 7 Cox Crim. Cases, 180.

³ *Schneider v. Detroit*, 72 Mich. 240; *Phelps v. Detroit*, 120 Mich. 447, 449; *Ranson v. Sault Ste. Marie*, 143 Mich. 661. See also *Dean v. Ann Arbor R. Co.*, 137 Mich. 459.

⁴ *Wabash R. Co. v. Defiance*, 167 U. S. 88, 100, citing text. In *Pennsylvania* it is held that the authority to grade and pave streets is among the implied powers of a municipal corporation. *Williamsport v. Commonwealth*, 84 Pa. St. 487; *White v. McKeesport*, 101 Pa. St. 394. See also *Barter v. Commonwealth*, 3 Pa. 253, and *Philadelphia v. Tryon*, 35 Pa. St. 401.

place will be considered more fully the liability of the corporation growing out of this power, in respect to maintaining the streets in a *safe* condition for travel. It will, however, be proper here to *notice the nature of the power to grade and improve streets*, as it has been judicially ascertained and settled. A leading case on this subject is that of *Goszler v. Georgetown*, decided by the Supreme Court of the United States.¹ By its constituent act, the corporation of Georgetown had "full power to make such by-laws and ordinances for the graduation and levelling of streets as they may judge necessary for the benefit of the town." Pursuant to this authority, the corporation passed an ordinance for the graduation of certain streets, the first section of which appointed commissioners for that purpose. The second section of the ordinance was as follows: "Be it ordained, that the said level and graduation, when signed by the commissioners and returned to the clerk of this corporation, *shall be forever thereafter* considered as the true graduation of the streets so graduated, and be binding upon this corporation, and all other persons whatever, and be forever thereafter regarded in making improvements upon said streets." The plaintiff made improvements according to this grade, and *afterwards* the corporation passed another ordinance directing the grade to be changed by being lowered, to the plaintiff's injury. The plaintiff's bill for an injunction was dismissed, the court holding: 1. That the power to graduate given by the legislature was not exhausted by its first exercise, but was a continuing one: the power is given to the town to legislate on the subject, to pass as many bylaws relating thereto as the corporation "may judge necessary for the benefit of the town." 2. The second section of the ordinance (above quoted) was not in the nature of a compact, and therefore was not final and irrevocable. In deciding this point, Mr. Chief Justice Marshall says: "But it cannot be disguised that a promise is held forth (by the second section of the ordinance) to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying that this ordinance can operate as a perpetual restraint on the corporation. When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its Constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract *which should so operate as to bind its legislative capacities forever thereafter*, and disable it from enacting a by-law, which the legislature enables it to enact,

¹ *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593.

may well be questioned. We rather think that the corporation cannot abridge its own legislative power."¹

§ 1146 (796). **Power to pave Streets; "Pavement" defined.** — The power to *pave streets* (usually conferred in those words) at the expense, in whole or in part, of the property benefited by the improvement, has given rise to some decisions which may be noticed. In holding that the power to *pave* includes the power to *gravel* streets, the Supreme Court of Illinois thus defines the word *pavement*: "A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone, but it may be as well formed of pebbles, or gravel, or other hard substances, which will make a compact, even, hard way or floor."²

¹ *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593, 597; *ante*, §§ 244, 245; *Post*, § 1149, note. Text quoted and approved in *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 814. The power to lay out, open, and grade streets in a city carries with it, by necessary implication, the power to establish the grade of such streets. An order establishing the location, width, and grade of streets, if passed without authority, is rendered valid by being subsequently confirmed by the legislature. *Himmelman v. Hoadley*, 44 Cal. 213.

Where a city has exclusive control of its streets, with power to improve and regulate them, the *manner* of their improvement rests in the discretion of the city authorities. In this case sodding the centre of a street, graveling the sides, and constructing a sewer were held to be but one improvement. *Murphy v. Peoria*, 119 Ill. 509. A city may adopt one mode of improvement for part of the streets and a different mode for the remainder. *Oakland Paving Co. v. Rier*, 52 Cal. 270. It is to be presumed that a city, in constructing a street, made it to conform to the grade as then established. *Thompson v. Keokuk*, 61 Iowa, 187.

² *Per Caton, C. J.*, in *Burnham v. Chicago*, 24 Ill. 496. The word "pave" includes the usual means to cover with stone or brick, so as to make a level or convenient surface for horses, carriages, or foot passengers. It includes macadamizing. *Warren v. Henly*, 31 Iowa, 31. It includes "flagging;" *i. e.*, paving with flat stone. *Phillips, In re*, 60 N. Y. 16. Authority to *pave*

authorizes *sidewalk* to be made of plank or other material, in the discretion of the council. *Burlington & M. R. R. Co. v. Spearman*, 12 Iowa, 112. Authority to a city to require abutting lot-owners to "pave the street" includes also authority to require them to build sidewalks. *Warren v. Henly, supra*. In *Louisiana*, it is held that the power to make sidewalks, at the cost of the adjoining lot-owners, includes the *guttering and curbing*. "By common consent," remarks the court, "it is considered that the term 'pavement' embraces the brick sidewalks, of which the curb and gutters form a part." *O'Leary v. Sloo*, 7 La. An. 25. In *Powell v. St. Joseph*, 31 Mo. 347, it appeared that the defendant corporation was authorized to assess the cost of paving streets to the owners of adjoining property in proportion to their fronts. This was held to authorize the city authorities to apportion the cost of *paving the street crossings*, as well as of such parts of the street as were in front of lots, among the lot-holders of the adjoining blocks, in proportion to the front feet. Followed in *Farrar v. St. Louis*, 80 Mo. 379, 392, and *Sedalia v. Coleman*, 82 Mo. App. 560. Abutters may be assessed for *paving street crossings*. *Creighton v. Scott*, 14 Ohio St. 438; *Williams v. Detroit*, 2 Mich. 560. Power to pave includes the power to lay *cross walks*. *Burke, In re*, 62 N. Y. 224; *Phillips, In re*, 60 N. Y. 16; *Lawrence v. Killam*, 11 Kan. 499. As to *paving intersections*. *State v. Elizabeth*, 30 N. J. L. 365; *Eager, In re*, 46 N. Y. 100; *Hines v. Lockport*, 41 How. Pr. (N. Y.) 435,

§ 1147 (798). **Power to compel Building of Sidewalks.**—In the absence of a statutory obligation no duty rests upon the owners of abutting property *to repair or improve a street or sidewalk* in front of their lots.¹ But the legislature may require the property owner to build the sidewalk at his own expense, or may delegate to the municipal authorities the power to direct it to be so built.² Under

Where the charter makes no provision as to the mode in which the expenses of local improvements are to be ascertained, for the purpose of taxation or assessment of the same, the plaintiff, in an action of this kind, is not precluded from averring and showing, by evidence *dehors* the record, the actual cost thereof. *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468. A resolution of intention to curb and macadamize a "street" held not to include the sidewalk. *Dyer v. Chase*, 52 Cal. 440.

¹ *Brizzolara v. Ft. Smith*, 87 Ark. 85; 112 S. W. Rep. 181; *Owensboro v. Hope*, 128 Ky. 524; 110 S. W. Rep. 272; *Rupp v. Burgess*, 70 N. J. L. 7; *Rochester v. Campbell*, 123 N. Y. 405. The sidewalk is simply a part of the street which the municipal authorities have set apart for pedestrians. *Hester v. Durham Traction Co.*, 138 N. Car. 288, 293.

² *James v. Pine Bluff*, 49 Ark. 199; *Little Rock v. Fitzgerald* 59 Ark. 494; *Leiper v. Minnig*, 74 Ark. 510. See also *Yale College v. New Haven*, 57 Conn. 1, 8.

In ordinary acceptance, the term "street" includes sidewalks. *Drew v. Geneva*, 150 Ind. 662; *Taber v. Grafmiller*, 109 Ind. 206; *Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26, 35. See also *Hendersonville v. Webb*, 148 N. Car. 120; 61 S. E. Rep. 670. Control of the streets conferred upon a city by charter extends to the sidewalk as well as the roadbed, although the abutting owner may own the fee of the street. *In re O'Brien*, 119 Mich. 540. A statute conferring upon a city the power to improve streets and to contract therefor, and making the cost thereof a lien upon abutting property, does not authorize the city to direct property owners to make sidewalks in front of their property. *Owensboro v. Hope*, 128 Ky. 524; 110 S. W. Rep. 272.

Authority to require the owners of land to build, when necessary, sidewalks in front of their land construed as sufficiently broad to confer

power to order *reconstruction* when necessary. *Walker v. Detroit*, 143 Mich. 427. Where the municipality has prescribed the character of the sidewalk, the abutting owner cannot put down a sidewalk of any material he chooses on the ground that all that the law requires is that the sidewalk shall be reasonably safe and fit for public travel. *In re O'Brien*, 119 Mich. 540. Although the abutter may have begun to build a sidewalk, the common council may compel him to change to another material. *Scribner v. Grand Rapids*, 119 Mich. 188. If an abutter proceeds to pave a sidewalk with brick in violation of an ordinance directing the sidewalk to be paved with another material, he will be enjoined. *Drew v. Geneva*, 150 Ind. 662.

But when a *property owner* has already constructed a sidewalk conforming to the requirements of an ordinance, there must be express legislative authority empowering the municipality to change the pavement while the existing pavement does not require repair. *Hawes v. Chicago*, 158 Ill. 653, 658. But compare *Shelton Co. v. Birmingham*, 61 Conn. 518, where it was held that the power of the municipality to change the grade and to order the owner to lay a new sidewalk was not affected by the fact that the existing concrete sidewalk was in good condition.

A city may *take up and carry away* the material of an old sidewalk, when it substitutes a better sidewalk in its place and does not incur any liability to the abutter thereby. *Snyder v. Lexington*, 20 Ky. Law Rep. 1562; 49 S. W. Rep. 765. But if the municipality lays a sidewalk in a street the fee of which is in the abutter, it *cannot remove the sidewalk* because of the failure or refusal of the abutter to pay an assessment therefor, and it becomes liable to the abutter for the damage if it so removes it. *Platt v. Oneonta*, 88 N. Y. App. Div. 192, *aff'd* 183 N. Y. 516. To the same effect, *Nichols v. Sadorus*, 120 Ill. App. 70. Power by

an authority to make such by-laws as to the common council shall seem "necessary for the good government of the city, and for the regulation and paving of the streets and highways," a city corporation may pass an ordinance requiring the owner of every lot fronting on a designated section of a public street to *fix curbstones* and make a *brick way* or *sidewalk* in front of his lot. Such an ordinance is neither unconstitutional, illegal, nor unreasonable. It would doubtless be otherwise, it is remarked, if this burden was laid without special cause upon one citizen, all others similarly situated being exempted.¹ But it has been held that authority conferred by statute to require the property owner to build and maintain a suitable sidewalk does not confer authority upon the city to require the property owners to remove embankments, or to fill in depressions, to bring the grade of the sidewalk to the established grade of the street.²

§ 1148. **Construction of Drains and Sewers.** — The construction and maintenance of a *system of sewers* for a municipality is clearly a municipal function.³ It is within the province of the legislature to make provision therefor and in its discretion to divide the municipality into sewer districts.⁴ Authority to construct sewers, when conferred upon a municipality, is *continuing in its nature*, unless otherwise expressly limited and restricted;⁵ and the determination

charter to "compel lot-owners to make safe and proper sidewalks of brick, plank, stone, or granolith" authorizes an ordinance designating the particular material of which a sidewalk should be made. *O'Haver v. Montgomery*, 120 Tenn. 448; 111 S. W. Rep. 449. It has been held that statutory authority conferred upon a city to construct sidewalks authorizes the city to remove a sidewalk in its discretion. *Attorney-General v. Boston*, 142 Mass. 200.

¹ *Paxson v. Sweet*, 16 N. J. Eq. 196, cited with approval by *Putnam, J.*, in *Boston v. Shaw*, 1 Met. (Mass.) 130-133. See *Downer v. Boston*, 6 Cush. (Mass.) 277, and observation (*arguendo*) of *Shaw, C. J.*, p. 281, as to vacant lots. Assuming that the power was properly construed, the duty enjoined by the ordinance could not be enforced by a sale of the property unless authority to that effect was unequivocally conferred by the legislature. Construing certain acts *in pari materia*, the court held that the lessee for a long term of years, and not the owner of the fee, was the "proprietor" or "owner" to assent to, or petition for, the paving of

streets. *Holland v. Baltimore*, 11 Md. 186. Tenant in dower in actual possession is an "owner" within the meaning of the charter requiring "owners" of lots to build sidewalks in front thereof. *White v. Nashville*, 2 Swan (Tenn.), 364. Power to pave at the expense of the adjacent owner, being limited and special, must be exercised strictly according to law. *Henderson v. Baltimore*, 8 Md. 352; *post*, §§ 1377-1379.

As to right to *relief in equity* against illegal taxes and assessments, see chap. xxxi., *post*, §§ 1570-1590.

² *Little Rock v. Fitzgerald*, 59 Ark. 494; *Hillhouse v. New Haven*, 62 Conn. 344. See also *Yale College v. New Haven*, 57 Conn. 1; *Smith v. St. Louis Mutual Life Ins. Co.*, 3 Tenn. Ch. Rep. 631.

³ *Anderson v. Lower Merion*, 217 Pa. 369, 382.

⁴ *Oil City v. Oil City Boiler Works*, 152 Pa. 348; *Anderson v. Lower Merion*, 217 Pa. 369, 382.

⁵ *McKevitt v. Hoboken*, 45 N. J. L. 482; *Matter of Fowler*, 53 N. Y. 60. The municipality may also alter drains, or change its system of drainage, if the

of the municipal authorities as to the *necessity* of the construction will be accepted as final and conclusive, and binding upon the courts in the absence of fraud or abuse.¹ The construction of sewers is a lawful use of the street as against an abutting proprietor, whether the fee of the street be in him, or in the city in trust for street uses. Although the fee of the street may be in the abutting proprietor, the use of the street for the purposes of sewers is not the imposition of a *new use or servitude* entitling the owner of the fee to compensation.² The construction of drains and sewers is regarded as, to a large extent, incident to the construction and maintenance of a city street. Hence authority to a municipal corporation, by its charter, to repair and keep in order its streets, is sufficient, without special grant to authorize it to construct drains and sewers; and, when constructed, the corporation will incidentally possess the power to pass ordinances regulating their use and the price at which private persons may tap them, and also to protect them against injury or invasion.³ When the city has power to construct sewers, it may,

welfare and comfort of the inhabitants will be thereby enhanced, but it cannot exercise this power recklessly and in wanton disregard of private rights. *Carondelet Canal & Nav. Co. v. New Orleans*, 38 La. An. 308.

¹ *St. Louis Bridge Co. v. People*, 125 Ill. 226; *Michener v. Philadelphia*, 118 Pa. 535; *Oil City v. Oil City Boiler Works*, 152 Pa. 348; *Philadelphia v. Odd Fellows Hall Assoc.*, 168 Pa. 105; *Philadelphia v. Union Burial Ground Soc.*, 178 Pa. 533.

In *Pennsylvania*, a statute provides for the incorporation of companies for the construction and maintenance of sewers in cities, &c. The statute merely authorizes incorporation for these purposes "for the health, comfort, and convenience of the inhabitants, and sanitary improvement in cities," &c., and authorizes corporations to enter upon and occupy any public highway with the consent of the local authorities. A permit issued under this statute by a borough to a sewer company for the construction of a system of sewers in the city streets does not give to the sewer company the exclusive right to use the streets for such purposes, and the borough may thereafter construct sewers in the same streets. *Olyphant Sewage-Drainage Co. v. Olyphant*, 211 Pa. 526.

² *Cone v. Hartford*, 28 Conn. 363; *Boston v. Richardson*, 13 Allen (Mass.), 152, 159; *Lawrence v. Nahant*, 136

Mass. 477; *Allen v. Boston*, 159 Mass., 324, 335; *Warren v. Grand Haven*, 30 Mich. 24, 28; *Stoudinger v. Newark*, 28 N. J. Eq. 187, aff'd 28 N. J. Eq. 446; *Traphagen v. Jersey City*, 29 N. J. Eq. 206, aff'd 29 N. J. Eq. 650; *Matter of Yonkers*, 117 N. Y. 564, 573; *Kelsey v. King*, 32 Barb. (N. Y.) 410; *Cincinnati v. Penny*, 21 Ohio St. 499; *Fisher v. Harrisburg*, 2 Grant Cas. (Pa.) 291.

The fact that a rural highway is converted into a city street and thereby becomes subject to use for the construction of drains, sewers, &c., does not impose an additional servitude upon the land entitling the owner of the fee to additional compensation. *Huddleston v. Eugene*, 34 Oreg. 343.

³ *Kramer v. Los Angeles*, 147 Cal. 668, 674, citing text; *Cone v. Hartford*, 28 Conn. 363; *Bronson v. Wallingford*, 54 Conn. 513; *Leeds v. Richmond*, 102 Ind. 372; *Fort Wayne v. Coombs*, 107 Ind. 75, 80; *Schipper v. Aurora*, 121 Ind. 154; *Kirkland v. Indianapolis*, 142 Ind. 123; *Boyce v. Tuhey*, 163 Ind. 202; *Coburn v. Bossert*, 13 Ind. App. 359; *Greensburg v. Zoller*, 28 Ind. App. 126; *Stoudinger v. Newark*, 28 N. J. Eq. 187; *Kelsey v. King*, 32 Barb. (N. Y.) 410; *Hastings v. Columbus*, 42 Ohio St. 585; *Fisher v. Harrisburg*, 2 Grant (Pa.) Cas. 291.

But in *Peck v. Grand Rapids*, 125 Mich. 416, it was held that under the charter powers of the city, it could not

when necessary, *extend them beyond the corporate limits* for the purpose of securing a suitable outlet.¹

§ 1149 (687, 689). **Right of City to use or dispose of Soil.** — Where the city in improving the street *necessarily removes soil, gravel, or stone*, it may use the material so removed on other portions of the same street, although the title to the soil of the street may be vested in the abutter;² and in some States it is held that the city

construct a sewer for general purposes in connection with proceedings to grade and gravel a street. In *Gates v. Grand Rapids*, 134 Mich. 96, 95 N. W. Rep. 998, this case was distinguished, and it was held that in such a proceeding it might construct a storm sewer for drainage purposes only. A general power to construct and maintain streets is sufficient authority to authorize a municipality to construct a sewer to carry off storm waters. *Kramer v. Los Angeles*, 147 Cal. 668, 675. See also *McGuire v. Rapid City*, 6 Dak. 346. In *Iowa*, it is held that a temporary open sewer, for surface drainage only, may be constructed by the street commissioner without specific authority from the council by ordinance. *Cooper v. Cedar Rapids*, 112 Iowa, 367. A city may, where the turnpike company does not object, assess abutting property for the construction of sewers in a street, although the street be under the control of the turnpike company. *Lewis v. Schmidt (Ky.)*, 43 S. W. Rep. 433. Construction of power; right to change, &c. *Mauch Chunk Bor. v. Shortz*, 61 Pa. St. 399; *Stroud v. Philadelphia*, 61 Pa. St. 255; *State v. Jersey City*, 30 N. J. L. 148; *State v. Jersey City*, 29 N. J. L. 441; *State v. Jersey City*, 27 N. J. L. 493.

A proprietor of adjoining lands does not by connecting his drain with a sewer waive the right to object to the validity of the local assessment to pay for the sewer. *Watertown v. Fairbanks*, 65 N. Y. 588. Including two distinct sewers in one construction contract held not illegal. *Ingraham, In re*, 64 N. Y. 310; *ante*, § 1149: *post*, § 1162. Where an act of the legislature contemplates a plan of draining the territory embraced within the map therein referred to, by a main sewer running through certain streets in the said act designated, with such lateral sewers as the commissioners of sewers might deem necessary for the proper

drainage of the said territory, the commissioners have no right to abandon the single sewer and adopt a plan substituting therefor two main sewers. *State v. Chamberlain*, 37 N. J. L. 51.

¹ *Langley v. Augusta*, 118 Ga. 590; *Shreve v. Cicero*, 129 Ill. 226; *Maywood Co. v. Maywood*, 140 Ill. 216; *Callon v. Jacksonville*, 147 Ill. 113; *Canal Com'rs v. East Peoria*, 179 Ill. 214, 234. See also *Minnesota & M. Land & Imp. Co. v. Billings*, 111 Fed. Rep. 972; *McBean v. Fresno*, 112 Cal. 159; *Cochran v. Park Ridge*, 138 Ill. 295; *Coldwater v. Tucker*, 36 Mich. 474.

² *Robert v. Sadler*, 104 N. Y. 229; *Bissell v. Collins*, 28 Mich. 277 (distinguishing *Cuming v. Prang*, 24 Mich. 514); *Overman v. May*, 35 Iowa, 89; *Bundy v. Catto*, 61 Ill. App. 209; *Burr v. Leicester*, 121 Mass. 241; *Grover v. Cornet*, 135 Mo. 21; *Graden v. Parkville*, 114 Mo. App. 527. See also *Aldrich v. Drury*, 8 R. I. 554.

In *Smith v. Rome*, 19 Ga. 89, where the city only acquired an easement or right of way, it was held (erroneously, in the author's judgment) that stone within the limits of the street which had to be removed in order to level and make the street passable, belonged to the adjoining owner as part of the soil, and not to the city as the owner of the right of way; and the latter could not, it was further held, use the rock that might result from the process of levelling for macadamizing or other street improvements, and the city was enjoined from so doing. See *Macon v. Hill*, 58 Ga. 595, cited *infra*.

In *New Haven v. Sargent*, 38 Conn. 50, it is held that the city, as against the adjoining owner, is entitled to the surplus soil of the street, and the adjoining owner was restrained from removing it. Compare *dictum* in *Cuming v. Prang*, 24 Mich. 514. By virtue of its control of the streets and high-

may use the soil necessarily removed from one street in improving that street or any other street in the city.¹ The right of *removal of soil from one public highway to another, for repairing the highway*, is learnedly considered by Mr. Chief Justice Gray, in a case in Massachusetts, and the conclusion is reached that such right exists by law and usage in the New England States.² It would also seem

ways, the municipality may prohibit, by ordinance, any person, even the owner of the fee, from removing any dirt or earth from any of the streets for any purpose without first obtaining the consent of the municipal authorities. *Palatine v. Krueger*, 121 Ill. 72.

In *Iowa*, it is held that as against the adjoining lot owner or original dedicator, the city holding the fee has full control over the street, and not simply over the surface; and it can maintain an action against any person who, without its permission, removes any material from the street whether that material be superficial or subterranean. *Des Moines v. Hall*, 24 Iowa, 234.

¹ *New Haven v. Sargent*, 38 Conn. 50; *Griswold v. Bay City*, 35 Mich. 452; *Shimmons v. Saginaw*, 104 Mich. 511, 514; *Huston v. Ft. Atkinson*, 56 Wis. 350; *Brickwell v. Hamele*, 57 Wis. 490, 494; *Titus v. Boston*, 149 Mass. 164; *Wabash R. Co. v. Defiance*, 10 Ohio Cir. Ct. 27, 39. See also *Bierwith v. Pieronnet*, 65 Mo. App. 431.

In *Maine*, it is held that a corporation which by its charter has power to repair and grade the streets may make such repairs and do such grading by authorizing others at their own expense and under the direction of the street commissioner to take materials from the street for their own private use. *Hovey v. Mayo*, 43 Me. 322.

In *Indiana*, it is held that the city can remove the natural soil from one street to another only when the improvement of the two streets is part of a single improvement. The owner cannot compel the city to remove the material to a place chosen by him; and if the owner fails to take steps to remove it within a reasonable time, the city may treat it as abandoned, and use it for such streets as it may see fit. *Delphi v. Evans*, 36 Ind. 90; *Aurora v. Fox*, 78 Ind. 1; *Haas v. Evansville*, 20 Ind. App. 482.

² *Denniston v. Clark*, 125 Mass. 216.

In this case *Gray, C. J.*, says: "It is too clear to require any discussion that the proprietor of land over which a public highway has been laid, retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public, or by any corporation by authority derived constitutionally from the legislature. *Tucker v. Tower*, 9 Pick. (Mass.) 109, 110. The owner of the land therefore retains his title in trees, grass, growing crops, buildings, and fences standing in the highway at the time of the laying out (unless he fails to remove them within a reasonable time after notice to do so), as well as in any mines or quarries beneath, which are not part of the surface of the earth upon and of which the highway is made. *Goodtitle v. Alker*, 1 Kenyon, 427, 437; s. c. 1 Burr. 133, 143; *Adams v. Emerson*, 6 Pick. (Mass.) 57; *Commonwealth v. Noxon*, 121 Mass. 42; *Tucker v. Eldred*, 6 R. I. 404; *Overman v. May*, 35 Iowa, 89. The decision in *Smith v. Rome*, 19 Ga. 89, cited for the plaintiff, unless it can be considered as substantially a case of a quarry, cannot be upheld.

"But it is equally clear that the grant of such an easement to the public, or to the corporation to which its rights have been delegated, authorizes the doing of any act in the highway, including the digging down or raising the soil to any extent that is necessary or proper to make and keep the way safe and convenient for the public travel. *Callender v. Marsh*, 1 Pick. (Mass.) 418; *Smith v. Washington*, 20 How. (U. S.) 135; *Boston v. Richardson*, 13 Allen (Mass.), 152; *Pontiac v. Carter*, 32 Mich. 164. All acts done for the purpose of repairing the way are of this character, although they may require the removal of the soil from one part of the way to another; and it is accordingly well settled that the public in the case of a highway, or a turnpike corporation or a railroad company in the case of a turnpike or

that the right of the city includes the *right to dispose of the surplus soil* to others who will remove it. And it has been decided that if the city does not desire the soil for the purpose of filling in other streets and the adjoining owner does not remove it, the city may sell and dispose of it in any way it deems proper.¹ But the public easement justifies only the taking of earth and soil which the process of construction or repair requires and necessarily compels to be removed. Hence, the city cannot by digging pits or otherwise excavating the street or highway, remove gravel or stone below the grade line for the purpose of using it on other parts of the same highway, and the abutter who owns the soil of the street can restrain such removal on the principle that his title to the soil includes the right to use it for all purposes but street uses proper.²

railroad, has the right, acting through proper officers, for the purpose of repairing the same highway, turnpike, or railroad, to take earth, gravel, or stones from one part and deposit them on another, although if the officer applies them to other uses he may become liable as a trespasser. In *Adams v. Emerson*, 6 Pick. (Mass.) 57, for instance, in which an action was maintained by the owner of land over which a turnpike road had been laid out, against a servant of the corporation, for taking the herbage growing thereon, Mr. Justice *Wilde*, delivering the opinion of the court, said: 'The *locus in quo*, although part of a turnpike road, is the soil and freehold of the plaintiff. He has the exclusive right of property in the land, subject, however, to the easement or rights incident to a public highway; such as the right of passage over it, and the right which the turnpike corporation has to construct a convenient pathway, and to keep it always in good repair. To accomplish these purposes, the corporation may dig up and remove from place to place, within the limits laid out for the road, any earth, sand, and gravel, and may dig or cut up sods and turf.' See also *Phillips v. Bowers*, 7 Gray (Mass.), 21, 26; *Burr v. Leicester*, 121 Mass. 241; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 453; *Fish v. Rochester*, 6 Paige (N. Y.), 268, 272; *Bissell v. Collins*, 28 Mich. 277; *Baxter v. Winoski Turnp. Co.*, 22 Vt. 114; *Cole v. Drew*, 44 Vt. 49; *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; *Aldrich v. Drury*, 8 R. I. 554.

'In New England, at least, the same

rule has been applied by law and usage to the taking of materials from one highway for the repair of another within the jurisdiction of the same municipal authorities. *Hovey v. Mayo*, 43 Me. 322; *New Haven v. Sargent*, 38 Conn. 50. In such a case, both highways must, for this purpose, be deemed as much parts of one plan of public improvement for the accommodation of the public travel as if they formed parts of a continuous line of road called by one name, as in the case of a turnpike or of a railroad.'

¹ *Griswold v. Bay City*, 35 Mich. 452; *Wabash R. Co. v. Defiance*, 10 Ohio Cir. Ct. 27, 39.

In *Massachusetts*, it is held that the public authorities may excavate the soil and remove it to the lands of another without incurring any liability to the owner of the material. *Upham v. Marsh*, 128 Mass. 546. But see to the contrary, *Grover v. Cornet*, 135 Mo. 21.

In *Minnesota*, it is held that when the improvement of a street renders it necessary to excavate and remove earth and rock therefrom, and where it is impracticable to permit the excavation and removal to be done by the owners of the soil, the public authorities may do it unembarrassed by claims of private owners, and may dispose of the material which they are required to remove without accountability to the owners of the soil; but the right is limited to what it is necessary to remove in connection with the improvement. *Viliski v. Minneapolis*, 40 Minn. 304.

² *Robert v. Sadler*, 104 N. Y. 229, rev'g 37 Hun (N. Y.), 377; *Viliski v.*

§ 1150. **Street Uses; Parkways, Bicycle Paths.** — Although a street is ordinarily intended for purposes of public travel, yet the municipal authorities in opening and laying out streets are not rigidly limited to that use. A street may in part unite the *two purposes*, one to furnish a *way for travel* and the other as a *park or public place*. These elements have frequently been united, and there are many cities where roads, boulevards, and avenues have been opened for the purpose of travel, and in connection with such use, lands have also been acquired for the sole purpose of furnishing ample space in order that the enjoyment of the street itself by the inhabitants of the municipality may thereby be enhanced.¹ Upon similar principles, it has been held that a *bicycle path* imposes no additional burden upon a highway and is a legitimate use thereof.²

§ 1151 (686). **Power is Continuing and Discretionary.** — That the power to *lay out, open, grade, and improve streets*, like other legislative powers, is a *continuing one*, unless the contrary be indicated, has been frequently decided in both the Federal and State courts. It may, therefore, be exercised from time to time, as the wants of the public may require.³ Of the necessity or expediency of its ex-

Minneapolis, 40 Minn. 304; *Delphi v. Evans*, 36 Ind. 90; *Aurora v. Fox*, 78 Ind. 1; *Overman v. May*, 35 Iowa, 89. See also *Higgins v. Reynolds*, 31 N. Y. 151; *Fisher v. Rochester*, 6 Lans. (N. Y.) 225; *Deverell v. Bauer*, 41 N. Y. App. Div. 53. In *Macon v. Hill*, 58 Ga. 595, the city was held liable where it changed the grade of a street to get materials to be used elsewhere in the city. Where there was a quarry in a street in which the city had an easement only, it was held that the city had no power to authorize a stranger to the fee to quarry stone therefrom and convert it to his own use. *Althen v. Kelly*, 32 Minn. 280.

¹ *Murphy v. Peoria*, 119 Ill. 509; *Thompson v. Highland Park*, 187 Ill. 265; *Matter of Bushwick Ave.*, 48 Barb. (N. Y.) 9; *Matter of Curran*, 38 N. Y. App. Div. 82; *Matter of Clinton Ave.*, 57 N. Y. App. Div. 166, aff'd 167 N. Y. 624; *Rudolph v. Ackerman*, 58 N. Y. App. Div. 596; *Dotey v. District of Columbia*, 25 App. D. C. 232; *Martin v. Williamsport*, 208 Pa. 590.

The legislature may transfer the control of streets to park commissioners to be improved and used for

park purposes, provided that such purposes are not inconsistent with their ordinary use as streets. *People v. Walsh*, 96 Ill. 232; *McCormick v. South Park Com'rs*, 150 Ill. 516. The fact that a portion of a sidewalk is set aside as *parking* does not affect the control of the municipal authorities over the sidewalk. *Dotey v. District of Columbia*, 25 App. D. C. 232. Statutory authority to "park" street construed. *Downing v. Des Moines*, 124 Iowa, 289.

² *Ryan v. Preston*, 59 N. Y. App. Div. 97. See also *O'Donnell v. Preston*, 74 N. Y. App. Div. 86. A city may be authorized by statute to improve a portion of a boulevard as a *speedway*. Such use is not inconsistent with the public uses of a boulevard. *Scovel v. Detroit*, 146 Mich. 93.

³ *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593; *Smith v. Washington*, 20 How. (U. S.) 135, 148; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 98, aff'g 52 Ohio St. 262, 318, citing text; *Field v. Barber Asphalt Co.*, 194 U. S. 618, 625, citing text; *Mead v. Portland*, 200 U. S. 148, 164, aff'g 45 Ore. 1; *New Haven v. Sargent*, 38 Conn. 50; *Markham v. Atlanta*, 23 Ga. 402; *Dunham v. Hyde Park*, 75 Ill. 371;

ercise, the governing body of the corporation, and not the courts, is the judge.¹

§ 1152 (686). **Liability for Change of Grade.** — The law is settled, as we shall have occasion hereafter more fully to illustrate, that, unless expressly so declared by special constitutional provision, or by charter or statute, a municipal corporation is not liable to property owners for the consequential damages necessarily resulting from either *establishing a grade or changing an established grade of streets*, although improvements were made in conformity with the first grade.² A statutory right to compensation for the change of

Chicago, B. & Q. R. Co. v. Quincy, 136 Ill. 563, 571, citing text; West Chicago Park Com'rs v. McMullen, 134 Ill. 170; Macy v. Indianapolis, 17 Ind. 267; Delphi v. Evans, 36 Ind. 90; Kokomo v. Mahan, 100 Ind. 242, quoting text; Koons v. Lucas, 52 Iowa, 177; Coates v. Dubuque, 68 Iowa, 550, quoting text; Methodist Episcopal Church v. Wyandotte, 31 Kan. 721; Carey Salt Co. v. Hutchinson, 72 Kan. 99; Barnes v. Parsons, 77 Kan. 311; 94 Pac. Rep. 151; Karst v. St. Paul, S. & T. F. R. Co., 22 Minn. 118, citing text; Hoffman v. St. Louis, 15 Mo. 651; McCormick v. Patchen, 53 Mo. 33; Estes v. Owen, 90 Mo. 113; McKevitt v. Hoboken, 45 N. J. L. 482 (the same principle applied to building sewers); Murphy v. Long Branch (N. J.), 61 Atl. Rep. 593; Plum v. Morris Canal & B. Co., 10 N. J. Eq. 256; Trenton v. McQuade, 52 N. J. Eq. 669, 672, citing text; Furman Street, *In re*, 17 Wend. (N. Y.) 649; Gall v. Cincinnati, 18 Ohio St. 563; O'Connor v. Pittsburgh, 18 Pa. St. 187; Roanoke Gas Co. v. Roanoke, 88 Va. 810, 815, quoting text; *ante*, § 242; Lewis Em. Dom., § 107.

¹ Wabash R. Co. v. Defiance, 167 U. S. 88, 102, aff'g 52 Ohio St. 262; Field v. Barber Asphalt Co., 194 U. S. 618, 625, citing text; San Francisco Pav. Co. v. Egan, 146 Cal. 635; Dunlap v. Mt. Sterling, 14 Ill. 251; Curry v. Mt. Sterling, 15 Ill. 320; Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333; Dunham v. Hyde Park, 75 Ill. 371; Brush v. Carbondale, 78 Ill. 74; Murphy v. Peoria, 119 Ill. 509; Illinois Cent. R. Co. v. Chicago, 141 Ill. 586; English v. Danville, 150 Ill. 92; Walker v. Morgan Park, 175 Ill. 570, 573; Baughman v. Heinselman, 180 Ill. 251; Chicago v. Wilson, 195 Ill. 19,

23; Topliff v. Chicago, 196 Ill. 215, 218; Farson v. Fogg, 205 Ill. 326, 340; Belleville v. Pfingsten, 225 Ill. 293, 298; Belleville v. Herzler, 225 Ill. 404; Chicago v. Hulbert, 234 Ill. 321; State v. Miles, 138 Ind. 692; Keith v. Wilson, 145 Ind. 149; Drew v. Geneva, 150 Ind. 662; Dyer v. Woods, 166 Ind. 44; Brown v. Barstow, 87 Iowa, 344; Dewey v. Des Moines, 101 Iowa, 416; Gallaher v. Jefferson, 125 Iowa, 324; Kemp v. Des Moines, 125 Iowa, 640; Carey Salt Co. v. Hutchinson, 72 Kan. 99; Mudge v. Walker, 122 Ky. 29; New Orleans v. Steinhardt, 52 La. An. 1043; Biddeford v. York County, 78 Me. 105; Baltimore v. Flack, 104 Md. 107, 123; St. Paul, M. & M. R. Co. v. Minneapolis, 35 Minn. 141; Knoblauch v. Minneapolis, 56 Minn. 321; Minneapolis & St. L. R. Co. v. Hartland, 85 Minn. 76, 79; Hannibal v. Hannibal & St. J. R. Co., 49 Mo. 480, 482; Little Miami, C. & X. R. Co. v. Dayton, 23 Ohio St. 510, 519; Philadelphia v. Dibeler, 147 Pa. 261; Wabash Ave., 26 Pa. Super. Ct. 305. What acts amount to change of grade. Karst v. St. Paul S. & T. F. R. Co., 22 Minn. 118; *post*, § 1447; Folkens v. Easton Bor., 116 Pa. St. 523; Hutchinson v. Parkersburg, 25 W. Va. 226; Mattingly v. Plymouth, 100 Ind. 545; Kepple v. Keokuk, 61 Iowa, 653; Oakley v. Williamsburgh, 6 Paige (N. Y.), 262; Goodall v. Milwaukee, 5 Wis. 32; Aurora v. Reed, 57 Ill. 29; *ante*, § 246. Compare Lafayette v. Fowler, 34 Ind. 140; State v. Jersey City, 34 N. J. L. 277; Dewitt v. Duncan, 46 Cal. 342; Ft. Wayne v. Cody, 43 Ind. 197; Yeakel v. Lafayette, 48 Ind. 116.

² Montgomery v. Townsend, 84 Ala. 478, 484, citing text; Montgomery v. Maddox, 89 Ala. 181, 183; Southern Bell Tel. Co. v. Francis, 109 Ala. 224,

a grade in a street is substantially a grant to the abutting owner of an easement in the street to have it maintained at its existing

228; *Hooker v. New Haven & N. Co.*, 14 Conn. 146; *Lafayette v. Bush*, 19 Ind. 326; *Delphi v. Evans*, 36 Ind. 90 (reviewing cases); *Creal v. Keokuk*, 4 G. Green (Iowa), 47; *Kepple v. Keokuk*, 61 Iowa, 653; *Hovey v. Mayo*, 43 Me. 322; *Callender v. Marsh*, 1 Pick. (Mass.) 418; *Brown v. Lowell*, 8 Met. (Mass.) 172; *Purinton v. Somerset*, 174 Mass. 556; *Laroe v. Northampton St. R. Co.*, 189 Mass. 254; *Cummings v. Dixon*, 139 Mich. 269; *Henderson v. Minneapolis*, 32 Minn. 319; *Genois v. St. Paul*, 35 Minn. 330; *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. St. Louis*, 14 Mo. 20; *Schattner v. Kansas City*, 53 Mo. 162; *Imler v. Springfield*, 55 Mo. 119; *Heiser v. New York City*, 104 N. Y. 68; *Folmsbee v. Amsterdam*, 142 N. Y. 118, aff'g 66 Hun (N. Y.), 214; *Talbot v. New York & H. R. R. Co.*, 151 N. Y. 155; *Torge v. Salamanca*, 176 N. Y. 324, 327; *Comesky v. Sufferin*, 179 N. Y. 393; *Smith v. Boston & A. R. Co.*, 181 N. Y. 132, aff'g 99 N. Y. App. Div. 94; *Melenbacker v. Salamanca*, 188 N. Y. 370, 374; *Brand v. Multnomah County*, 38 Oreg. 79, 92, citing text; *Davis v. Silverton*, 47 Oreg. 171; *Green v. Reading*, 9 Watts (Pa.), 382; *Philadelphia v. Randolph*, 4 Watts & Serg. (Pa.) 514; *Humes v. Knoxville*, 1 Humph. (Tenn.) 403; *Home Building, &c. Co. v. Roanoke*, 91 Va. 52; *Harrisonburg v. Roller*, 97 Va. 582; *Swift v. Newport News*, 105 Va. 108; *Haubner v. Milwaukee*, 124 Wis. 153; *post*, §§ 1665-1683.

Mr. Lewis, on *Eminent Domain*, §§ 92-110, 207-224, gives a general survey of the adjudications in the several States on the subject of damages caused by change of grade. Mr. Mills, *Em. Dom.* §§ 195-197, states the point decided in many cases which he cites.

In *Kentucky*, the right to change the grade without liability to pay damages is not absolute and unqualified. *Louisville v. Louisville Rolling Mill Co.*, 3 Bush (Ky.), 416. A change of grade is not shown to be illegal by an allegation that it was made "without any necessity therefor," because the council of the city are the judges of the necessity of the change. *Macy v. Indianapolis*, 17 Ind. 267. The *establishment or change of a grade* is in-

dependent of the condemnation or opening of a street, and may be done either before or after a street is condemned. *Kelly v. Baltimore*, 65 Md. 171. Abutting property owners cannot require the city to excavate or fill up a street to grade; but when the city changes the surface of a street they may by statute compel it to observe the grade lines, or pay damages. *Given v. Des Moines*, 70 Iowa, 637. A statute, fixing the grades of streets at their intersection, held to fix the grades at all intermediate points by connecting the points specified by a straight line. *Gafney v. San Francisco*, 72 Cal. 146. In grading streets and sidewalks *shade trees may be removed*, if necessary, and if destroyed, an adjoining owner cannot recover damages therefor, unless they were killed by reason of neglect or carelessness in the work. *Castleberry v. Atlanta*, 74 Ga. 164; *Hildrup & Windfall*, 29 Ind. App. 592. See also *Vanderhurst v. Tholcke*, 113 Cal. 147.

One who signs a petition for a change of grade is estopped to claim damages resulting therefrom, on the ground that the petition was not signed by a sufficient number of persons. *Cross v. Kansas City*, 90 Mo. 13. Where a city agreed with railroad companies that, upon their erecting a bridge twenty feet high over their tracks, it would construct approaches thereto and close to travel that part of the street between the ends of the bridge, except upon the bridge, it was held that this amounted to an *alteration of the grade*, and that it could not be done without altering the established grade in the manner prescribed in the city charter. The construction of the bridge and approaches was enjoined at the suit of an owner of property situated opposite the approaches. *Wilkin v. St. Paul*, 33 Minn. 181.

In *Iowa*, provision is made by statute for compensating adjoining owners for damages caused by a change of grade. Under it the right of action arises upon the actual change, and not upon the passage of the ordinance; and there is but one action for damages in cutting down a street and sidewalk; a recovery in one case is a bar to a new action in the other. *Hempstead v. Des Moines*, 63 Iowa, 36; *Pratt v. Des*

grade.¹ When the statute gives to an abutter the right to compensation for a change of grade, he can only recover when the facts and conditions prescribed by the statute are made to appear.² Hence, there must be an actual change of grade by the municipality. If the only acts performed by the municipality consist in causing the inequalities of the street to conform to an already established and existing grade, there is no change of the grade within the meaning of a statute giving the right to compensation therefor.³ ♦ If the right to compensa-

Moines N. W. Ry. Co., 72 Iowa, 249; Mulholland v. Des Moines, A. & W. R. Co., 60 Iowa, 740. See also Phillips v. Council Bluffs, 63 Iowa, 576; Brown v. Lowell, 8 Met. (Mass.) 172. Compare McCarthy v. St. Paul, 22 Minn. 527; Lewis, Em. Dom. §§ 210, 667. In *Indiana*, by statute, an established grade cannot be changed unless the damages which will be caused to adjacent property are first assessed and tendered to the owners. If the city fails to have damages assessed and to pay them, a common-law action lies. *Lafayette v. Wortman*, 107 Ind. 404.

For effect of *constitutional provisions*, declaring liability for property "damaged," upon rights of abutting owners in cases of changes of grade, see notes to §§ 1014, *ante*, and 1677, *post*; Lewis, Em. Dom. chap. v., §§ 223-224; Mills, Em. Dom. § 204 *a*. *Mode of exercising power to grade*. *Delphi v. Evans*, 36 Ind. 90. Proof of action of council establishing grade. *Nebraska City v. Lampkin*, 6 Neb. 27. In *Illinois*, change of grade must be by ordinance; resolution is not sufficient. *McDowell v. People*, 204 Ill. 499; *Chicago & N. P. R. Co. v. Chicago*, 174 Ill. 439, 444.

¹ *Torge v. Salamanca*, 176 N. Y. 324, rev'g 86 N. Y. App. Div. 211. In this case it is said that this statutory easement is similar in every respect to those invaded in the elevated railroad cases. Index, *Railroads in Streets*.

The primary object of the exercise of the power to alter the grade of streets is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage, and to adapt the street more perfectly for use as a public way. *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157. Injury to property by change of grade of street by the erection of an overhead viaduct may, under the statute, be the subject of an

award to the owners or persons interested, although the property is not actually taken. *Matter of Grade Crossing Com'rs*, 154 N. Y. 550. Statute providing for payment of damages for change of grade held not to be unconstitutional as embracing more than one subject not expressed in title. *People v. Fitch*, 147 N. Y. 355. Property owners whose lots do not abut upon the streets of which the grade is changed, and who have suffered no injury except that which indirectly results from a lawful improvement, held not entitled to compensation under the statute. *Matter of Grade Crossing Com'rs*, 166 N. Y. 69, aff'g 46 N. Y. App. Div. 473. Where the charter of a city provides for the alteration of a street grade previously established, and for a method of indemnity to abutting owners whose buildings are injured thereby, an alteration of such grade, although effected in connection with the paving of the street, subjects the city to an action at law against it to recover the resulting damages. *Fuller v. Mt. Vernon*, 171 N. Y. 247, aff'g 64 N. Y. App. Div. 621.

² *Comesky v. Suffern*, 179 N. Y. 393.

³ *Whitmore v. Tarrytown*, 137 N. Y. 409; *Farrington v. Mt. Vernon*, 166 N. Y. 233, aff'g 51 N. Y. App. Div. 250; *Comesky v. Suffern*, 179 N. Y. 393, 398; *Stenson v. Mt. Vernon*, 104 N. Y. App. Div. 17.

Where it simply appears that the village street commissioner without authority from it or formal action on its part changing the grade, has from time to time taken small quantities of earth from one place in a street and deposited it in another, or for the purpose of repairing and improving the street has cut it down in one place and raised it in another, or has dug out earth on the sides of the street for the purpose of widening the travelled bed thereof, a change or alteration of the

tion is conferred by Constitution or by statute, and the legislature prescribes a special remedy in such cases, that remedy alone can be pursued and an action will not lie.¹ But if the statute creates the right, and provides no special remedy, an ordinary civil action will lie.² And there is no exemption of the municipality from liability for resulting damages when the change of grade is *effected without authority of law*, or where it is made without complying with the provisions of the statute with reference thereto. Under either of

grade within the meaning of a charter provision entitling a person damaged thereby to compensation is not shown, although these acts, continued for a series of years, may have wrought an actual change in the grade. *Whitmore v. Tarrytown*, 137 N. Y. 409.

To justify a recovery for a change of grade under charter provisions, it must appear that the change or alteration was by or under authority of the municipality; there must have been some definite action by resolution or ordinance of its trustees fixing a new grade, or at least some definite acquiescence on its part in a new grade. *Whitmore v. Tarrytown*, 137 N. Y. 409. But to establish the existing grade of a street within the meaning of a city charter regulating changes of grade, *it is not essential that there should be a formal ordinance*; the grade may be established by long continued user and by the acquiescence and recognition of the municipality. *Folmsbee v. Amsterdam*, 142 N. Y. 118, aff'g 66 Hun (N. Y.), 214; *Stenson v. Mt. Vernon*, 104 N. Y. App. Div. 17.

¹ *Torge v. Salamanca*, 176 N. Y. 324, 330; *Smith v. Boston & A. R. Co.*, 181 N. Y. 132, aff'g 99 N. Y. App. Div. 94; *Melenbacker v. Salamanca*, 188 N. Y. 370, 377.

Under the *New York Grade Crossing Act* the power to measure and determine the damage as well as to award compensation is vested in commissioners to be appointed by the court, and the court cannot refuse to appoint on the ground that the injury to property not taken is slight and the damage of no consequence. *Matter of Grade Crossing Com'rs*, 154 N. Y. 561, aff'g 21 N. Y. App. Div. 633. Under the *Grade Crossing Law* of New York it is necessary that the provisions of that law, as well as the requirements of the different city charters, be complied with. Hence, in the case of all changes of grade crossings effected after the

enactment of the statute, notice must be given to the board of railroad commissioners and the railroad company, although the proceeding may primarily be brought under the city charter. *Matter of Ludlow Street*, 172 N. Y. 542, aff'g 59 N. Y. App. Div. 180. Under that statute the aggrieved owner of premises must file notice of claim for damages with the railroad commissioners within six months after the completion of the work. *Melenbacker v. Salamanca*, 188 N. Y. 370, aff'g 116 N. Y. App. Div. 691.

A statute providing for compensation for change of grade, and declaring that commissioners appointed by the court shall have "exclusive jurisdiction to estimate the loss and damage" sustained, does not deprive the courts of the power to review by *certiorari* the proceedings of the commissioners to determine whether their awards are made from legal and authorized evidence, include only authorized elements of damage, and follow a proper rule or basis in determining the amount. *Matter of Fitch*, 147 N. Y. 334. Index, *Certiorari*.

² *Hovey v. Mayo*, 43 Me. 322, 332; *Andover & M. Turnp. Co. v. Gould*, 6 Mass. 40; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Brown v. Lowell*, 8 Met. (Mass.) 172; *Reock v. Newark*, 33 N. J. L. 129; *Dore v. Milwaukee*, 42 Wis. 18; *White v. McKeesport*, 101 Pa. St. 394. Construction of remedial statutes allowing damages for change of grade. *Mills, Em. Dom.* § 197; *Lewis, Em. Dom.* §§ 207-218, 624. The owner of property adjacent to a street has a right to presume that the city will not permit an embankment above the established grade to remain in the street, or that it will provide proper culverts to prevent the embankment from impeding the flow of surface water. He is justified in building in reference to the established grade. *Damour v. Lyons City*, 44 Iowa, 276.

these conditions, the aggrieved abutter is entitled to recover his damages from the city in an ordinary action, although a special method of procedure may apply when the requirements of the statute are complied with.¹

§ 1153 (672). **Right of Lateral Support.** — As between the proprietors of adjacent lands, neither proprietor may excavate his own soil so as to cause that of his neighbor to loosen and fall into the excavation. The right to lateral support is not so much an easement, as it is a right incident to the ownership of the respective lands. The *preservation of lateral support to a highway*, as constructed for the public use, is an obligation to the community, which rests upon the adjacent land-owner. It is an absolute right in the public in the maintenance of which the members of the community are concerned; and it is of no materiality whether the fee of the street or highway is in the municipality, or whether it holds and controls it by a lesser title.² This was held to be the rule, although the municipality is not under a similar obligation to the abutting owner, for the reason that with respect to the construction and maintenance of the public highway, it exercises a governmental function and can come under no liability in its reasonable performance thereof, thus constituting an exception to the general rule of lateral support.³

§ 1154 (688). **Municipal Control over Uses; Right to make Sewers, Drains, &c.** — The power of the public, or of the municipal authorities representing by delegated authority the public, over streets is not confined to their use for the sole purpose of travel, but they

¹ Folmsbee v. Amsterdam, 142 N. Y. 118, aff'g 66 Hun (N. Y.), 214; Fuller v. Mt. Vernon, 171 N. Y. 247, aff'g 64 N. Y. App. Div. 621; Bernhard v. Rochester, 127 N. Y. App. Div. 875; Haubner v. Milwaukee, 124 Wis. 153.

If a change of grade be made without the prior enactment of an ordinance providing for it, it may be *ratified* by the subsequent acts of the municipality. Shiloh Street, 165 Pa. 386; Deer v. Sheraden Borough, 220 Pa. 307; Index, *Curative Acts*. Liability of a city for *trespass* on property by encroaching thereon in effecting change of grade. Davis v. Silverton, 47 Oreg. 171. An *abutting owner* may not cut down the grade of an existing street for the benefit or convenience of his own property to the detriment of his neighbors and without their consent.

If they are injured in their right of access, they may resist the change of grade, and it will, in a proper case, be restrained by injunction. Cunningham v. Fitzgerald, 138 N. Y. 165.

² Haverstraw v. Eckerson, 192 N. Y. 54, aff'g 124 N. Y. App. Div. 18. See also Milburn v. Fowler, 27 Hun (N. Y.), 568; Finegan v. Eckerson, 32 N. Y. App. Div. 233.

³ See *post*, § 1679; Haverstraw v. Eckerson, 192 N. Y. 54, 59, aff'g 124 N. Y. App. Div. 18. See also Moore v. Albany, 98 N. Y. 396, 407. In New York Steam Co. v. Foundation Co., 195 N. Y. 43, rev'g 123 N. Y. App. Div. 254, it was held that an abutter, in constructing a vault, must not disturb the support of pipes in a street, and is liable if he does, although he may not have been negligent.

may be used for many other purposes required by the public convenience. The *uses to which streets in towns and cities may legitimately be put* are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to the latter, all the public requires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil, and, by virtue of this ownership, is entitled, except for the purposes of repairs, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface; and he may maintain actions against those who obstruct the road or interfere with his rights therein.¹ But with respect to *streets in populous places*, the public convenience requires more than the mere right to pass over and upon them. They may need to be graded and brought to a level; and therefore the public or municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street or elsewhere, and may make *culverts, drains, and sewers* upon or under the surface.² Whether the municipal corporation holds the

¹ *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498, 512, *per McLean, J.*; *Kincaid v. Indianapolis Nat. Gas Co.*, 124 Ind. 577; *Magee v. Overshiner*, 150 Ind. 127, 133; *Bliss v. Ball*, 99 Mass. 597; *White v. Godfrey*, 97 Mass. 472; *Boston v. Richardson*, 13 Allen (Mass.), 152, 153; *Stackpole v. Healy*, 16 Mass. 33; *Peck v. Smith*, 1 Conn. 103; *Adams v. Rivers*, 11 Barb. (N. Y.) 393; *Griffin v. Martin*, 7 Barb. (N. Y.) 298; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Webber v. Eastern R. R. Co.*, 2 Met. (Mass.) 149; *Louisville v. U. S. Bank*, 3 B. Mon. (Ky.) 138, 158; *McDevitt v. Peoples Nat. Gas Co.*, 160 Pa. 367; *ante*, §§ 1072, 1079.

In *Cincinnati v. White*, 6 Pet. (U. S.) 431, the Supreme Court observes that "all public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary for an appropriation of a highway in the country." This is manifestly true, and that is too narrow a view of the nature of a *street* which holds that the public gets nothing but a mere right of way, and that the adjoining owner retains, as against the public every other right; the public must be taken to get every right necessary to the

beneficial use and enjoyment of the street, and the public rights in the streets of a populous place are much more enlarged and various than with respect to ordinary highways. Some of the cases have overlooked this difference, and applied too strictly the settled rules of the latter, in all their extent, to the former. See *ante*, § 1076; *infra*, § 1155; *Cincinnati v. Penny*, 21 Ohio St. 499.

The duty of keeping the highway in a safe condition for public travel involves the duty of a reasonable supervision of the highway. *Cusick v. Norwich*, 40 Conn. 376.

In *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, *Elliott, J.*, said: "There is an essential distinction between urban and suburban highways, and the rights of abutters are much more limited in the case of urban streets than they are in the case of suburban ways. We note the distinction between the classes of public ways and declare that the servitude in the one class is much broader than it is in the other, but it is not necessary to here remark with particularity the difference between the two classes of public ways, for we are here concerned only with suburban ways."

² *Barrows v. Sycamore*, 150 Ill. 588; *Fort Wayne v. Coombs*, 107 Ind. 75, 80, citing text; *Boston v. Richardson*,

fee of the street or not, the true doctrine is that the municipal authorities may, under the usual powers given them, do all acts appropriate or incidental to the beneficial use of the street by the public, of which, when not done in an improper and negligent manner, the adjoining fee-holder cannot complain.¹

§ 1155. **Nature and Extent of Public Rights in City Streets.**—Whilst, as has been pointed out above,² the courts in the consideration of questions arising from the use of the streets in a manner which is prejudicial to abutting owners have developed a rule of law which affords just and full protection to the rights of abutters, on the other hand a distinct tendency has been evinced to develop a correlative and enlarged view of the public rights. The courts have never regarded the public use to which streets might properly be devoted as depending upon the methods of travel and public uses generally recognized at the time when the streets were opened, or as depending on even such public uses and methods of travel as have the sanction of long continued custom and acquiescence. The use of the streets of a city must be *extended to meet new means of locomotion*,³ and in the case of *sub-surface structures* a disposition is shown by the courts to recognize these as legitimate street uses when designed for the public health or comfort, and the general advantage of the citizens of the municipality, and not maintained primarily or exclusively for the emolument of private corporations. This extended view of the proper uses of city streets is sometimes justified on the ground of an inherent difference between country highways

13 Allen (Mass.), 152; Lawrence v. Nahant, 136 Mass. 477; Stoudinger v. Newark, 28 N. J. Eq. 187, 191, aff'd 28 N. J. Eq. 446, citing text; Traphagen v. Jersey City, 29 N. J. Eq. 206, aff'd 29 N. J. Eq. 650; Matter of Yonkers, 117 N. Y. 564, 573, citing text; Palmer v. Larchmont El. Co., 158 N. Y. 231, quoting text; Huddleston v. Eugene, 34 Ore. 343, citing text. *Infra*, § 1149.

¹ Boston v. Richardson, 13 Allen (Mass.), 152, 159, *per Gray, J.*; West v. Bancroft, 32 Vt. 367, *per Pierpont, J.*; Barter v. Commonwealth, 3 Pa. (Penn. & W.) 253; Philadelphia v. Tryon, 35 Pa. St. 401; Williamsport v. Commonwealth, 84 Pa. St. 487, 493, citing text; Boyden & Walkley, 113 Mich. 609, quoting text; Ellison v. Allen, 30 N. Y. Supp. 441, quoting text; Bissell v. Collins, 28 Mich. 277; Cuming v. Prang, 24 Mich. 514, 523;

Kelsey v. King, 32 Barb. (N. Y.) 410; Aurora v. Fox, 78 Ind. 1; New Haven v. Sargent, 38 Conn. 50. See also Palatine v. Kreuger, 121 Ill. 72. How power to grade must be exercised. Delphi v. Evans, 36 Ind. 90; Terre Haute v. Turner, 36 Ind. 522; McGregor v. Boyle, 34 Iowa, 268; *post*, §§ 1211, 1222.

In *Illinois*, the general rule is recognized that municipal corporations, having the fee and exclusive control of the streets, may appropriate them to any use not incompatible with the object for which they were established. Quincy v. Bull, 106 Ill. 337; Barrows v. Sycamore 150 Ill. 588.

² *Ante*, §§ 1123, 1124.

³ Chicago v. Banker, 112 Ill. App. 94, 99; Magee v. Overshiner, 150 Ind. 127, 132; People v. Eaton, 100 Mich. 208. As to ordinances regulating the use of city streets by *automobiles*, see *ante*, § 714.

and city streets,¹ but other decisions seem to deny or to disregard this supposed distinction, and hold that country highways, just as city streets, may, in the discretion of the local authorities and under statutory authority, be applied to and used for legitimate public purposes intended for a benefit of the locality without any additional burden being imposed upon the fee thereof.²

But, upon whatever view it be founded, some courts have, rightly in our judgment, held that the public uses to which a city street may be applied without imposing an additional burden or servitude upon the fee are not to be limited by arbitrary rules, but are to be extended to meet public wants and necessities occasioned, it may be, by the enlarged uses to which abutting property is devoted. Thus, the Supreme Judicial Court of Massachusetts in holding that the owner of land taken for a street holds it subject to the *right of the legislature to authorize the city to construct a subway for local railroad travel*, and that the owner of the fee is not entitled to compensation therefor, declared that the public easement in a city street includes every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the

¹ In *McDevitt v. People's Natural Gas Co.*, 160 Pa. 367, *Williams, J.*, said with reference to the difference between country highways and city streets: "The necessity for drainage, for a water supply, for gas for purposes of lighting, for natural or fuel gas for heat, for subways, for telegraph and other wires, and for other urban necessities or conveniences, give to the municipality a control over the subsurface that the town has not. Property in a city is no less sacred than property in the country. The title of the owner is neither better nor worse because of the location of his land, but its situation may subject it to a greater servitude in favor of the public in a large compactly built city than would be imposed upon it in the open country. A city has the right to use the streets and alleys to whatever depth below the surface it may be desirable to go, for sewers, gas, and water mains, and all other similar uses. On taking the streets for these necessary or desirable purposes it is acting, not for its own profit, but for the public good. It is the representative of the inhabitants of the city, considering their health and family comfort, and their business needs; and every lot-owner shares in the benefits which such an appropriation of the streets and alleys confers.

If the city has control over the soil in and under the streets, it compensates him by making him a sharer in the public advantages that result from proper drainage, from a water supply, from the general distribution of gas, and the like. The disturbance of the owner's control over the subsurface of the street is in a legal sense an invasion of his rights, but it is *damnum absque injuria*. He has no right of action against the municipality therefor. The use of the surface is not restricted to the condition of travel in common use when a street is open, but such improved methods of travel as the public interests require may be adopted with the consent of the municipality."

² In *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, rev'g 6 N. Y. App. Div. 12, it was held that *electric light poles and fixtures* may be erected on a country highway just as in a city street without imposing any additional burden or servitude upon the fee; that in this respect there is no distinction between a city street and a country highway; and that the question whether the country highway should be devoted to this use is a matter to be referred to the discretion of the local authorities acting under powers conferred by the legislature.

use of the street. It pointed out that if it should be said that the persons originally laying out the streets did not contemplate this enlarged use of the public streets, yet on the other hand neither did they contemplate or foresee that the growth of cities should induce land owners to erect buildings fifteen or twenty stories high, or more, with basements, cellars, and sub-cellars, imposing additional burdens upon the streets and creating additional demands in respect thereof. In the original settlement and in laying out of city streets it was never supposed that the surface of the street would be insufficient for the use of the people with convenience and comfort in going to and fro and passing in and out in the transaction of business or the pursuit of pleasure, and the court held that if the enlarged use of the streets for these purposes necessitated the use of the sub-surface therefor, although it might be in the form of a tunnel or subway for railroad purposes, the legislature, or the municipality under legislative authority, was justified in applying the sub-surface to these extended uses without incurring any obligation to compensate the owner of the fee for the portions of the soil beneath the surface appropriated therefor.¹

¹ In *Sears v. Crocker*, 184 Mass. 586, 587, in holding that a subway might be constructed in Boston where the fee of the city streets is vested in private ownership subject only to the public easement, and that the owner of land within the street lines taken therefor is not entitled to compensation, *Knowlton*, C. J., forcibly observed: "This public easement includes every kind of travel and communication for the movement of or transportation of persons or property, which is reasonable and proper in the use of the street. In the early settlement of the country and in the location of streets in later times, these ways were appropriated to the public for the movement of persons and property from place to place, just as the adjacent lands were appropriated to the use of private owners. The original proprietors of lands in Boston and the original proprietors of lands in New York did not foresee the growth of population and business which has induced landowners in the largest cities to erect buildings fifteen or twenty stories high or more, and to excavate under them basements and cellars and subcellars to be ventilated by the use of engines, to be lighted by electricity, and filled with merchandise. They did not think that the surface of

the streets would be insufficient for the use of the people with convenience and comfort in moving to and fro and passing in and out in the transaction of business or the pursuit of pleasure. It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used. Our system, which leaves to the landowner the use of a street above or below the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it, in any way that is not unreasonable in reference either to the acts of all who have occasion to travel, or to the effect upon the property of abutters. The increase of the requirements for the public within the streets of our large cities has probably equalled if it has not surpassed the increase of requirements for business along the streets. The legislature, the guardian of public interests and of private rights, has determined that the space below the surface of certain streets in Boston

§ 1156 (690). **Right of City to construct Cisterns in Streets for Public Uses.** — Thus, although an easement only be acquired by the

is needed for travel. *The question is whether action under the statutes involves an acquisition of a new right as against the landowner, or only an appropriation and regulation of existing rights.* It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travellers or abutters. If it is not an unreasonable mode of using them, the mere fact that it *deprives abutters of the use of vaults* and other similar underground structures in the streets which they have hitherto maintained is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable."

But it is to be observed that in *Matter of Rapid Transit Com'rs*, 128 N. Y. App. Div. 103, the Appellate Division of the Supreme Court of New York for the Second Department held that in the case of *certain streets in Brooklyn*, the fee of which was either in the abutting proprietors or in third parties, the city of Greater New York, which embraced Brooklyn, could not, under legislative authority, construct a *rapid transit subway* for railroad purposes without making compensation to the abutter. The court declared that in the exercise of the powers conferred, "the governmental powers of the municipality were not enlarged; it was merely invested with powers and franchises which it had been unable to sell to a quasi-public corporation, just as it might have been invested with the powers and franchises of a water company. The city as a public corporation or distinct political entity was endowed by the legislature with the same powers and privileges which it had sought to confer upon a railroad corporation, and it thus became charged with the same duties and obligations which would have been assumed by a railroad corporation in accepting the franchise. For all the purposes of construction of this underground railroad

it became a railroad corporation, having no more right in the highways and public places of the city than would belong to any other corporation, and with no other or higher right to take private property than would belong to an ordinary municipal corporation," quoting § 109, *ante*. Therefore, the court held that, as the city of New York, in its capacity as a municipal corporation, was not the owner of the fee of the street, and as a long line of adjudications in New York holds that railroads, both street and steam, where the fee is not in the city, constitute an added burden upon the streets of a municipality entitling the owners of the fee to compensation for the taking of the property (*Peck v. Schenectady R. Co.*, 170 N. Y. 298, 301, and authorities cited), the legislature must have intended that abutting owners should be entitled to compensation for property taken thereby. This decision must, however, be accepted with qualifications, and it is doubtful whether its reasoning is generally applicable to other States, for the New York Court of Appeals, contrary to the rule generally adopted in other States, held in *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404, that the construction of a horse railroad in a street, the fee being in the abutter, without the consent of the owner of the fee, is the imposition of an additional burden or servitude upon the fee, and afterwards reaffirmed this ruling in *Peck v. Schenectady R. Co.*, 170 N. Y. 298, and applied it to *electric street surface railroads*. In the latter case, the Court of Appeals recognized the fact that the rule in New York is contrary to the great weight of authority, and only felt constrained to apply it because, as it said, "The doctrine of the *Craig Case* has now become a rule of property, which this court cannot in justice overthrow. . . . Therefore, notwithstanding the fact that many jurisdictions have held a contrary doctrine still a principle which has been so thoroughly engrafted upon the law of our own jurisprudence should not be lightly disregarded."

As to right of a city to use the portion of the street *below the surface*, see *Henry v. Cincinnati*, 25 Ohio Cir. Ct. 178; *Kittanning v. Kittanning Consol. Nat.*

public, the municipal or local authorities may build a reservoir or *cistern in a street*, to retain water with which to sprinkle streets or extinguish fires.¹ In a case in Iowa, occurring in a city where the fee of the soil in the street was in the adjoining proprietor, subject to the public easement, it appeared that the city corporation built a cistern in the street underneath the surface, near the line of the defendant's lot, and that subsequently the defendant erected a building on his lot on the line of the street, and in excavating for his cellar and foundation wall, and in taking the earth from under the sidewalk in the street, occasioned the destruction of the cistern, for which an action was brought against him by the city; and it was held that the action could not be maintained, because, the fee of the street being in the defendant, subject to the public easement, the city had no right, without his consent, to construct the cistern. The court observes that, "subject to the public easement, the owner of the adjoining lots is the absolute owner of the soil of the streets, and retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not inconsistent with the public right of way."² So far as this case affirms that a municipal corpora-

Gas. Co., 26 Pa. Super. Ct. 355; Dempster v. United Traction Co., 205 Pa. 70, 76. Index, *Railroads in Streets*.

¹ West v. Bancroft, 32 Vt. 367. See also Lostutter v. Aurora, 126 Ind. 436, 438; Savage v. Salem, 23 Ore. 381.

The cost of public wells and cisterns in Louisville may be apportioned among the owners of lots fronting the public ways to the middle of each square from the intersection of streets where located. Louisville v. Osborne, 10 Bush (Ky.), 226; Louisville Steam Forge Co. v. Anderson (Ky.), 57 S. W. Rep. 617; Abraham v. Louisville, 23 Ky. Law Rep. 375; 62 S. W. Rep. 1041.

But in Wright v. Austin, 143 Cal. 236, it is held that the sprinkling of a highway is not a necessary incident to the enjoyment of the public easement in the highway. Hence, the municipality cannot sink a well to obtain water for that purpose. The title to all the percolating water in the highway is in the owner of the fee. But *quære* as against the city for its reasonable uses. In Suffield v. Hathaway, 44 Conn. 521, the title to the fee of a highway to the centre thereof was in the abutting owner, and a spring of water issued from the owner's side of the highway but within its lines. It was held that the selectmen of the town

could not divert the water from the spring to a *public* trough on the other side of the highway. But *quære*?

Where the fee of the highway is in the abutter, the city may not sink a well in the street and thereby tap a vein of mineral water which supplies a well on the adjoining property of an abutter. The court held that while the city had the right to put down a well to obtain water for public purposes, the public easement did not justify it in trying to tap the mineral well of the abutter, thereby drawing off the water. Hamby v. Dawson Springs, 126 Ky. 451; 104 S. W. Rep. 259. But *quære*? A well, originally dug in a street by a lot-owner, may be taken charge of by the corporate authorities and made fit for convenient public use. The corporation is not guilty of maintaining a nuisance as against the abutting lot-owner where it does no more than construct a platform around the mouth of the well and causes a pump to be placed on it for the use and convenience of the public. Lostutter v. Aurora, 126 Ind. 436.

² Dubuque v. Maloney, 9 Iowa, 450, 461, *per Stockton, J.* In towns and cities platted under the code of Iowa, the lot-owners do not hold the fee to the middle of the street, and have no

tion cannot rightfully construct a public cistern for municipal uses, in a public street, without the consent of the abutter holding the fee, it is directly opposed to the case from Vermont and other cases cited, as well as to the sound and necessary principle above laid down, namely, that the city corporation may make every use of a street which reasonably conduces to the public convenience and enjoyment. It will never do, we think, to hold that a municipality, invested with the control of streets and charged with the duty of preserving the public health, promoting the public welfare, and of making provision to extinguish fires, may not, if it deems it expedient, construct a subterranean reservoir or sewer in the middle of a street without the assent of the opposite lot-owners.¹

§ 1157 (728). **Bridges; Duty of Repair; Municipal Control.** — Having considered the relation of municipal corporations to streets and highways within their limits, it remains to refer to bridges. Bridges are usually part of the street or highway.² In this country

other interest in the streets except a right of way common to the whole public. This is doubtless too broad a statement. Dubuque and Keokuk are exceptions in this respect. *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Ib.* 261; *Haight v. Keokuk*, 4 Iowa, 199; *Dubuque v. Maloney*, *supra*; *Dubuque v. Benson*, 23 Iowa, 248; *Des Moines v. Hall*, 24 Iowa, 234; *Cook v. Burlington*, 30 Iowa, 94. See chapter on Dedication, *ante*, §§ 1072, 1076. City has the right to impose conditions upon which an adjacent property owner may be permitted to excavate area under a sidewalk, and until the conditions are complied with, it is authorized to forbid such excavation being made. *Davis v. Clinton*, 50 Iowa, 585; *Des Moines v. Hall*, 24 Iowa, 234. A city also has power to fill up wells in streets, as a sanitary measure, and the passage of an ordinance for that purpose is *ipso facto* a revocation of permission to construct and maintain them. They may be abolished at the expense of the public and without compensation to the persons who constructed them. *Ferrenbach v. Turner*, 86 Mo. 416.

¹ But although the city may use or authorize the use of its streets for water-pipes, it cannot, at least without express legislative authority, construct the water works themselves within the limits of the street. Hence, a *water-tank* is an unlawful use. *Morrison v. Hinkson*, 87 Ill. 587; *Davis v. Appleton*,

109 Wis. 580. Similarly, a *stand-pipe* in the street is an unlawful use. *Barrows v. Sycamore*, 150 Ill. 588. See also *Howe v. Lowell*, 171 Mass. 575, where it was held that a *pumping station* was not incident to a common, park, or boulevard, and was a breach of a condition that the lands should only be used for these purposes.

² *Dodge County v. Chandler*, 96 U. S. 205; *Washer v. Bullitt County*, 110 U. S. 558, 564; *State v. Street*, 117 Ala. 203, 208; *Jacksonville v. Drew*, 19 Fla. 106; *Floyd County v. Rome St. R. Co.*, 77 Ga. 614; *Chicago v. Powers*, 42 Ill. 169; *Goshen v. Myers*, 119 Ind. 196; *Manderschid v. Dubuque*, 29 Iowa, 73; *Commonwealth v. Central Bridge Co.*, 12 Cush. (Mass.) 242, 244; *Cascade County v. Great Falls*, 18 Mont. 537; *Whitall v. Gloucester County*, 40 N. J. L. 302; *Read v. Camden*, 54 N. J. L. 347, 373; *Mahnken v. Monmouth County*, 62 N. J. L. 404; *Spencer v. Hudson County*, 66 N. J. L. 301, 304; *Woodbridge v. Raritan Traction Co.*, 64 N. J. Eq. 169, 171; *Birmingham v. Rochester City & B. R. Co.*, 137 N. Y. 13; *Sadlier v. New York City*, 185 N. Y. 408, 416; *Bank of Idaho v. Malheur County*, 30 Oreg. 420; *Brand v. Multnomah County*, 38 Oreg. 79, 94; *Rigony v. Schuykill*, 103 Pa. 382; *Pittsburg & W. E. P. R. Co. v. Point Bridge Co.*, 165 Pa. 37; *State v. Wood County*, 72 Wis. 629, 637.

A bridge is said to be a mere sub-

the power of municipal corporations to build them, and their authority over them, are wholly statutory, and their duties in respect to them are either prescribed by statute or spring from their powers. There is *no common-law responsibility* on municipal corporations in respect to the repair of bridges within their limits; but where bridges are part of the streets, and built by the municipal authorities under powers given to them by the legislature, *they are liable for defects therein*, on the same principles and to the same extent as for defective streets, — a subject elsewhere treated.¹

stitute for a ferry. *Per Savage, C. J.*, in *People v. Saratoga & R. R. Co.*, 15 Wend. (N. Y.) 114, 133. Index, *Ferry*. Where the limits of a city are extended so as to include a bridge owned by the county, the bridge becomes a part of the city street by which it is approached and must be kept in repair by the city. *Cascade County v. Great Falls*, 18 Mont. 537. See *supra*, §§ 1138-1141. Index, *Bridge*; *Charter*.

¹ See cases first cited to this section; also *Smoot v. Wetumpka*, 24 Ala. 112; *Richardson v. Royaltown & W. Turnp. Co.*, 6 Vt. 496; *Wayne Co. Turnp. Co. v. Berry*, 5 Ind. 286; *Humphreys v. Armstrong County*, 56 Pa. St. 204; *Cooley v. Essex County*, 27 N. J. L. 415; *Mechanicsburg v. Meredith*, 54 Ill. 84; *post*, chaps. xxix., xxxii.; *Chicago v. McGinn*, 51 Ill. 266; *Burritt v. New Haven*, 42 Conn. 174; *Jacksonville v. Drew*, 19 Fla. 106; *Howard County v. Legg*, 93 Ind. 523. See *post*, § 1688, note.

Bridge defined: *State v. Gorham*, 37 Me. 451; *Regina v. Derbyshire*, 2 Q. B. 745; *Sussex County v. Strader*, 18 N. J. L. 108. The word "bridge" may embrace within its meaning such abutments as are necessary to make the structure accessible and useful. *Tolland v. Willington*, 26 Conn. 578; *Bardwell v. Jamaica*, 15 Vt. 438; *Sussex County v. Strader*, 18 N. J. L. 108; *Rex v. West Riding*, 7 East, 596. *Approaches to bridge*: *Commonwealth v. Deerfield*, 6 Allen (Mass.), 449; *Swansea v. Somerset*, 132 Mass. 312; *Burritt v. New Haven*, 42 Conn. 174. Statutory authority for the construction of "bridges" held to cover the construction of a *viaduct* over a railroad company's tracks within the city. *Argentine v. Atchison, T. & S. F. R. Co.*, 55 Kan. 730; *State v. Gorham*, 37 Me. 451.

One town has no right of action for

contribution from another town of any part of the expense of erecting or repairing a bridge on the boundary line between them, unless there is an agreement to bear part of the expense. *Dimmick H. Com'rs v. Waltham H. Com'rs*, 100 Ill. 631. "It is clear that at the common law a county might be required to maintain a bridge or causeway across its boundary line, and extending into the territory of an adjoining county. The same rule prevails in this country." *Mr. Justice Woods, Washer v. Bullitt County*, 110 U. S. 558.

Duty to repair; Liability for defects: Both by the common law and the statute of 22 Henry VIII., affirming it, the duty of repairing public bridges rested upon the county in all cases where no private person or other body is specially charged therewith. 2 Inst. 700, 701; *King v. West Riding*, 2 East, 342, 356; *Hill v. Livingston Co. Sup.*, 12 N. Y. 52; *Follett v. People*, 12 N. Y. 273; *People v. Cooper*, 6 Hill (N. Y.), 516; and at common law it was indispensable to the legal character of the bridge repairable by the county, that it should be shown to cross a stream or water-course (*King v. Oxfordshire*, 1 B. & Ad. 289; *King v. Salop County*, 13 East, 95; *King v. Lindsey*, 14 East, 317; *King v. Northampton*, 2 M. & S. 262); but these words were held to cover water flowing in a channel between banks more or less defined; even though the channel were occasionally dry. *King v. Marquis of Buckingham*, 4 Camp. 189; *King v. Oxfordshire*, 1 B. & Ad. 289. See also *King v. Trafford*, *ib.* 874; *King v. Whitney*, 3 A. & E. 69; *King v. West Riding*, 2 East, 342; *King v. Northampton*, 2 M. & S. 262; *King v. Devon, Ry. & M.* 144; *Queen v. Derbyshire*, 2 Q. B. 745, 756. Whether the particular structure is a bridge or not,

§ 1158 (729). **Municipal Power to construct Free Bridges over Streets.** — An incorporated town, being charged by its charter or by

if there be reasonable evidence as to it, is a question for the jury. *Queen v. Gloucestershire*, 1 C. & M. 506; *Tolland v. Willington*, 26 Conn. 578. But see *Madison Co. Com'rs v. Brown*, 89 Ind. 48.

The common-law responsibility of counties to repair bridges has never prevailed in the United States. *Hedges v. Madison County*, 6 Ill. 567; *Hill v. Livingston*, 12 N. Y. 52; *Huffman v. San Joaquin*, 21 Cal. 426. *Lee County v. Yarbrough*, 85 Ala. 590, citing note; *Williams v. Stillwell*, 88 Ala. 332; *Rapho v. Moore*, 68 Pa. 404. In some of the States it is imposed by statute on townships. *Lewis v. Litchfield*, 2 Root (Conn.), 436; *Swift v. Berry*, 1 Root (Conn.), 448; *Lobdell v. New Bedford*, 1 Mass. 153; *State v. Campton*, 2 N. H. 513; *State v. Canterbury*, 28 N. H. 195; *State v. Boscawen*, 32 N. H. 331. And in some on counties. *Wilson v. Jefferson County*, 13 Iowa, 181; *Sussex County v. Strader*, 18 N. J. L. 108; *Bartlett v. Crosier*, 17 Johns. (N. Y.) 439; *post*, chap. xxxii. A provision in a statute that a certain bridge, when completed, shall be a public bridge, and "under the control of the county supervisors," makes it a county charge. *People v. Dutchess County*, 1 Hill (N. Y.), 50. In *Michigan*, by statute, townships are liable for injuries caused by defective bridges. *Medina v. Perkins*, 48 Mich. 67. It is there held that while maintaining a bridge a township is bound to keep it in such repair as is required by a bridge of its particular kind. *Stebbins v. Keene Tp.*, 60 Mich. 214; *Same v. Same*, 55 Mich. 552; *post*, chap. xxxii. While in erecting bridges a township is bound to make them safe for ordinary use, it is not required to anticipate unusual strains, such as the passage of very heavy machinery. *Fulton Iron Works v. Kimball*, 52 Mich. 146; *McCormick v. Washington*, 112 Pa. St. 185. See to same effect, *Wilson v. Granby*, 47 Conn. 59. Whether *mandamus* lies to compel the body bound to repair bridges and highways to do so, or whether the remedy is by indictment, *quære*. 1 Hill, 50, *supra*; *post*, § 1493.

A mandatory duty imposed upon a county by statute to repair or rebuild a bridge may be enforced by *mandamus*

on the relation of a citizen who is injured by the failure to rebuild or repair. *People v. Queens County*, 142 N. Y. 271. Duty to maintain and repair a bridge forming part of an abandoned turnpike road, see *People v. Queens County*, 151 N. Y. 190.

If a bridge is built by an individual for his own exclusive benefit, over a highway, he is bound to keep it in a safe condition, or respond to an action for damages to any person injured by his omission. *Per Nelson, J.*, in *Heacock v. Sherman*, 14 Wend. (N. Y.) 58; 13 Co. 33; 1 Bac. Ab. tit. "Bridges," 535, note; 2 East, 342; 5 Burr. 2594; 13 East, 220; *Woolrych on Ways and Bridges*, 202, 204, and cases; 1 Salk. 359; 2 Blacks. 687. How long this obligation continues, where bridges become useful to and are generally used by the public, see 14 Wend. 58, *supra*. As to the repair, by the public, of bridges originally built by private persons, see also *Bisher v. Richards*, 9 Ohio St. 495, 502, *per Gholson, J.*; *State v. Campton*, 2 N. H. 513; *Dygert v. Schenck*, 23 Wend. (N. Y.), 446; *Requa v. Rochester*, 45 N. Y. 129; *Sampson v. Goochland Co. Jus.*, 5 Gratt. (Va.) 241; *Monmouth v. Gardiner*, 35 Me. 247; *Pa. R. Co. v. Duquesne Bor.*, 46 Pa. St. 223; *Smoot v. Wetumpka*, 24 Ala. 112; *Indianapolis v. McClure*, 2 Ind. 147. In *Houfe v. Fulton*, 34 Wis. 608, the town was, under the circumstances, held estopped to deny its duty to keep the bridge in repair, though originally built by private subscription.

Powers and duties of cities in respect to bridging canals and rivers which intersect their streets. *Korah v. Ottawa*, 32 Ill. 121; *Joliet v. Verley*, 35 Ill. 58; *Towles v. Chatham Co. Inf. Ct. Jus.*, 14 Ga. 391; *Wayne Co. Turnp. Co. v. Berry*, 5 Ind. 286; *Scott v. Chicago* (bridges over river in city limits), 1 Biss. 510; *Chicago v. Powers*, 42 Ill. 169. No common-law obligation on canal company to bridge a highway laid out subsequent to making of canal. *Morris C. & B. Co. v. State*, 24 N. J. L. 62.

Where a city lawfully builds over a navigable river a bridge constructed with a draw, the right to navigate the river, and the right to cross the bridge, co-exist and qualify each other, but such

statute with the control over its streets and the duty to improve the same, may contract for the *construction of free bridges* over a stream dividing its streets, and issue its warrants or orders to raise money to be so expended. But such corporation has no implied power to *execute a deed of trust conveying a bridge erected by the corporation* to trustees, authorizing the charging of tolls thereon, and pledging the bridge and the tolls collected thereon for the payment of the debt created for its construction.¹ A city corporation, invested with the ordinary powers over streets, was held to be authorized to provide for the construction of a free bridge across a river running through it, upon ground dedicated and set apart for a street, although the city was laid off on only one side of the river, but was approached from the other side by a road touching the river where the bridge was located.²

§ 1159. **Bridge Approaches and Elevated Viaducts.**—The legislative grant of power to construct a bridge carries with it the right to elevate the bridge to a sufficient height to avoid the danger of ice and floods; and the right to elevate carries with it by necessary implication the right to construct *reasonable and proper approaches*.³ The *erection of a bridge or elevated structure* necessary for carrying out a public purpose is an exercise of governmental powers when made under express legislative authority, and the municipality incurs no liability for consequential injuries to others; it is only liable for the taking of private property or easements, or where by

a bridge must not materially obstruct the navigation of the river; and the city, if charged with the *duty of working and keeping the draw open*, is *civilly liable* to a navigator for negligence, causing damage, in the performance of his duty. *Scott v. Chicago*, 1 Biss. 510. Measure of damages in such case stated by *Drummond, J. Ib.* City also liable to traveller for negligently leaving draw open and unguarded, and not properly lighted. *Chicago v. Wright*, 68 Ill. 586.

Municipal power to protect. *Hooksett v. Amoskeag Manuf. Co.*, 44 N. H. 105; *Korah v. Ottawa*, 32 Ill. 121; *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Freedom v. Ward*, 40 Me. 383; *Gallia Co. Com'rs v. Holcomb*, 7 Ohio, Pt. I. 232; *Calais v. Dyer*, 7 Me. 155; *Andover v. Sutton*, 12 Met. (Mass.) 182; *Monmouth v. Gardiner*, 35 Me. 247; *ante*, § 1140, note. A city which is bound by its charter to *repair bridges*

may contract for the *maintenance* thereof. *State v. Cowgill & H. Milling Co.* 156 Mo. 620.

¹ *Mullarkey v. Cedar Falls*, 19 Iowa, 21; *Dively v. Cedar Falls*, 27 Iowa, 227; *Clark v. Des Moines*, 19 Iowa, 199; *Chicago v. Powers*, 42 Ill. 169; *Corey v. Rice*, 4 Lansing (N. Y.), 141. See Index, *Bridge*; *Charter*; *Ferry*.

² *Dively v. Cedar Falls*, 27 Iowa, 227. *But not a toll-bridge.* *Ib.*; *Mullarkey v. Cedar Falls*, 19 Iowa, 21; *Bell v. Fouch*, 21 Iowa, 119; *Barrett v. Brooks, Ib.* 144; *ante*, § 1158.

A municipal corporation cannot, without express authority, erect a *toll-bridge and levy and collect tolls*. *Clark v. Des Moines*, 19 Iowa, 199; *Colton v. Hanchett*, 13 Ill. 615.

³ *Commonwealth v. Pittston Ferry Bridge Co.*, 148 Pa. 621. Index, *Bridge*; *Charter*; *Ferry*; *Railroads in Streets*.

negligence, lack of care, or some other affirmative act, a direct injury is occasioned.¹ The construction of an *elevated bridge approach* or of an *elevated viaduct* within the lines of a street, when devoted to the ordinary purposes of street travel, is regarded as a *mere change of the grade* of the street, and as such does not take any property or easement of an abutter for which he is entitled to compensation.²

§ 1160 (666). **Vacation of Streets.**—The *plenary power of the legislature over streets and highways* is such that it may, in the absence of special constitutional restriction, vacate or discontinue the public easement in them, or invest municipal corporations with this authority.³ But the power to vacate streets and public places is

¹ *Sadlier v. New York City*, 185 N. Y. 408, aff'g 104 N. Y. App. Div. 82.

² *De Lucca v. North Little Rock*, 142 Fed. Rep. 597; *Selden v. Jacksonville*, 28 Fla. 558; *Willis v. Winona*, 59 Minn. 27; *Willetts Mfg. Co. v. Mercer County*, 62 N. J. L. 95; *Talbott v. New York & H. R. R. Co.*, 151 N. Y. 155, aff'g 78 Hun (N. Y.), 473; *Sauer v. New York City*, 180 N. Y. 27, aff'd 206 U. S. 536; *Sadlier v. New York City*, 185 N. Y. 408, aff'g 104 N. Y. App. Div. 82; *Brand v. Multnomah County*, 38 Ore. 79, 94; *Mead v. Portland*, 45 Ore. 1, aff'd 200 U. S. 148; *Home Building Co. v. Roanoke*, 91 Va. 52; *Colclough v. Milwaukee*, 92 Wis. 182; *Walish v. Milwaukee*, 95 Wis. 16.

Where a bridge has been built for the purpose of continuing a highway across a stream, the *approach*, when built within the lines of the highway, is *part of the highway* and does not constitute an additional burden upon the land. *Willetts Mfg. Co. v. Mercer County*, 62 N. J. L. 95. In *Sandpoint v. Doyle*, 14 Idaho, 749, it was held that where an *approach to a bridge* was so built that one side thereof coincided with the line of the street next the plaintiff's premises, the plaintiff was entitled to construct a platform to connect his property with the approach for purposes of ingress and egress. The court was of the opinion that the approach formed a part of the street, and that the abutter's easement in the street entitled him to ingress and egress by the bridge and its approaches.

³ *Columbus v. Union Pac. R. Co.*, 137 Fed. Rep. 869, quoting text; *Southern R. Co. v. Ables*, 153 Ala. 523; 45 So. Rep. 234, quoting text;

Polack v. San Francisco Orphan Asylum, 48 Cal. 490; *Brook v. Horton*, 68 Cal. 554; *San Francisco v. Burr*, 108 Cal. 460; *Whitsett v. Union Depot & R. Co.*, 10 Colo. 243; *Bailey v. Philadelphia, W. & B. R. Co.*, 4 Harring. (Del.) 389; *Patton v. Rome*, 124 Ga. 525; *Marietta Chair Co. v. Henderson*, 121 Ga. 399; *Coker v. Atlanta, K. & N. R. Co.*, 123 Ga. 483, 486, citing text; *People v. Walsh*, 96 Ill. 232; *Chicago v. Union Building Assoc.*, 102 Ill. 379, 397; *Meyer v. Teutopolis*, 131 Ill. 552, citing text; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 22, quoting text; *Spiegel v. Gansberg*, 44 Ind. 418; *State v. Huggins*, 47 Ind. 586; *Gray v. Iowa Land Co.*, 26 Iowa, 387; *Barr v. Oskaloosa*, 45 Iowa, 275; *Marshalltown v. Forney*, 61 Iowa, 578; *McLachlan v. Gray*, 105 Iowa, 259, 262, citing text; *Spitzer v. Runyan*, 113 Iowa, 619, quoting text; *Getchell & M. L. & Mfg. Co. v. Des Moines Union R. Co.*, 115 Iowa, 734; *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625, quoting text; *Eudora v. Darling*, 54 Kan. 654; *Leavenworth v. Douglass*, 59 Kan. 416, 420; *Highbarger v. Milford*, 71 Kan. 331; *Hinchman v. Detroit*, 9 Mich. 103; *People v. Ingham County*, 20 Mich. 95; *Riggs v. Detroit Board of Education*, 27 Mich. 262; *Cooper v. Detroit*, 42 Mich. 584; *Glasgow v. St. Louis*, 107 Mo. 198; *Jersey City v. State*, 30 N. J. L. 521; *Central Park Com'rs, In re*, 61 Barb. (N. Y.) 40; *Fearing v. Irwin*, 4 Daly (N. Y.), 385, aff'd 55 N. Y. 486; *People v. Kerr*, 27 N. Y. 188, 192, 193; *Coster v. Albany*, 43 N. Y. 399; *Kellinger v. Forty-second St. R. Co.*, 50 N. Y. 206; *Reis v. New York City*, 188 N. Y. 58, 67,

not inherent in a municipality by reason of its creation and existence, nor is it to be implied from the fact that it is vested with general control over such streets and places. The power *must be expressly*

aff'd 113 App. Div. 464; *Philadelphia & R. R. Co. v. Philadelphia & T. R. Co.*, 6 Whart. (Pa.) 25; *Northern Liberties Com'rs v. Northern Liberties Gas Co.*, 12 Pa. St. 318; *Paul v. Carver*, 26 Pa. St. 223; *Stuber's Road*, 28 Pa. St. 199; *McGee's Appeal*, 114 Pa. 470, 476, citing text; *Union Street*, Pottsville, 140 Pa. 525; *State v. Taylor*, 107 Tenn. 455, citing text; *Ponischil v. Hoquiam Sash & D. Co.*, 41 Wash. 303; *Mottman v. Olympia*, 45 Wash. 361; *Kimball v. Kenosha*, 4 Wis. 321; *supra*, §§ 1122-1129. Index, *Railroads in Streets*; *infra*, chap. xxv.

Legislative act validating the action of the municipal authorities in vacating and changing location of a public park was sustained. *Kettle v. Fremont*, 1 Neb. 329. See Index, title *Curative Acts*. In *Baird v. Rice*, 63 Pa. St. 489, an act authorizing the erection of municipal public buildings on a square originally dedicated for that purpose, and the vacation of so much of two public streets as might be necessary, was held constitutional. *Ante*, § 1097. Says Mr. Justice *Campbell*, in *Riggs v. Board of Education of Detroit*, 27 Mich. 262: "In *Hinchman v. Detroit* [*supra*], the power of the city to vacate a portion of the Campus Martius was sustained, and it was held this might be done without determining in advance the future uses. And where private property is not taken, the right by authority of legislation to surrender or extinguish public rights has never been questioned. 3 *Smith's Leading Cases*, 96; *People v. Ingham Co. Sup.*, 20 Mich. 95."

But in *Indiana* the principle was regarded as sound, that in addition to the public easement, and distinct from it, there exists in favor of the owner of a lot upon the street, and as appurtenant to it, a private right to use the street and to insist that the street shall forever be kept open to its full width. [See on this point, *ante*, §§ 1123, 1124; *post*, §§ 1168, note, 1245, 1259, 1260; and case of *Fritz v. Hobson*, cited in the note.] And the court considered the conclusion to follow from this principle that the legislature cannot, without the consent of the lot-owner, or com-

pensating him for the damage, vacate a street, or any part of it, in front of or adjoining the lot. *Haynes v. Thomas*, 7 Ind. 38; *Indianapolis v. Croas*, 7 Ind. 9; *Tate v. Ohio & M. R. Co.*, 7 Ind. 470, 483. But as to this point, *quere*? In view of the considerations stated in §§ 1123, 1124, 1127, 1168, and note, that the abutter has *proprietary* rights or easements in the streets, there seems to be some difficulty in holding that although he has a remedy for obstructions to the streets and for invasions of his *proprietary* rights therein, he is without remedy if the street is altogether vacated. The text, however, states the general result of the authorities. Perhaps the distinction may be this. The State may abandon the public easement or right therein, or change the use, but cannot, except by the exercise of the power of eminent domain, close the street so as to deprive the abutter of his easements of access, &c., whereas in New York such easements are held to be "property" in the sense of the eminent domain clause of the Constitution. See Judge *Hare's* discussion of the subject, 1 *Am. Const. Law*, 372-378. *Lewis, Em. Dom.* § 13. As to the existence and nature of the abutter's rights in streets and whether such rights are "property" within the meaning of the Constitution, see Index, *Abutter*; *Constitution*; *Railroads in Streets*; *infra*, chap. xxv.

When a street has been vacated, it becomes as if it had never existed, and the city *cannot restore* the street by a simple repeal of the ordinance vacating it. The only way it can again become a street is by regular proceedings to open it under the power of eminent domain. *Belleville v. Hallowell*, 41 Kan. 192. Where proceedings to vacate an alley have been had by a town and the abutting owner has thereupon entered upon the alley and made valuable improvements by erecting buildings on it, the town is *estopped* to dispute the regularity and validity of the proceedings to vacate the alley. *Blennerhassett v. Forest City*, 117 Iowa, 680.

conferred by legislative enactment, or must be necessary to the exercise of some power expressly conferred; and any requirements imposed by statute must be substantially complied with.¹ The

¹ *MacIntosh v. Nome*, 1 Alaska, 492; *Texarkana v. Leach*, 66 Ark. 40, citing text; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Cromwell v. Connecticut B. S. Quarry Co.*, 50 Conn. 470; *Greist v. Amrhyh*, 80 Conn. 280; *Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co.*, 39 Fla. 306; *Georgia Southern & F. R. Co. v. Harvey*, 84 Ga. 372; *Marietta Chair Co. v. Henderson*, 121 Ga. 399; *Coker v. Atlanta, K. & N. R. Co.*, 123 Ga. 483, 486; *St. Louis, A. & T. H. R. Co. v. Belleville*, 122 Ill. 376; *Pew v. Littlefield*, 115 Ill. App. 13; *Moffitt v. Brainard*, 92 Iowa, 122; *Gargan v. Louisville, N. A. & C. R. Co.*, 89 Ky. 212; *Martin v. Louisville*, 97 Ky. 30; *Louisville v. Bannon*, 99 Ky. 74; *Fitchburg v. Fitchburg R. Co.*, 180 Mass. 535; *Miller v. Corinna*, 42 Minn. 391; *New London v. Davis*, 73 N. H. 72; *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 540; *Newark v. Delaware, L. & W. R. Co.*, 42 N. J. Eq. 196; *Reilly v. Racine*, 51 Wis. 526, 530; *James v. Darlington*, 71 Wis. 173; *Baines v. Janesville*, 100 Wis. 369; *Ashland v. Chicago & N. W. R. Co.*, 105 Wis. 398; *Johnston v. Lonstorf*, 128 Wis. 17.

Where a statute gives jurisdiction to a city over the streets within its domain, and another statute gives the same power and authority over an intersecting boulevard to park commissioners, each has an equal right within the areas covered by these intersections, which belong to both in common. Neither authority can cut off or close up the intersecting ways without leave of the other. *West Chicago Park Com'rs v. Chicago*, 170 Ill. 618. *What will confer the power.* *State v. Elizabeth*, 37 N. J. L. 432. Its scope. *Quinn v. Paterson*, 27 N. J. L. 35; *State v. New Brunswick*, 32 N. J. L. 548. Power of the legislature over public uses. *Newark v. Stockton*, 44 N. J. Eq. 179; *ante*, §§ 1100, 1103, 1104.

The power to vacate a street is the same whether the public interest in the street was acquired by *dedication* or by *condemnation*. *Glasgow v. St. Louis*, 107 Mo. 198. A power to discontinue a highway may be exercised to take effect at a subsequent time, or when another highway shall be laid

out and constructed to take the place of the old one. *New London v. Davis*, 73 N. H. 72, 75. See also *Coakley v. Boston & M. R. Co.*, 159 Mass. 32, 36.

"An alteration by competent authority of an existing road or way is a discontinuance of those portions of the way which do not come within the newly assigned limits; and no special order of discontinuance is necessary." *Brook v. Horton*, 68 Cal. 554, citing *Commonwealth v. Westborough*, 3 Mass. 406; *Commonwealth v. Cambridge*, 7 Mass. 158, and *Bowley v. Walker*, 8 Allen (Mass.), 21. See also *Florida Cent., & P. R. Co. v. Ocala St. & S. R. Co.*, 39 Fla. 306; *Naschold v. Westport*, 71 Mo. App. 508. Power conferred on a city to "establish or vacate" any street or alley held not to confer power to narrow the same. *Dorsch v. Beaumont Glass Co.*, 74 Ohio St. 208. The power to vacate a street exists as an incident to the power to lay out the city streets on a map; existing streets may be vacated when necessary to the exercise of the statutory power to lay out streets. *Matter of New York City*, 166 N. Y. 495, aff'g 56 N. Y. App. Div. 122. Power generally "to open, lay out, to widen, straighten, or otherwise change" city streets does not confer authority to vacate a street. *Coker v. Atlanta, K. & N. R. Co.*, 123 Ga. 483, 487. But this power authorizes the city to vacate a strip of land forming part of the street for the purpose of straightening it. It may sell the strip so vacated to the abutter. *Patton v. Rome*, 124 Ga. 525.

A city may, under its statutory power to vacate streets, vacate only a portion of the street. *Brown v. San Francisco*, 124 Cal. 274; *Hyde Park v. Dunham*, 85 Ill. 569; *People v. Hyde Park*, 117 Ill. 462; *Meyer v. Teutopolis*, 131 Ill. 552; *Mt. Carmel v. Shaw*, 155 Ill. 37. A city may vacate a strip upon each side of the street so as to narrow it, where the purpose of narrowing is not to benefit private owners. *Mt. Carmel v. Shaw*, 155 Ill. 37. When the statute declares that the street may be vacated upon the petition of the property owners, a petition is a jurisdictional prerequisite. *Spiegel v. Gansberg*, 44 Ind. 418; *Lowe v. Lawrence*

exercise of the power is *discretionary* on the part of the municipality; and in the absence of abuse the courts will not interfere with its exercise.¹ Without a judicial determination, a municipal corporation, under the authority conferred in its charter "to locate and establish streets and alleys, and *vacate* the same," may constitutionally order the vacation of a street; and this power, when exercised with due regard to individual rights, will not be restrained at the instance of a property owner claiming that he is interested in keeping open the streets dedicated to the public.² The power to vacate a street or public place is to be exercised in the *public interest*, and not for the sole purpose of benefiting a private party.³

burg Roller Mills Co., 161 Ind. 495; *Pettibone v. Hamilton*, 40 Wis. 402; *Warren v. Wausau*, 66 Wis. 206; *James v. Darlington*, 71 Wis. 173; *Baines v. Janeville*, 100 Wis. 369; *Ashland v. Chicago & N. W. R. Co.*, 105 Wis. 398. The vacation of a city street *should be a matter of record*; parol testimony of abandonment is not admissible to prove that a street has been vacated. *Lathrop v. Central Iowa R. Co.*, 69 Iowa, 105.

¹ *Symons v. San Francisco*, 115 Cal. 555; *Brown v. San Francisco*, 124 Cal. 274, 278; *People v. Wieboldt*, 233 Ill. 572; *Spiegel v. Gansberg*, 44 Ind. 418; *Bowen v. Hester*, 143 Ind. 511; *McLachlan v. Gray*, 105 Iowa, 259; *Spitzer v. Runyan*, 113 Iowa, 619, 621; *Chrisman v. Brandes*, 137 Iowa, 433; *Van Witsen v. Gutman*, 79 Md. 405; *Detroit Real Estate Ins. Co. v. Wayne Cir. Judge*, 137 Mich. 108; *State v. Minneapolis Park Com'rs*, 100 Minn. 150; *Knapp v. St. Louis*, 156 Mo. 343; *Bellevue v. Bellevue Imp. Co.*, 65 Neb. 52; *Kean v. Elizabeth*, 54 N. J. L. 462; *Wetherill v. Pennsylvania R. Co.*, 195 Pa. 156; *Ponischil v. Hoquiam Sash & D. Co.*, 41 Wash. 303; *Mottman v. Olympia*, 45 Wash. 361; *Kakeldy v. Columbia & P. S. R. Co.*, 37 Wash. 675; *Tilly v. Mitchell & L. Co.*, 121 Wis. 1. See also *Raht v. Southern R. Co.* (Tenn. Ch. App.), 50 S. W. Rep. 72.

In *Michigan* it is provided by statute that streets may be vacated by the common council, or by the court *on the petition* of all the landowners abutting on the vacated portion. The jurisdiction thus conferred upon the court and upon the common council is concurrent; but when the council has acted adversely to the vacation of a portion of a street, the court will not interfere

with its determination on the petition of the abutting landowners unless in case of abuse. *Detroit Investment Co. v. Wayne Cir. Judge*, 137 Mich. 108. Although the consent of the municipality is not required to the action of the court on the petition of the abutting owners, the power of the court to vacate is to be sparingly exercised in opposition to the judgment and desire of the city authorities. *In re Albers*, 113 Mich. 640. The council, by virtue of the statute, may impose conditions upon vacating. *Detroit Inv. Co. v. Wayne Circuit Judge*, 137 Mich. 108. When the street is vacated on the petition of abutting owners, the city has no proprietary interest in it, when the title is in the abutters, and the city is not entitled to compensation upon vacation. *In re Albers*, 113 Mich. 640.

A city of the third class, having power under statute to vacate or discontinue streets whenever deemed necessary or expedient, the court will not interfere by injunction with the passage of an ordinance vacating a street, even although the vacation may damage a property holder, as ample provision may be made for the satisfaction of such damages either by that ordinance itself or by subsequent ordinances. There is no law which requires the entire matter to be included in one ordinance. *Atkinson v. Wykoff*, 58 Mo. App. 86.

² *Gray v. Iowa Land Co.*, 26 Iowa, 387 (distinguished from *Warren v. Lyons City*, 22 Iowa, 351). See also *Meyer v. Teutopolis*, 131 Ill. 552, quoting text; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, quoting text; *Glasgow v. St. Louis*, 107 Mo. 198, 204, quoting text.

³ *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 407; *Ligare v. Chicago*,

In Pennsylvania, and in some other States, it is held that the vacating of a street *is not a taking of the property* of an abutter which entitles him to compensation under the constitutional provision,¹

139 Ill. 46; *Smith v. McDowell*, 148 Ill. 51; *Corcoran v. Chicago, M. & N. R. Co.*, 149 Ill. 291; *People v. Atchison, T. & S. F. R. Co.*, 217 Ill. 594; *DeLand v. Dixon Power & L. Co.*, 225 Ill. 212; *Pew v. Litchfield*, 115 Ill. App. 13; *Louisville v. Bannon*, 99 Ky. 74; *Henderson v. Lexington (Ky.)*, 111 S. W. Rep. 318; *Van Witzon v. Gutman*, 79 Md. 405; *Townsend v. Epstein*, 93 Md. 537, 555; *Laurel v. Lowell*, 84 Miss. 435; *Kansas City v. Hyde*, 196 Mo. 498; *Naschold v. Westport*, 71 Mo. App. 508; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y. 108; *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488. See also *Cromwell v. Connecticut B. S. Quarry Co.*, 50 Conn. 470.

It is, however, to be observed that as the act of vacating a street is legislative in its nature as well as discretionary, the *motives of the municipality* in passing the ordinance cannot, as a general rule, be inquired into. See *State v. Minneapolis Park Com'rs*, 100 Minn. 150, 155; *Tilly v. Mitchell & L. Co.*, 121 Wis. 1. Index, *Ordinances*. In cases where the vacating of streets was held to be illegal as for a private purpose only, the illegal purpose appeared upon the face of the proceedings themselves, or was a necessary inference from the facts and circumstances attending the municipal action.

Where a street was originally dedicated by the abutting owners, an ordinance vacating a strip on each side of it is not void because the strips are donated to such abutting lot-owners, since upon vacation the strips would revert to the abutting owners by operation of law, and the provision of the ordinance is merely surplusage. *Mount Carmel v. Shaw*, 155 Ill. 37. See also *Parker v. Catholic Bishop*, 146 Ill. 158; *East St. Louis v. O'Flynn*, 119 Ill. 200; *Knapp v. St. Louis*, 156 Mo. 343; *Ponischil v. Hoquiam Sash & D. Co.*, 41 Wash. 303. The fact that one of the reasons for vacating a portion of a street was to accommodate the person over whose land the vacated portion ran does not invalidate the ordinance. *Kean v. Elizabeth*, 54 N. J. L. 462, aff'd 55 N. J. L. 337. Where the ownership of the fee of the street is in the city, the mere fact that, as a conse-

quence of closing the street, private ownership results pursuant to statutory provision, does not convert the main purpose of the legislation from a public into a private one. *Matter of New York City*, 28 N. Y. App. Div. 143, aff'd 157 N. Y. 409.

An ordinance which has the effect of *excluding* from a portion of a street *all save certain railroad companies and giving them the exclusive use and occupation thereof* is void as a vacation of part of the street for the benefit of private persons and as a perversion of the power of the municipality in order to promote private interests. *Ligare v. Chicago*, 139 Ill. 46; *Corcoran v. Chicago, M. & N. R. Co.*, 149 Ill. 291. The ordinance being void, the title does not revert to the abutting owner, who is therefore not entitled to an injunction restraining the railroad companies from laying tracks in the street. *Corcoran v. Chicago, M. & N. R. Co.*, 149 Ill. 291. An ordinance vacating a street is not void on the ground that it is a grant or sale and not a vacation because it contains a provision to that effect that "there shall be and is hereby granted . . . to the railroad company that portion of the street vacated for depot purposes." *Columbus v. Union Pacific R. Co.*, 137 Fed. Rep. 869.

In *Iowa* (where the fee is in the city), it is held that, upon vacation, the city may grant to an individual the ground covered by a vacated alley. *Dempsey v. Burlington*, 66 Iowa, 687. And the courts have even gone so far as to hold that an alley may be vacated for the purpose of allowing it to be devoted to private use. *Marshalltown v. Forney*, 61 Iowa, 578. *Day, C. J.*, remarked in this case: "If the vacation of a street puts an end to the public use, it certainly cannot affect the power of the city to vacate, that the vacation was made for the purpose of devoting the vacated street or alley to a private use. If the power to vacate is otherwise rightfully exercised and no private rights are injuriously affected, it is not material what object is intended to be promoted by the vacation."

¹ *Pennsylvania*. In *Paul v. Carver*, 24 Pa. 207, it was held that the legis-

but there are many decisions to the effect that when the vacation of a street or highway interferes with the access to the abut-

lature has the power to vacate a public street without the consent of those whose private interest may be affected, and without providing compensation for the injury. *Black, J.*, said: "Surrendering the right of way over a public road to the owners of the soil is *not* taking private property for public use, and the proprietors of *other land* incidentally injured by the discontinuance of the road are not entitled to compensation. A private road is private property, and an Act of Assembly to close it up without paying for it would be depriving the owner of his property. But a public road belongs to nobody but the State; and when the government sees proper to vacate it, the consequential loss, if there be any, must be borne by those who suffer it, just as they would bear what might result from a refusal to make it in the first place." This decision was followed in *McGee's Appeal*, 114 Pa. 470, 477, where the court further held that the vacating of a city street is not "*damaging*" property for public use within the meaning of the constitutional provision on the subject. *Clark, J.*, said: "By the vacation of Washington Street no private property was taken or applied to public use; on the contrary, private property which had heretofore been appropriated by the public was surrendered to the proper owner, and when thus surrendered, who can gainsay the right of the owners to use it with their other property in the construction or enlargement of their works, highways, or improvements?" These decisions have been adhered to by the Supreme Court of Pennsylvania. See *Wetherill v. Pennsylvania R. Co.*, 195 Pa. 156; *Daughters of American Revolution v. Schenley*, 204 Pa. 572, 583; *Howell v. Morrisville*, 212 Pa. 349; *Rockafeller v. Northern Cent. R. Co.*, 212 Pa. 485; *Umbria Street*, 32 Pa. Super. Ct. 333, 335; *Nocton v. Pennsylvania R. Co.*, 32 Pa. Super. Ct. 555. But the municipality may by statute be charged with the obligation to make compensation to the abutters. *Howard Street*, 142 Pa. 601, 605; *Butler Street*, 25 Pa. Super. Ct. 357; *Umbria Street*, 32 Pa. Super. Ct. 333. The *Pennsylvania cases* establishing this doctrine are discussed by *Ladd, J.*, in *Long v. Wilson*, 119 Iowa, 267, who said that

they were to be distinguished in that the public had but an easement, and the vacation amounted to no more than a surrender of this easement to the owner of the fee, concurring in this respect with the Iowa decisions relating to the vacation of country highways. See *Brady v. Shinkle*, 40 Iowa, 576; *Grove v. Allen*, 92 Iowa, 519; *McKinney v. Baker*, 100 Iowa, 362.

In *California*, it has also been held that in the case of public roads in the country which have not been dedicated and in respect to which there are no contract rights or no obligation on the part of the public, the abutters have no rights which are property under the Constitution and which must be paid for upon vacation, and that a statute is not unconstitutional because it authorizes the vacation of public roads without making any provision for the assessment or payment of damages. The court said that creation of highways by use, or under the statute, created an easement for the benefit of the public for such time only as the public necessities and convenience might require, and created no covenant or obligation in favor of an abutter that the highway should always exist; and an abutter must be held to have acquired and improved his property in view of the fact that the statute which provides for the establishment and maintenance of highways also provides for vacating them. The public use ceases upon vacation of the highway, and an injury to an abutting owner consequent upon such ending of the use cannot be held a taking or damaging of private property for a public use, but is only *damnum absque injuria*. *Levee Dist. No. 9 v. Farmer*, 101 Cal. 178.

In *Montana*, it has also been held that the owners of land along which a public road passes are not entitled to damages on vacation of the road by the proper authorities if there is no taking of property for public use within the meaning of the constitution. *State v. Deer Lodge County*, 19 Mont. 582.

The logical result of these decisions would seem to be that the rights of the abutter are not affected or impaired by the vacation in any degree, but merely the public easement is extinguished. Therefore when the street or highway is vacated, the abutter, by

ter's property in such a manner that he is *specially and peculiarly damaged*, — suffering a loss or injury differing from that of the public, not merely in degree, but also in kind, — the abutter is entitled to compensation under statutory provisions or under the constitutional prohibition against the taking or damaging of private property for public use without making just compensation therefor.¹

The question whether an abutting owner is entitled to receive compensation for property taken by the vacating of a city street, in

virtue of his private easements, would still have the right to use it for ingress and egress to his lot. This seems to be the view adopted by the Court of Chancery Appeals of *Tennessee* in *Raht v. Southern R. Co.* (Tenn. Ch. App.), 50 S. W. Rep. 72. This view is, however, contrary to the decisions cited *infra* to the effect that compensation must be made for the abutter's easements destroyed by vacating the street, which decisions all proceed upon the theory that all easements of way are terminated, and the land reverts to private use freed from any easements in favor of the abutters.

¹ *Chicago v. Baker*, 86 Fed. Rep. 753; *Bigelow v. Ballerino*, 111 Cal. 559; *Haynes v. Thomas*, 7 Ind. 38; *Butterworth v. Bartlett*, 50 Ind. 537; *Rensselaer v. Leopold*, 106 Ind. 29; *Cook v. Quick*, 127 Ind. 477; *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604; *Borghart v. Cedar Rapids*, 126 Iowa, 313; *Long v. Wilson*, 119 Iowa, 267; *Ridgway v. Osceola*, 139 Iowa, 590; 117 N. W. Rep. 974; *Central Branch Union Pac. R. Co. v. Andrews*, 30 Kan. 590, 595; *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625; *Highbarger v. Milford*, 71 Kan. 331; *Bannon v. Rohmeiser*, 90 Ky. 48; *Henderson v. Lexington* (Ky.), 111 S. W. Rep. 318; *Van Witsen v. Gutman*, 79 Md. 405; *Webster v. Lowell*, 142 Mass. 324; *Pearsall v. Eaton County*, 74 Mich. 558; *Buhl v. Fort Street Union Depot Co.*, 98 Mich. 596; *Horton v. Williams*, 99 Mich. 423; *Laurel v. Rowell*, 84 Miss. 435; *Glasgow v. St. Louis*, 107 Mo. 198; *Heinrich v. St. Louis*, 125 Mo. 424; *Christian v. St. Louis*, 127 Mo. 109; *Knapp v. St. Louis*, 153 Mo. 560; *Naschold v. Westport*, 71 Mo. App. 508; *Lindsay v. Omaha*, 30 Neb. 512; *Egerer v. New York Cent. & H. R. R. Co.*, 130 N.Y. 108; *Reis v. New York City*, 188 N. Y. 58, aff'g 113 N. Y. App. Div. 464; *Gillender v. New York City*, 127 N. Y. App. Div. 612; 111 N. Y. Supp.

1051; *People v. Delany*, 120 N. Y. App. Div. 801, aff'd 192 N. Y. 7; *Johnston v. Old Colony R. Co.*, 18 R. I. 642; *Cherry v. Rock Hill*, 48 S. Car. 553; *Anderson v. Turbeville*, 6 Coldw. (Tenn.) 150; *State v. Taylor*, 107 Tenn. 455; *State v. Hamilton*, 109 Tenn. 276, 286; *Johnston v. Lonstorf*, 128 Wis. 17, 27; *infra*, chap. xxv.

That the power to vacate a street cannot be exercised so as to deprive the abutter of access to his premises without compensation, is held in *New York*, following the principles of the decisions in the well-known *Elevated Railroad Cases*. See *Egerer v. New York Central & H. R. R. Co.*, 130 N. Y. 108. See Index, *Abutter*; *Railroads in Streets*, as to nature of abutter's rights and whether they are "property" within the meaning of the Constitution.

In *Indiana*, the city council is, by statute, deprived of the power to proceed to vacate a street when any property owner objects, unless a petition by two-thirds of the property owners be presented. Where only a part of the street is to be vacated, a property owner upon the street but not on the part to be vacated is not a competent objector. *Hall v. Lebanon*, 31 Ind. App. 265. When all the owners of the property on the block petition for the vacation of the street, they thereby waive all claim to damages or compensation, and provision need not be made therefor in the ordinance vacating the street. *Belleville v. Hallowell*, 41 Kan. 192. Private citizens cannot enjoin the alteration of a street on the ground that it will interfere with their property and business and inconvenience a portion of the public when the plaintiffs' property does not abut on the street to be altered and the proposed change does not deprive them of access to their land. *Wootters v. Crockett*, 11 Tex. Civ. App. 474.

its nature, depends, it has frequently been held, upon the ability of the claimant to establish that he is *specially and peculiarly damaged* thereby, *i. e.*, that he suffers an injury differing in nature, and not merely in degree, from that suffered by the public at large.¹ The consideration of the question whether the abutting owner is specially and peculiarly damaged has resulted in a difference of opinion on the part of the courts, some courts being of the opinion that under certain circumstances the injury is special and peculiar, whilst other courts, under the same circumstances, have regarded it as only such as is sustained by the general public. The existence of the special and peculiar damage is, however, more readily recognized *when the property abuts upon the particular part of the street that is vacated*.² Many decisions declare that, as a general rule, only property abutting upon the portion of the street closed is specially damaged by the vacation, and that only such abutter can recover damages or compensation for the taking of his property. Hence, if the property of the abutter is *located on another street, or on a different part of the same street*, he is not entitled to compensation or damages.³ In other States this limitation is not observed, and

¹ East St. Louis v. O'Flynn, 119 Ill. 200; Leavenworth v. Douglass, 59 Kan. 416; Cram v. Laconia, 71 N. H. 41. Even if the property abuts on the vacated portion of the street the owner must show special and peculiar damages by the closing to be entitled to compensation. Christian v. St. Louis, 127 Mo. 109. See also Perkins v. Ross (Tenn. Ch. App.), 42 S. W. Rep. 58. A statute providing that on the vacation of a street the damage to property shall be *ascertained and paid*, gives a right only to damages *specially sustained* by the party, over and above that which is common to the public in general. East St. Louis v. O'Flynn, 119 Ill. 200; Re Centre St., 115 Pa. St. 247. See also Chicago v. Baker, 86 Fed. Rep. 753.

² In New York, the rule appears to be adopted that no compensation can be exacted from the municipality when there is left to the private citizen owning abutting property other and suitable means of access thereto. Coster v. Albany, 43 N. Y. 399; Fearing v. Erwin, 55 N. Y. 486, 490; Kings County F. Ins. Co. v. Stevens, 101 N. Y. 411, 418; Egerer v. New York Cent. & H. R. R. Co., 130 N. Y. 108, 113; Reis v. New York City, 188 N. Y. 58, 68, aff'g 113 N. Y. App. Div. 464.

It is to be observed that in none of these cases did the way which was closed abut on the plaintiff's premises, although the language of the courts would seem to imply that if the property abut upon two streets and only one street be vacated opposite the property, the abutter would not be entitled to compensation. In Reis v. New York City, 188 N. Y. 58, aff'g 113 App. Div. 464, it was held that where the city owned all the lots on both sides of the street in a certain block as well as the fee of the street, and had closed the street pursuant to statute and erected a building thereon for hospital purposes, the owner of lots abutting on the same street, but in the two next adjacent blocks facing on the street, had suffered and could suffer no actionable damage so far as any of her public easements were concerned by the closing of the street when it is not intended to take any part of the street upon which her property abuts or any part thereof which is opposite the block in which she owns property, and the closing and discontinuance of the street will leave all of her lots accessible by public ways.

³ Southern R. Co. v. Ables, 153 Ala. 523; 45 So. Rep. 234; Symons v.

decisions are to be found to the effect that the owner of property which *does not abut* on the part of the street closed is entitled to compensation, provided he is able to prove special and peculiar damage.¹ The right to *injunctive relief*, where the abutter's

San Francisco, 115 Cal. 555; Chicago v. Union Building Assoc., 102 Ill. 379; East St. Louis v. O'Flynn, 119 Ill. 200; Dantzer v. Indianapolis Union R. Co., 141 Ind. 604; Heller v. Atchison, T. & S. F. R. Co., 28 Kan. 625; Billard v. Erhart, 35 Kan. 611; Smith v. Boston, 7 Cush. (Mass.) 254; Stanwood v. Malden, 157 Mass. 17; Nichols v. Richmond, 162 Mass. 170; Natick Gas Light Co. v. Natick, 175 Mass. 246, 250; Kimball v. Homan, 74 Mich. 699; Buhl v. Fort Street Union Depot Co., 98 Mich. 596; Baudistel v. Jackson, 110 Mich. 357; Baudistel v. Michigan Cent. R. Co., 113 Mich. 687; Beutel v. West Bay Sugar Co., 132 Mich. 587; Poythress v. Mobile & O. R. Co., 92 Miss. 638; 46 So. Rep. 139; Glasgow v. St. Louis, 107 Mo. 198; Knapp v. St. Louis, 153 Mo. 560; Knapp v. St. Louis, 156 Mo. 343; Cummings Realty Co. v. Deere, 208 Mo. 66; Enders v. Friday, 78 Neb. 510; 111 N. W. Rep. 140; Lee v. McCook, 82 Neb. 26; 116 N. W. Rep. 955; Cram v. Laconia, 71 N. H. 41; Kean v. Elizabeth, 54 N. J. L. 462; Dodge v. Pennsylvania R. Co., 43 N. J. Eq. 351, *aff'd* 45 N. J. Eq. 366; Cherry v. Rock Hill, 48 S. Car. 553; State v. Taylor, 107 Tenn. 455; State v. Hamilton, 109 Tenn. 276, 286; Wilkins v. Chicago, St. L. & N. O. R. Co., 110 Tenn. 422; Ponischil v. Hoquiam Sash & D. Co., 41 Wash. 303; Mottman v. Olympia, 45 Wash. 361.

An injury to real estate by cutting off direct approach thereto in one direction, by discontinuing a highway across a railroad at a point not in front of the premises, even if it is a serious and permanent injury, is one which the owner suffers in common with the rest of the community, although greater in degree, and gives him no individual remedy by action for damages. Davis v. County Com'rs, 153 Mass. 218. The discontinuance of part of a street in a city is not a ground of action by the owner of land on another street into which, opposite his land, the part of the street discontinued runs obliquely, if the means of access to his estate remain ample,

although its money value is diminished by the diversion of travel and it is immaterial that a small point of land, of which he owns the fee subject to the public right of way, touches the discontinued part of the street. Stanwood v. Malden, 157 Mass. 17. The mere fact that by discontinuance of a street the complainant, instead of being able to reach a certain point by an unbroken separate line, had to make a short turn and select other roads running in the same direction, was held not to be sufficient to entitle him to compensation. Kimball v. Homan, 74 Mich. 699. When property abuts on the vacated portion of a street, it is no defence to the right to compensation that the abutter still has an access to his property by another street. Heinrich v. St. Louis, 125 Mo. 424.

¹ It has been held that in *Illinois* it is not essential to the statutory right of action against the city for vacating a street that the property should abut on the closed portion. Chicago v. Baker, 86 Fed. Rep. 753; s. c. 98 Fed. Rep. 830. The closing of a part of a public street constituting a way across a railroad track, and the erection of a viaduct in another place, was held to damage an owner whose property was thereby left upon a blind court, in a manner different from the general public and to entitle him to damages, although his property only touched the vacated portion of the street at one corner. Chicago v. Burcky, 158 Ill. 103.

In *Pennsylvania*, it has been held that where part of a street has been vacated and the owners of property abutting on the street but not on the part vacated are left in a *cul de sac*, cutting them off from access to the system of streets in the direction of the vacated part, they are, under the statute, entitled to compensation. The injury is different from the injury sustained by those who use the street for travel only, not in degree merely, but in kind. *In re Melon Street*, 182 Pa. 397. The court said: "The abutting owner's special right in a street as a means of access to his property is not limited to the part

right exists generally, against the vacating of a city street without making compensation, is usually, although not uniformly, conceded; but even in such cases an injunction will only be granted upon the application of a property owner who can show that he suffers *special and peculiar injury* to his property by the closing of the street.¹

of the street on which his property abuts. Such a limitation of his right would deny him compensation if all the street except the part immediately in front of his property were vacated. His right is the right of access in any direction which the street permits. As affecting this right, no distinction can be drawn between a partial and a total deprivation of access; the impairment of the right is a legal injury differing in degree only from its total destruction." See also *Ruscomb Street*, 30 Pa. Super. Ct. 476; s. c. 33 Pa. Super. Ct. 148.

In *Highbarger v. Milford*, 71 Kan. 331, it was held that one who purchases a platted parcel of land bounded by laid out and dedicated streets has the right to use such streets as are reasonably necessary for the enjoyment of the parcel of land so purchased by him. Ordinarily such streets are those which bound the block in which his land is situated, or such as furnish access in either direction. Hence, if a part of one of the streets is vacated in the middle of the block, creating a *cul de sac* upon which his property abuts, he is specially injured and is entitled to compensation. In *Kentucky* it has been held that compensation is payable only to the owners of property abutting upon an alley in the block which is affected by the vacation. *Henderson v. Lexington* (Ky.), 111 S. W. Rep. 318. The owner of land outside of but abutting upon the boundary line of a city and upon the end of a street is a stranger to the city, and cannot object in proceedings to vacate the street. *House v. Greensburg*, 93 Ind. 533.

The fact that by the proposed discontinuance of a street an abutting owner is deprived of the only direct way to reach the shore of a harbor about two blocks distant from his dwelling, and that he is compelled to make a considerable detour in order to reach the same, and is thus put to great inconvenience and the value of his property materially lessened,

was held to give him the required *status* to review by *certiorari* the action of the municipal authorities in discontinuing the street, although their action might not be such as would entitle him to maintain an action for damages. *People v. Shaw*, 34 N. Y. App. Div. 61.

¹ *Felton v. Ackerman*, 22 U. S. App. 154; *Texarkana v. Leach*, 66 Ark. 40; *Davies v. Epstein*, 77 Ark. 221, 228; *Georgia S. & F. R. Co. v. Harvey*, 84 Ga. 372; *Coker v. Atlanta, K. & N. R. Co.*, 123 Ga. 483; *Chicago v. Union Building Assoc.*, 102 Ill. 379; *Hesing v. Scott*, 107 Ill. 600; *East St. Louis v. O'Flynn*, 119 Ill. 200; *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625; *Billard v. Erhart*, 35 Kan. 611; *Robinson v. Brown*, 182 Mass. 266; *Rude v. St. Louis*, 93 Mo. 408; *Glasgow v. St. Louis*, 107 Mo. 198; *Knapp v. St. Louis*, 153 Mo. 560; *Knapp v. St. Louis*, 156 Mo. 343; *Cummings Realty Co. v. Deere*, 208 Mo. 66; *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351, aff'd 45 N. J. Eq. 366; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264; *Lowery v. Petree*, 8 Lea (Tenn.), 674, 678; *Wilkins v. Chicago, St. L. & N. O. R. Co.*, 110 Tenn. 422; *Ponisich v. Hoquian Sash & D. Co.*, 41 Wash. 303, 309; *Mottman v. Olympia*, 45 Wash. 361. But in *Illinois*, the right to an injunction appears to be denied on the ground that discretion is vested in the municipal authorities to determine in the first instance whether property in the near vicinity of the vacated street will or will not be damaged by the vacation. If they find that it will be specially damaged by the proposed vacation or closing, they should proceed as required by law to ascertain and pay the same by the usual proceedings. If the municipal authorities find that no damage will result, they may proceed to vacate the street by ordinance. As in a question with an abutting owner it will be presumed that the authorities will pay for property damaged, and this presumption

When the public or municipal right in a city street is limited to a mere easement for street purposes, the *fee* of the street *reverts upon vacation* to the possession of the owner discharged from the public easement.¹ If, however, the fee of the vacated street be in the city, as in the case of statutory dedications² or otherwise, a diversity of opinion has arisen. In some cases it is held that the fee remains in the city, and that the land may be disposed of by the municipality,³ whilst other courts have with much seeming reason construed the *fee to be a base or determinable fee*, of which the municipality is divested upon the vacation of the street, and which reverts to the original owner or his grantee,⁴ or to the abutter. In other jurisdictions, often by virtue of *express statutory provision*, the fee attaches to the abutting property on either side of the street in proportion to frontage.⁵

will continue until the property owner has established his damage in an appropriate action. When no proceedings are instituted by the municipal authorities to ascertain the damage, a property owner will not be afforded relief by injunction, but will be limited to his remedy by action at law. *Parker v. Catholic Bishop*, 146 Ill. 158. Index, *Equity; Injunction*.

If a property owner does not apply for an injunction before the closing of the street, he will be limited to an action at law for damages. *Marietta Chair Co. v. Henderson*, 121 Ga. 399. Where a street has been vacated upon petition, and the petitioner has expended money in buildings erected on the vacated street, *other owners are barred by laches* from reviewing the proceedings by *certiorari*. *Beutel v. Bay Circuit Judge*, 124 Mich. 521.

¹ *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498, 513; *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Wirt v. McEmery*, 21 Fed. Rep. 233; *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570; *Bayard v. Hargrove*, 45 Ga. 342; *Harrison v. Augusta Factory*, 73 Ga. 447; *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 404; *Wallace v. Fee*, 50 N. Y. 694; *Haberman v. Baker*, 128 N. Y. 253; *Downes v. Dimock & Fink Co.*, 75 N. Y. App. Div. 513; *Barnes v. Philadelphia, N. & N. Y. R. Co.*, 27 Pa. Super. Ct. 84; *Mitchell v. Bass*, 26 Tex. 372, 380; *Day v. Chambers*, 62 Tex. 190, 192.

² *Ante*, § 1072.

³ *Iowa*. Upon vacation of streets to which the city acquired title by

statutory dedication, the fee remains in the city. *Pettingill v. Devin*, 35 Iowa, 344; *Day v. Schroeder*, 46 Iowa, 546; *Lake City v. Fulkerson*, 122 Iowa, 569; *Harrington v. Iowa Cent. R. Co.*, 126 Iowa, 388, 390. Upon vacation the city may, pursuant to statutory authority, convey the lands. *Spitzer v. Runyan*, 113 Iowa, 619; *Lake City v. Fulkerson*, 122 Iowa, 569; *Harrington v. Iowa Cent. R. Co.*, 126 Iowa, 388. But does not such grantee take subject to the abutter's right of access?

"If the fee in the street was in the State, or in the city, the vacating of the street leaves the State or the municipality, as the case may be, in the possession of the property, to use it for any purpose that it may see proper, without reference to its former use." *Per Cobb, J.*, in *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 404.

⁴ *Illinois*. Upon a statutory dedication the fee passes to the city, but it is merely a base or determinable fee of which the city is divested on vacation and which reverts to the original owner or his grantees and not necessarily to the abutters. Neither the legislature nor the corporate authorities can divest the original owner or his assignee of the right of reversion. *Gebhardt v. Reeves*, 75 Ill. 301. See also *Helm v. Webster*, 85 Ill. 116; *Hyde Park v. Borden*, 94 Ill. 26; *Matthiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411; *Wirt v. McEmery*, 21 Fed. Rep. 233. But why should not the reverter be to the abutter?

⁵ *Statutory provisions vesting fee in*

§ 1161 (680). **Extent of Power over Street Uses.** — As the highways of a State, including streets in cities, *are under the paramount and primary control of the legislature*, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may legitimately be put, depends, within constitutional limitations, entirely upon their

abutters and their construction: Atchison, T. & S. F. R. Co. v. Patch, 28 Kan. 470; Challiss v. Atchison Union D. & R. Co., 45 Kan. 398; Showalter v. Southern Kan. R. Co., 49 Kan. 421; s. c. 57 Kan. 681; Atchison, T. & S. F. R. Co. v. Davidson, 52 Kan. 739; Southern Kan. R. Co. v. Sharpless, 62 Kan. 841; Scudder v. Detroit, 117 Mich. 77; Bellevue v. Bellevue Imp. Co., 65 Neb. 52; Matter of New York City, 28 N. Y. App. Div. 143, aff'd 157 N. Y. 409; People v. Metz, 119 N. Y. App. Div. 271, aff'd 189 N. Y. 550; Blackwell, E. & S. W. R. Co. v. Gist, 18 Okla. 516; Bullen v. Arkansas Valley & W. R. Co., 20 Okla. 819; 95 Pac. Rep. 476. *Constitutionality* of such statutory provisions, see Matter of New York City, 157 N. Y. 409, aff'd 28 N. Y. App. Div. 143.

Ohio. In this State the fee of the city streets appears to be vested in the municipality in trust, however, for street purposes. Cincinnati & S. G. A. St. R. Co. v. Cummins, 14 Ohio St. 523; Columbus v. Agler, 44 Ohio St. 485; Callen v. Columbus E. E. Lt. Co., 66 Ohio St. 166; Hamilton, G. & C. T. Co. v. Parish, 67 Ohio St. 181. *On vacation, the fee passes to the abutters upon the theory of accretion so called.* Stephens v. Taylor, 51 Ohio St. 593; Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264; Callen v. Columbus E. E. Lt. Co., 66 Ohio St. 166, 174; Hamilton, G. & C. T. Co. v. Parish, 67 Ohio St. 181; Stevens v. Shannon, 6 Ohio Cir. Ct. 142. *But compare* Van Wert Board of Education v. Edson, 18 Ohio St. 226; Mahoning County v. Young, 59 Fed. Rep. 96.

In Hamilton, G. & C. T. Co. v. Parish, 67 Ohio St. 181, the court thus clearly explains the theory upon which it held that the fee of a vacated street passed to the abutter, — "The fee being in the municipality in trust for street purposes, the abutting lot-owner, in addition to his easement in the street for passage and repassage in common with the general public, has a special easement in the street appendant and

appurtenant to his lot for ingress and egress; and when the street becomes vacated the public thereby surrenders, or, more properly speaking, legally abandons the public use thereof for travel, but the private or special use or easement adheres to the abutting lots and becomes part and parcel of them as by accretion, so as to preserve the right of ingress or egress to the lots over the land that formerly formed the street or part thereof. The reason that a street, when vacated, becomes a part of the abutting lots, is not because the owner of the lot owned the fee of the street, but because it must go there by necessity, to preserve his easement of ingress and egress, which in many cases is a valuable property right, and without which the lots might be of little value. The street being vacated and abandoned, the public no longer owns it, and it must either revert to the original owner, or adhere to the abutting lots as by accretion. As the original owner is presumed to have received full value for the street when he sold the lots, there is no just reason why he should have the street, when vacated, restored to him. And as the lot-owners and those in the line of title have paid an increased price for the lots by reason of the easement in the street, it is only just that when the street becomes vacated, the easement should be preserved to them by adding the vacated street to the lots, and therefore this doctrine of accretion in such cases has been adopted in this State, and generally elsewhere."

Colorado. A statutory dedication vests the fee in the city. Upon vacation it has been held that the fee reverts to the abutter, if he has received a deed to his lot, sufficient in terms to convey to the middle of the street, although the deed may have been made after the statutory dedication was effected. Olin v. Denver & R. G. R. Co., 25 Colo. 177; Overland Machinery Co. v. Alpenfels, 30 Colo. 163; Bothwell v. Denver Union Stockyards Co., 39 Colo. 221.

charters or the legislative enactments applicable to them.¹ It is usual in this country for the legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways and public places within their limits, and the uses to which they may be appropriated.² This will be illustrated everywhere throughout the present chapter. The authority to open, care for, regulate, and improve streets, taken in connection with the other powers usually granted, gives to municipal corporations all needed authority to keep the streets free from obstructions, and to prevent improper use thereof, and to pass necessary and reasonable ordinances to this end.³ Thus, a city, having "the care, supervision,

¹ Text approved; *Grand Rapids Electric L. & P. Co. v. Grand Rapids Edison, El. L. & F. G. Co.*, 33 Fed. Rep. 659; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Brand v. Multnomah County*, 38 Oreg. 79, 91, citing text; *Allen v. Clausen*, 114 Wis. 244, 250.

² This section quoted by Mr. Justice *Hunt*, and its doctrines applied in *Barnes v. District of Columbia*, 91 U. S. 540.

A city holds its streets in trust for the public, and has no power to divest itself of control thereof. *Ante*, § 245. An ordinance setting apart a street for a pleasure-way, and attempting to give the park commissioners control over the same, is to be regarded as a license to protect them from prosecution for interfering with such street, but not as relieving the city of its duty to improve the same as the public necessity may require. *Kreigh v. Chicago*, 86 Ill. 407.

³ *Sinton v. Asbury*, 41 Cal. 525; *Illinois Cent. R. Co. v. Galena*, 40 Ill. 344; *Toledo, P. & W. R. Co. v. Chenoa*, 43 Ill. 209; *Terre Haute v. Turner*, 36 Ind. 522; *Citizens' Gas & Mining Co. v. Elwood*, 114 Ind. 332; *Dudley v. Frankfort*, 12 B. Mon. (Ky.) 610, 617; *Commonwealth v. Brooks*, 99 Mass. 434; *Ellison v. Allen*, 30 N. Y. Supp. 441, citing text; *Mercer v. Pittsburgh, Ft. W. & C. R. Co.*, 36 Pa. St. 99; *Philadelphia v. Philadelphia & R. R. Co.*, 58 Pa. St. 253; *Roanoke Gas. Co. v. Roanoke*, 88 Va. 810, 814, quoting text. The common council of *Detroit* cannot start proceedings to open a private alley, except on application by responsible and interested parties. *People v. Detroit Rec. Ct. Judge*, 40 Mich. 64.

Power to the common council of a

city, by the charter, to adopt ordinances "to prevent the *cumbering* of streets, sidewalks," &c., in view of the distinction recognized in the charter, and which the legislation of *Michigan* had always made, between cumbering and obstructing a public way, and encroaching upon it, was held to refer to impediments to travel placed in the open street, and not to actual enclosures of a portion of the street by fences, or occupation by buildings. *Grand Rapids v. Hughes*, 15 Mich. 54.

Power to a city, by its charter, to regulate the use of streets and alleys and to prevent and remove obstructions from them, contemplates the preservation of actual ways against nuisances which interfere with their accustomed use, and until they have become actually open obstructions thereon, under a claim of title apparent on the face of the prosecution, cannot be punished under an ordinance in the municipal tribunal, but the rights of the parties must be determined in the public courts. *Jackson v. People*, 9 Mich. 111. See also *Warwick v. Mayo*, 15 Gratt. (Va.) 528. *Construction of power to remove obstruction. State v. Jersey City*, 37 N. J. L. 348; *State v. Jersey City*, 34 N. J. L. 33; *Dawes v. Hightstown*, 45 N. J. L. 501; s. c. *Ib.* 127. A municipal corporation may cause *surveys of streets*, squares, and other public property to be made, and may employ a surveyor or engineer to furnish copies of an original map or a new map of the city or town. *People v. Flagg*, 17 N. Y. 584; *Randall v. Van Vechten*, 19 Johns. 60.

Municipal power to regulate streets and sidewalks includes the power to determine the *width* of each. *State v. Morristown*, 33 N. J. L. 57. Authorized

and control of streets, squares, and commons" within its limits, may, by ordinance, prohibit the appropriation of these to private use, such as sales by individuals at auction thereon, or upon the sidewalks or streets.¹

§ 1162 (681). **Ordinances on the Subject.** — So, authority to *erect and keep in repair bridges and streets* confers by implication the power to employ all reasonable means necessary to that end, and among these means may be the passage of an ordinance inflicting a fine for *wilful or negligent injuries thereto*.² Power thus to protect the public property of the corporation could probably also be derived from the usual authority to regulate the police of the city.³ The *gutters and drains of a city* intended to carry off *surface water* can be used by manufacturers and others only by the consent, express or implied, of the local government. Such use is unlawful

or lawful *temporary obstructions, post*, § 1168. Power to *construct sidewalks* "as the public convenience may require," includes the power to *remove them*. *Per Devens, J.* "It is urged that this power to *construct sidewalks*, even if it be discretionary, cannot be treated as giving authority to remove or dispense with them, where they already exist. To hold thus would be to give too limited an interpretation to the statute. The general power to construct sidewalks in all streets or not, whether macadamized or paved, must be construed as one which deals with the whole subject, and places it within the control of the local authorities. It authorizes them, in their discretion, not merely to *construct* them or not where they do not now exist, but to *remove or dispense* with them where they do exist, if in their judgment it is desirable." *Attorney-General v. Boston*, 142 Mass. 200.

¹ *White v. Kent*, 11 Ohio St. 550. See also *Shelton v. Mobile*, 30 Ala. 540. Power of city to remove nuisances and obstructions on streets at the expense of the party creating them. See generally, *Hawley v. Harrall*, 19 Conn. 142. As to power of city highway surveyor and street commissioner over sidewalks, see *Noyes v. Ward*, 19 Conn. 250, 270; *Clark v. McCarthy*, 1 Cal. 453. Power to prevent sidewalks from being obstructed by *swine*. *Commonwealth v. Curtis*, 9 Allen (Mass.), 266. *Relation of sidewalk to street*. See Index, title,

Taxation and Assessment. *Hart v. Brooklyn*, 36 Barb. (N. Y.) 226. *An awning* erected without municipal consent may be declared an unlawful obstruction of a street. *Pedrick v. Bailey*, 12 Gray (Mass.), 161. Index, *Awning*. *Hayscales* erected by a private person in a street for private purposes may be removed by the city authorities, in case of his refusal to remove them himself. Injunction will not lie to restrain such a removal. *Emerson v. Babcock*, 66 Iowa, 257. In *Everett v. Council Bluffs*, 46 Iowa, 66, it is held that *shade trees* upon the edge of streets are not obstructions. *Ante*, §§ 589, 721; 1134, note; *post*, chap. xxxii., § 1694 *et seq.*, note. Index — *Trees*.

² *Ante*, §§ 589–593, as to power to adopt ordinances. Index, *Fines, &c.*

³ *Korah v. Ottawa*, 32 Ill. 121. See *Hooksett v. Amoskeag Manuf. Co.*, 44 N. H. 105. As to right of a town to maintain case against wrongdoers for injuries to the public highways and bridges; right of street officer to prevent injury to street. *Clark v. McCarthy*, 1 Cal. 453. Towns in the New England States have such interests in the highways within their limits as to enable them to maintain case or other suitable action for their obstruction (*Laconia v. Gilman*, 55 N. H. 127), or for their destruction or the conversion of materials. *Troy v. Cheshire R. Co.*, 23 N. H. 83. Index, *New England Towns*.

if it result in a nuisance, and may be prohibited by the municipal authorities.¹

§ 1163 (683). **Public Nature of Streets; Paramount Legislative Control.** — Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is, in either case, of *the essence of the street that it is public*, and hence, as we have already shown, under the paramount control of the legislature as the representative of the public.² Streets do not belong to the city or town within which they are situated, although acquired by the exercise of the right of eminent domain and the damages paid out of the corporation treasury. The authority of municipalities over streets they derive, as they derive all their other powers, from the legislature, — from charter or statute.³ The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its chief and primary, but by no means sole, use.⁴

§ 1164. **Legislative Power; Right or Privilege to use Streets.** — The streets of a city *are affected by a trust for the public use and benefit*. Their primary purpose is for travel and passage by the public, and in connection therewith abutting owners have certain rights of access which are in the nature of private rights. But as shown above, streets are subject to the control of the legislature, which may im-

¹ Municipality No. 1 v. Gaslight Co., 5 La. An. 439; *ante*, § 1148, chap. xxxii. Index — *Surface Water*.

² State v. Kean, 69 N. H. 122, 128, quoting text.

³ Barter v. Commonwealth, 3 Pa. (Pen. & W.) 253; Commonwealth v. Erie & N. E. R. Co., 27 Pa. St. 339; Allegheny v. Ohio & P. R. Co., 26 Pa. St. 355; Meyer v. Boonville, 162 Ind. 165, citing text; Ellison v. Allen, 30 N. Y. Supp. 441, citing text; Brand v. Multnomah County, 38 Ore. 79, 91, citing text.

⁴ Chicago, B. & Q. R. Co. v. Quincy, 136 Ill. 563, 571, citing text; Morse v. Sweeney, 15 Ill. App. 486, citing text. This passage in the text cited and approved, Quincy v. Jones, 76 Ill. 231, 244; Henkel v. Detroit, 49 Mich. 249.

It is held in *New York* that *pedestrians and vehicles* have the right of passage in common, and neither any superior right of way; each is bound to use due care to avoid being injured

and to avoid doing injury. Barker v. Savage, 45 N. Y. 191; *post*, § 1694, note. Duty of traveller upon street-crossing where vehicles are numerous considered. *Ib.* A traveller on foot has no right of priority over vehicles in the street; and it was held negligence *per se* for such a traveller to attempt to cross a public thoroughfare ahead of approaching vehicles which he saw, upon nice "calculations" of the chances of injury, which turned out to be mistaken calculations. Belton v. Baxter, 54 N. Y. 245, approving Barker v. Savage, 45 N. Y. 191.

Uses of *alleys* as distinguished from streets. Beecher v. People, 38 Mich. 289; *post*, §§ 1154, 1179.

An ordinance vesting in the mayor and street commissioner the power to temporarily close a street for repairs is a mere police regulation and is valid. It is not a delegation of legislative power. Haller v. St. Louis, 176 Mo. 606. Index, *Police Power*.

pose reasonable terms and conditions upon the right to use them, or may delegate to the municipality the power to do so. The legislature may authorize a city to *impose a tax* for purposes of revenue upon vehicles for the privilege of using the city streets, but this power to tax must be expressly conferred upon the municipality, and will not be inferred from general authority to regulate and control the use of the streets. The decisions also declare that although the vehicles may be taxed as *property*, and although the business of the owner in which they are used may be taxed as an *occupation*, the exaction of another and additional tax for the privilege of vehicles using the streets of the city is not double or illegal taxation.¹

¹ Fort Smith v. Scruggs, 70 Ark. 549; Gartside v. East St. Louis, 43 Ill. 47; Harder's Storage Co. v. Chicago, 235 Ill. 58 (distinguishing and limiting Chicago v. Collins, 175 Ill. 445); Tomlinson v. Indianapolis, 144 Ind. 142; Terre Haute v. Kersey, 159 Ind. 300; Mason v. Cumberland, 92 Md. 451; St. Louis v. Weitzel, 130 Mo. 600; St. Louis v. Green, 7 Mo. App. 468; Kansas City v. Richardson, 90 Mo. App. 450; Kansas City v. Smith, 93 Mo. App. 217; Marmet v. State, 45 Ohio St. 63; Frommer v. Richmond, 31 Gratt. (Va.) 646. See also Denver City R. Co. v. Denver, 21 Colo. 350. In Harder's Storage Co. v. Chicago, 235 Ill. 58, 87, the court sustained a "wheel tax" imposed by the city of Chicago by ordinance as constitutional in all respects and as a valid impost authorized by an express statutory provision. The court held that the fact that the plaintiff was taxed upon its vehicles as "property," and also upon its "occupation" as a teamster, as well as subjected to a tax upon the privilege of using vehicles on the public streets, did not amount to double taxation. *Hand, J.*, said: "The law is well settled that the owner of vehicles used upon the public streets and highways may be required to pay an *ad valorem* tax upon such vehicles as property, and may also be required to pay a tax upon the right or privilege of using such vehicles in his business, — that is, an occupation tax. The subject of the *ad valorem* taxation is property. The subject of the other taxation is a right or privilege, — an entirely distinct and different thing. Because these two things are distinct and different the two taxes do not constitute double taxation. The question

which is now to be considered is whether or not, in addition to the *ad valorem* tax on vehicles as property, and a *license tax* on the right to pursue an occupation in which vehicles may be used, there may also be imposed a *license tax upon the right or privilege* of using vehicles upon the public streets and highways. Precisely, the question is whether or not a license tax upon an occupation in which an owner of vehicles is engaged and in the pursuit of which he uses such vehicles, and a license tax upon the right to use such vehicles upon the public streets and highways, are taxes upon the same thing and hence double taxation. No matter what the subject of taxation, some person must pay the tax. When one person pays a tax for the privilege of pursuing his occupation and for the privilege of using vehicles on the public streets, he is paying taxes on distinct and different things, and the fact that he may use vehicles in his occupation can make no difference. For example, two men each carry on a laundry. One uses vehicles, the other does not. Can the man who has the vehicles justly claim exemption from the tax on the privilege of using vehicles on the streets because he has paid his occupation tax? The occupation tax was paid for the privilege of carrying on a laundry, and he may or may not make use of the further privilege of using vehicles in the streets. The taxes which complainant in the case at bar must pay are levied upon three separate and distinct subjects: (1) an *ad valorem* tax on vehicles, as property; (2) an occupation tax or license on the privilege of carrying on business as a carter or public teamster; and (3) a license tax

§ 1165 (684). **Open to all Suitable and Proper Uses; Steam-threshing Machine.** — On the ground that a highway, when not restricted in its dedication or by statute to some particular mode of use, is *open to all suitable methods*; that persons who make use of horses as a means of travel or traffic on the highways have no superior rights to those who make use thereof in other ways; and that a steam-engine as a means of locomotion in a highway is not *necessarily* a nuisance, the Supreme Court of Michigan held that the owner of an engine used mainly for threshing grain, mounted on wheels, and moving along a highway in the country by means of steam-power, and likely to frighten horses, *was not absolutely liable* for an injury to a traveller on the same highway, caused by his horse, though ordinarily gentle, taking fright at the engine, since in the opinion of the court the only ground of liability would be that of negligence, which would depend upon the question whether, under the circumstances, due care was exercised in the use and

on the privilege of using its vehicles on the public streets. Taxation upon each of these three different subjects is not double taxation simply because one person may have to pay two or all of the three taxes, since it is not the person who is taxed, but his property and his privileges. One person may avail himself of a half dozen or more different privileges, for each of which he may be required to pay a tax or license fee." The court distinguished the earlier case of *Chicago v. Collins*, 175 Ill. 445, and limited its effect. In that case the tax was imposed by ordinance upon private vehicles, and it was held that the ordinance was invalid and unreasonable because discriminatory in its effect, there being no good ground for discriminating between vehicles used for private purposes only and vehicles used for business purposes. In disposing of the case the court used *dicta* to the effect that the use of the city streets was a matter of right and not of privilege; these *dicta* are overruled and qualified by the later case. It is to be observed of all these cases that the reasonableness of the tax or license imposed for revenue purposes was sustained very largely upon the ground that by the statute or ordinance it was to be applied solely to the maintenance of the city streets and was a reasonable charge or impost upon the vehicles using the street, because of their tendency to bring the street into a state of disrepair. On principle

it would seem that a city might be authorized to charge a toll for the use of its streets just as turnpike roads may be authorized, and that whether this toll is levied in the form of a charge collected each time the vehicles pass through a toll-gate, or collected by an impost for the privilege of using the streets, is immaterial. But grave doubt may be expressed whether the power of the legislature extends so far as to absolutely prohibit the use of city streets by vehicles at its discretion. Abutters have a right of access to their property by all usual and ordinary means which cannot arbitrarily be taken away or impaired, and this of itself is held by many courts, as elsewhere shown in this chapter, to place a limit upon the power and control of the legislature. The decisions cited above are justified as a proper exercise of the taxing power, and the question whether the use of city streets by vehicles or pedestrians is a matter of privilege or of right on the part of the citizen, would seem to have little or no relevancy to the exercise of the power to tax. In any event, while the power to tax may be exercised to such an extent as to destroy the subject of taxation, it implies, theoretically at least, the continued existence of the subject of taxation, and a tax should in law be regarded as regulative in its nature rather than prohibitive. See *Index, Licenses; Taxation.*

management of the locomotive engine.¹ It may admit of doubt whether the use of a steam engine in the streets of a city could lawfully be made without the consent, or at all events against a regulation, of the municipal authorities.²

§ 1166 (682). **Regulation of Traffic.** — It is within the power of the legislature to *regulate the traffic* upon the streets of a city. Thus, it may, subject always to the legal rights of the abutters, *exclude business traffic* from a public street and direct that it be used for pleasure purposes only.³ It may delegate this power to the municipality. Ordinances reasonably regulating the traffic are legislative acts, which are not subject to judicial control.⁴ By virtue of

¹ *Macomber v. Nichols*, 34 Mich. 212. A highway is a public way for the use of the public in general, for passage and traffic, without distinction. *Starr v. Camden & A. R. Co.*, 24 N. J. L. 592; *post*, § 1168; and note.

A statute which requires any person using a traction or road engine on a street to send a person in advance to warn approaching teams does not apply to a *steam road roller* owned by a city; such roller is not a traction or road engine. *New Albany v. Stier*, 34 Ind. App. 615. But in *New York* it appears to have been held that a statutory provision prohibiting the use of any public highway or street by any carriage, vehicle, or engine propelled by steam without sending a person in advance to give warning is applicable to a steam road roller. *Buchanan's Sons v. Cranford Co.*, 112 N. Y. App. Div. 278. See also *Mullen v. Glens Falls*, 11 N. Y. App. Div. 275.

² *Ante*, § 1161; *post*, § 1168, and note. In *Commonwealth v. Allen*, 148 Pa. 358, the court was of the opinion that a highway may be used for operating a traction engine for the purpose of moving it from one place to another, but it held that it was a nuisance to make several trips daily back and forth to and from a quarry hauling two wagons laden with stone, making an excessive noise, and frightening horses. A similar conclusion was arrived at in *McCarter v. Ludlum Steel & Spring Co.*, 71 N. J. Eq. 330. See also *Attorney-General v. Scott*, [1904] 1 K. B. Div. 404; *s. c.* [1905] 2 K. B. Div. 160; *Chichester v. Foster*, [1906] 1 K. B. Div. 167.

³ *Cicero Lumber Co. v. Cicero*, 176 Ill. 9.

Use of street for *moving buildings*, see § 715, *ante*. See also *Keating v. MacDonald*, 73 Conn. 125; *Indiana R. Co. v. Calvert*, 168 Ind. 321; *Richards Building Moving Co. v. Boston El. L. Co.*, 188 Mass. 265; *Concord v. Burleigh*, 67 N. H. 106; *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. Dak. 585. *Roller skating on the streets for sport* may be regulated or prohibited. A prohibition thereof for sport does not infringe the right of the public to travel on roller skates. *Billington v. Miller*, 75 N. J. L. 415; 67 Atl. Rep. 935. An ordinance prohibiting any game of tenpins, ball, wicket, or other game in the streets, does not prevent boys running at play. *Beaudin v. Bay City*, 136 Mich. 333. On the subject of this section, see *Index, Ordinances; Police Power*.

But an ordinance creating a *pleasure driveway which forbade the use of heavy vehicles thereon* except by special permission of the city officials without prescribing any general conditions upon which such permission would be granted, was held to be unreasonable and invalid as vesting the officers with arbitrary power. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9. The legislature has complete power to regulate highways, and may prescribe what vehicles may be used on them, and may provide that *bicycles shall be forbidden on certain roads*, unless permitted by the road superintendent. *State v. Yopp*, 97 N. Car. 477.

⁴ *Indiana R. Co. v. Calvert*, 168 Ind. 321. As to ordinances regulating the use of streets see further, *ante*, §§ 712, 714, 715, 716.

General authority to a city to lay out and open streets and to regulate

delegated authority, the municipality may by ordinance *limit and restrict the speed of vehicles* in the streets of the municipality,¹ may make other reasonable regulations as to the use of the streets and

and repair them was construed, in connection with power to care for and superintend streets, to confer power to adopt ordinances to prevent the improper use of the streets. *People v. James*, 16 Hun (N. Y.), 426. By virtue of the power to regulate the use of the streets for purposes of travel and for signs and other purposes, a city may, by ordinance, *exclude* from its streets *advertising trucks*, and may thereby prevent a company operating *motor vehicles* from displaying general advertising matter on the exterior of its vehicles. *Fifth Avenue Coach Co. v. New York City*, 194 N. Y. 19. The municipal power to regulate the use of streets cannot be exercised so as to *interfere with the liberty of a citizen*. Hence, where an ordinance prohibited *lounging, standing, or loafing* around the street corners, or other public places, it was held that it had no application to the defendant who had taken part in picketing premises where employees were on strike, but conducted himself in an orderly manner and did not interfere with travel. *St. Louis v. Gloner*, 210 Mo. 503.

An ordinance prohibiting the leaving of horses in the streets *unhitched and unattended*, is valid. *Rowe v. Reneer* (Ky.), 99 S. W. Rep. 250; *Wells v. Mt. Olivet*, 126 Ky. 131; 102 S. W. Rep. 1182. Ordinances regulating *hawking and peddling* in the city streets, see *New Orleans v. Fargot*, 116 La. 369; *Shreveport v. Dantes*, 118 La. 113; *State v. Barbelais*, 101 Me. 512; *Stamford v. Fisher*, 140 N. Y. 187, aff'g 63 Hun (N. Y.), 123; *Ex parte Henson*, 49 Tex. Crim. Rep. 177.

¹ *Commonwealth v. Crowninshields*, 187 Mass. 221. Exclusive control of the streets conferred upon a city by charter accompanied by general power to make ordinances to carry the provisions of the charter into effect, is sufficient to authorize all reasonable regulations as to *fast driving* and any other use of the streets which may make travel thereon dangerous to the public. *Scudder v. Hinshaw*, 134 Ind. 56. An ordinance prohibiting riding or driving in the streets *faster than an ordinary trot* is sufficiently definite, is not invalid for uncertainty, and is reasonable. *Nealis v. Hayward*, 48 Ind. 19.

A statutory regulation of the *speed of horses travelling* on the streets of New York City was held to have no application to the speed at which engines and hose carts connected with the *fire department* might be driven when going to a fire. *Farley v. New York City*, 152 N. Y. 222, rev'g 9 N. Y. App. Div. 536. See also as to the application and effect of a statutory provision giving the engines and vehicles of the *fire department* the right of way over all other vehicles, *Geary v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 514, aff'd 177 N. Y. 535; *New York City v. Metropolitan St. R. Co.*, 90 N. Y. App. Div. 66, aff'd 182 N. Y. 536. A statute giving to the insurance patrol or *salvage corps* the right of way over all vehicles except those carrying the mail, is constitutional. *Duffhe v. Metropolitan St. R. Co.*, 109 N. Y. App. Div. 603, aff'd 187 N. Y. 522. A statute giving the *salvage corps* the right of way does not absolve it from liability for negligence. *Newcomb v. Boston Prot. Dept.*, 146 Mass. 596; *Muhs v. Fire Ins. Salvage Corps*, 89 N. Y. App. Div. 389. An ordinance limiting the rate of speed of vehicles to six miles an hour was held to be unreasonable and invalid as applied to a *salvage corps* responding to an alarm of fire. *State v. Sheppard*, 64 Minn. 287. See also *Warren v. Mendenhall*, 77 Minn. 145. But on the other hand, it has been held that an ordinance prohibiting immoderate driving is binding upon the *fire department*. Hence, the fire marshal was held liable for damages caused through immoderate driving when going to a fire. *Morse v. Sweeney*, 15 Ill. App. 486. An *ambulance* was also held to be within the scope of a municipal ordinance prohibiting the driving of any vehicle through any street at a faster rate than six miles an hour, and the effect of the ordinance is not modified by a subsequent ordinance giving to every ambulance, &c., the right of way over other vehicles. *People v. Little*, 86 Mich. 125. An ordinance giving the *fire department* the right of way does not absolve it from the necessity of exercising care, particularly at crossings. *Garrity v. Detroit Citizens St. R. Co.*, 112 Mich. 369.

the avoidance of obstructions therein;¹ may require vehicles using the city streets *to be licensed*;² and it may require that vehicles using the city streets, or waiting therein for passengers, shall obey the directions of the police officers stationed in the streets and public places.³ By virtue of the supervision and control of the streets vested by statute in a municipality, it has been held that it is within the power of the municipality to require that any vehicle carrying a heavy load *shall use a particular portion of the street*,⁴ or require vehicles carrying heavy loads *to use wide tires*.⁵

¹ An ordinance which prohibits the *standing of teams* across the city streets and stopping one team alongside of another so as to obstruct the streets, held to be reasonable. *Commonwealth v. Derby*, 162 Mass. 183. The city may by ordinance *forbid public selling* on the city streets. *Commonwealth v. Ellis*, 158 Mass. 555. See also *Wade v. Nunnally*, 19 Tex. Civ. App. 256. An ordinance forbidding the *stopping of vehicles on the streets* longer than twenty minutes is reasonable and valid. *Commonwealth v. Fenton*, 139 Mass. 195. But an ordinance which prohibits the stopping of hacks and drays on certain streets except when receiving or delivering goods, was held to be unreasonable and void, no allowance being made for necessary stoppages for other purposes. *Ex parte Battis*, 40 Tex. Crim. App. 112.

An ordinance which requires *vehicles to keep to the right* of the centre of the street, and not to turn to the left into intersecting streets until they have passed beyond the centre of the intersecting street, held to be reasonable and valid. *State v. Larrabee*, 104 Minn. 37. Authority to make regulations for carriages authorizes an ordinance prescribing rates of fare and prohibiting the exaction of more than a specified fare for any prescribed distance. *Commonwealth v. Gage*, 114 Mass. 328.

² Power to regulate the use of the streets authorizes the city to *require a license*, and to exact a license fee for vehicles using the streets. *Tomlinson v. Indianapolis*, 144 Ind. 142. The power to *exact a license* for hacks is conferred by authority to make ordinances and exclusive control of the streets. *Scudder v. Hinshaw*, 134 Ind. 56. Under power to license, regulate, and control cartmen, &c., the city may *exact a license from wagons and carts*.

Gartside v. East St. Louis, 43 Ill. 47; *St. Louis v. Green*, 70 Mo. 562; *Brooklyn v. Breslin*, 57 N. Y. 591. But under a mere power to regulate or license the city *cannot impose a fee for purposes of a revenue*. *Terre Haute v. Kersey*, 159 Ind. 300; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562; *New York City v. Hexamer*, 59 N. Y. App. Div. 4. More fully as to distinction between the power to "license" and the power to "tax," see Index, *Licenses; Taxation*. Licenses may be exacted from *both residents and non-residents* who use vehicles in the city streets so long as there is no discrimination. *Tomlinson v. Indianapolis*, 144 Ind. 142; *Frommer v. Richmond*, 31 Gratt. (Va.) 646. Index, *Ordinances; Taxation*.

³ *Police officers* may be authorized by ordinance to *direct where hacks* and other vehicles shall stand at railroad depots, *Veneman v. Jones*, 118 Ind. 41; *St. Paul v. Smith*, 27 Minn. 364; or at theatres or places of public entertainment, *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438; or when soliciting passengers, *Commonwealth v. Matthews*, 122 Mass. 60. Index, *Police Officers; Police Power*.

⁴ An ordinance requiring all vehicles carrying loads exceeding twenty-five hundred pounds to use fifteen feet of the width of the street next to an electric railroad track was held to be reasonable, provided the portion of the street so set apart was reasonably suitable for the purpose. *State v. Boardman*, 93 Me. 73.

⁵ *People v. James*, 16 Hun (N. Y.), 426; *Regina v. Pipe*, 1 Ont. Rep. 43. An ordinance enacted under power to regulate the use of the streets and requiring wagons carrying heavy loads to have wheel tires three inches wide was held to be reasonable. *Harrison v. Elgin*, 53 Ill. App. 452. A *bicycle is a vehicle*; the riding of which on a side-

Power to make such ordinances "respecting *streets, wagons, carts, drays, &c.*, as to the council shall appear necessary for the *security, welfare, and convenience* of the city," authorizes an ordinance regulating the weight which wagons and other vehicles employed in the transportation of goods, wares, or produce of any kind shall carry through the streets of the city. In thus holding, the court admitted that "an ordinance which would operate as a total exclusion of the right of the citizen to pass over the streets of the city with his loaded wagon and team would be unreasonable and void, as against common right; but the ordinance in question merely *regulates* the exercise and enjoyment of the right, and is valid."¹

§ 1167. **Hackstands.**—Generally speaking, public sidewalks and streets are for use by all, upon equal terms, for any purpose consistent with the object for which such sidewalks and streets are established; subject, of course, to such general regulations as may be prescribed by the constituted authorities for the public convenience, to the end that, as far as possible, the rights of all may be conserved without undue discrimination. *Licensed hackmen and cabmen*, unless forbidden by valid local regulations, may, within reasonable limits, *use a public sidewalk* in prosecuting their calling, provided such use is not materially obstructive in its nature, that is, of such exclusive character as, in a substantial sense, to prevent others from also using it upon equal terms for legitimate purposes.² By virtue of its power to regulate the use of streets and sidewalks, and to regulate hackmen, &c., the city council *may provide for public hackstands* in the city streets, and may prescribe the length of time that hackmen may stand thereat.³ But it is not within the power

walk of a city or town is an offence punishable under a statute making it unlawful for any person to ride or drive upon the sidewalk. *Whiting v. Doob*, 152 Ind. 157; *Millett v. Princeton*, 167 Ind. 582.

¹ *Nagle v. Augusta*, 5 Ga. 546. Power to require license from persons with heavy loads using streets. *Gartside v. East St. Louis*, 43 Ill. 47; *Brooklyn v. Breslin*, 57 N. Y. 591; *ante*, §§ 589-593; *post*, § 1407. Non-residents using streets cannot be taxed therefor. *St. Charles v. Nolle*, 51 Mo. 122. But see *Memphis v. Battaille*, 8 Heisk. (Tenn.) 524; *ante*, §§ 627, 628. Authority to make regulations for the passage of carriages, wagons, &c., authorizes an ordinance limiting the loads of vehicles to three tons, unless the load

shall consist of an article which cannot be divided. Such an ordinance is reasonable and valid. *Commonwealth v. Mulhall*, 162 Mass. 496.

² *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 303, *aff'd* 120 Fed. Rep. 215.

³ *Pennsylvania Co. v. Chicago*, 181 Ill. 289; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 303.

Hacks. The regulation of hacks, omnibuses, and vehicles is generally conceded to be peculiarly within the power of a municipality by ordinance passed for the purpose. *Scudder v. Hinshaw*, 134 Ind. 56; *Ex parte Vance*, 42 Tex. Crim. Rep. 618. An ordinance prohibiting certain classes of people, including hack-drivers, from soliciting on the railroad platforms of a depot is not unreasonable, but is in the interest of the public

of the municipality to authorize the creation or maintenance of a hackstand of such a nature as to *interfere with the ingress to and egress from* abutting property; nor can the establishment of a hackstand by municipal ordinance be used as a justification for the acts of hackmen in congregating upon the sidewalk in front of and adjacent to or about the abutting premises, so as to interfere with the ingress and egress of persons desiring to visit the same.¹ Similarly, hotel keepers and other property owners may make such reasonable use of the street adjoining the hotel or property as is reasonably necessary for the purpose of enabling them to keep carriages for the use of their guests on call.²

§ 1168 (730). **Necessary and Temporary Obstructions to Use of Street.** — We have shown that the primary purpose of a street is for passage and travel, and that unauthorized and illegal obstructions to its free use come within the legal notion of a nuisance. But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the *right of the public to the free and unobstructed use of a street or way is subject to reason-*

and for their protection, comfort, and convenience. *Emporia v. Shaw*, 6 Kan. App. 808. But an ordinance *establishing hack and street car stands at a depot* which required the hack-drivers to remain with their vehicles, but did not require the persons in charge of the street cars to do the same, was held to be an *unreasonable discrimination* and void. *Ex parte Vance*, 42 Tex. Crim. Rep. 618.

¹ *Donovan v. Pennsylvania Co.*, 199 U. S. 279, aff'g 120 Fed. Rep. 215; *Curry v. District of Columbia*, 14 App. D. C. 423; *Branahan v. Cincinnati Hotel Co.*, 39 Ohio St. 333.

An ordinance prohibiting the soliciting by hackmen of passengers for hire in a railroad station when the station is being used by passengers leaving or entering, is valid and reasonable. *Seattle v. Hurst*, 50 Wash. 454; 97 Pac. Rep. 454. As against the owner of the fee of a highway, the municipality cannot by ordinance establish a public hackstand in the highway. That is not an ordinary highway use. *McCaffrey v. Smith*, 41 Hun (N. Y.), 117. In *Rex v. Cross*, 3 Campb. 224, Lord *Ellenborough* characterized the use of streets for hack-

stands as making a stable yard of the King's Highway.

² *Willard Hotel Co. v. District of Columbia*, 23 App. D. C. 272; *People v. Brookfield*, 6 N. Y. App. Div. 398; *Odell v. Bretney*, 62 N. Y. App. Div. 595. But a hotel owner cannot permit hacks to stand in front of his hotel for his own use and convenience if there be a public stand in the immediate vicinity, *e. g.*, in a square opposite his property. *Odell v. Bretney*, 38 N. Y. Misc. 603. Where a number of carriages are permitted to stand in front of a hotel with the permission of the proprietor, changing constantly as they find occupation, not obstructing the main entrance to the hotel, and occasioning as little inconvenience as possible to other vehicles using the street, a *permanent hackstand is not maintained*. *People v. Brookfield*, 6 N. Y. App. Div. 398. An ordinance which *prohibits hack drivers from standing* waiting for employment at any other place than a public hackstand, or in front of private premises, with the consent of the owner and on a special permit issued by the municipal authorities, is valid. *New York City v. Reesing*, 38 N. Y. Misc. 129.

able and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, &c., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvement of adjoining lots by digging cellars, by building, &c.; this may occasion a reasonable necessity for using a part of the street or sidewalk for the deposit of material. *Temporary obstructions of this kind* are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as they are, reasonably necessary. There need be no *absolute* necessity; it suffices that the necessity is a *reasonable* one. But this will never justify the leaving of the street or way in an unsafe and dangerous condition, or its use in an unreasonable manner or for an unreasonable time.¹

¹ Angell on Highways, chap. vi.; Hawk. P. C. chap. lxxvi. § 49; *post*, § 1683; *Clark v. Fry*, 8 Ohio St. 358, 373, *per Bartley, C. J., arguendo*; *People v. Cunningham*, 1 Denio (N. Y.), 524; *Rex v. Jones*, 3 Campb. 230, 231; *O'Linda v. Lothrop*, 21 Pick. (Mass.) 292; *Rex v. Ward*, 4 Ad. & El. 384, 405, relating to a hoard erected for repairing a house; *Rex v. Russell*, 6 Barn. & C. 566, as to temporary acts of loading coals in keels; *Rex v. Cross*, 3 Campb. 224, 226; *Rex v. Jones*, 6 East, 230; *Cline v. Cornwall*, 21 Grant (Can.), 129, 142; *Grant v. Stillwater*, 35 Minn. 242; *State v. Omaha*, 14 Neb. 265; *Smith v. McDowell*, 148 Ill. 51, citing text; *Gates v. Richmond*, 103 Va. 702; *Gerdes v. Iron & Foundry Co.*, 124 Mo. 347, 354, citing text. *Infra*, §§ 1169, 1170, 1172.

In *Commonwealth v. Passmore*, 1 Serg. & R. (Pa.) 217, the Supreme Court of Pennsylvania, speaking of this subject, says: "Necessity justifies actions which would otherwise be nuisances; this necessity need not be absolute, — it is enough if it be reasonable. No man has a right to throw wood or stones into the street at pleasure; but inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner," and be not unreasonably prolonged.

Approved, *People v. Cunningham*, 1 Denio (N. Y.), 524, 530; *Clark v. Fry*, 8 Ohio St. 358, 374; *Rex v. Cross*, 3 Campb. 224; *St. John v. New York*, 3 Bosw. (N. Y.) 483. In *Wood v. Mears*, 12 Ind. 515 (an action for special damages against the author of the obstruction), it was held that a street of a city may be obstructed by placing material for building in it for a reasonable time and so as to occasion the least inconvenience, if, *from want of room elsewhere, it be reasonably necessary to deposit it in the street*; and a plea is defective which does not aver or show this reasonable necessity, as it cannot be judicially inferred from the fact that the building was being erected in a populous city. Undoubtedly, a man in the pursuit of his lawful business will be excused for acts which, if wantonly done, would be regarded as nuisances, yet no considerations of private interest or convenience will justify a person in the pursuit of his business unreasonably to incommode the public or interfere with their right to the free use of the street. Angell on Highways, § 231. The law on this point is well stated by the court in *Rex v. Russell*, 6 East, 427: "That the primary object of the street is for the free passage of the public, and anything which impeded that free passage, *without necessity*, was a nuisance. That if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could be conveniently contained within his own private

Although the distinction between the extent of the rights of the public in a street and the right of the abutting proprietor to *access*

premises, he must either enlarge his premises or remove his business to some more convenient spot." *Infra*, § 1170. Same principle applied to congregation of carts in the public streets for the reception of slops from a distillery. *People v. Cunningham*, 1 Denio (N. Y.), 524. To the keeping of coaches at a stand in the street, waiting for passengers. *Rex v. Cross*, 3 Campb. 224, 226. To a timber merchant depositing timber in the street. *Rex v. Jones*, 6 East, 230; and see also *Rex v. Carlile*, 6 Carr. & P. 636; *Rex v. Moore*, 3 B. & Ald. 184. What uses of streets permissible, discussed. *Norristown v. Moyer*, 67 Pa. St. 355.

Mere neglect to repair a street will not render a municipal corporation liable to an adjoining owner for loss of business, unless he can show it to be a public nuisance which occasions a damage peculiar to himself. *Gold v. Philadelphia*, 115 Pa. St. 184.

Moving buildings on suitable streets, with expedition and care, is permissible. *Graves v. Shattuck*, 35 N. H. 257. See *ante*, § 715. *An exhibition of wild animals* on a public street is a nuisance; and when made under municipal authority rendering the use of the street dangerous to travellers, whereby a private injury was sustained, the city was held liable. *Little v. Madison*, 42 Wis. 643.

Temporary obstruction of street by loading and unloading cars. *Mathews v. Kelsey*, 58 Me. 56. But a street cannot be used for depot purposes. *Mahady v. Bushwick R. Co.*, 91 N. Y. 148. *Lewis, Em. Dom.* § 117. The right temporarily to obstruct the highway springs from reasonable necessity and is limited by it; and those who exercise the right "must so conduct themselves as to discommode others as little as is reasonably practicable, and remove the obstruction or impediment within a reasonable time, having regard to the circumstances of the case; and when they have done this the law holds them harmless." *Davis v. Winslow*, 51 Me. 264, 297; *Franklin Wharf Co. v. Portland*, 67 Me. 46; *infra*, §§ 1169, 1170.

Whether steam-engine in a street as a means of locomotion is a nuisance. *Macomber v. Nichols*, 34 Mich. 212; *ante*, § 684, note. *Steam motors in streets*, see *post*, § 1248, note. A railroad in a

street is not *per se* a nuisance, but may become so, if used in an improper or unreasonable manner. *State v. Louisville, N. A. & C. Ry. Co.*, 86 Ind. 114. *New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18. A railroad placed longitudinally in a street without legislative authority is a nuisance. *Burlington v. Pennsylvania R. Co.*, 56 N. J. Eq. 259; *New Jersey S. R. Co. v. Long Branch*, 39 N. J. L. 28 l. c. 33; *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267. "A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain." *King v. Jones*, 3 Campb. 230. See also *Thorpe v. Brumfitt*, L. R. 8 Ch. Ap. 650. What is a reasonable time must be determined by the circumstances of each case. *Hesselbach v. St. Louis*, 179 Mo. 505. It must appear that building materials placed opposite premises under authority of an ordinance occupied no greater part of the street than allowed by the ordinance, and that no unnecessary use of the street was made. *Martin v. Chicago, B. & Q. R. Co.*, 87 Ill. App. 208. A man has no right to eke out the inconvenience of his own premises by taking the public highway into his timber-yard, *King v. Jones*, 3 Campb. 230; or stoneyard. *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Commonwealth v. King*, 13 Met. (Mass.) 115. A highway is not to be used as a stable-yard. *King v. Cross*, 3 Campb. 224. See also *Ridley v. Lamb*, 10 Up. Can. Q. B. 354; *Mott v. Schoolbred*, L. R. 20 Eq. 22. Or as a place for the deposit of a cart and machinery for the purpose of taking photographic likenesses. *Queen v. Davis*, 24 Up. Can. C. P. 575. Or a projecting show board. *Read v. Perrett*, L. R. 1 Ex. Div. 349; *Original Hartlepool Collieries Co. v. Gibb*, L. R. 5 Ch. Div. 713. A stage-coach may set down or take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time. *Rex v. Cross*, 3 Campb. 224.

So long as the alleged obstruction is for the public convenience there can be

to his premises from the street has been often overlooked,¹ yet it is one which has been asserted by high authority, and which may be regarded as thoroughly established, subject to legitimate legislative regulation. The right of an abutting owner to access to and from the street is a *private right*, in the sense that it is something different from the right which the members of the public have to use the street for public purposes. By the courts of New York and of some other States it is even regarded as an *easement* in favor of the abutter's lot in the legal sense of the term, and as such is property or a property right, protected by the Constitution against legislative appropriation without compensation.² Conformably to the distinction above mentioned, a person owning or in possession of premises abutting on a public highway or street, *whose right of access to the same is unreasonably or unlawfully obstructed*, may recover from the person causing such obstruction damages for the private injury he sustains, where such damages are particular, direct, and substantial.³

no reasonable ground of complaint. *King v. Russell*, 6 B. & C. 566; but see *King v. Ward*, 4 A. & E. 384. A railway company has no right to turn a highway into a yard for cars. *Vars v. Grand Trunk R. Co.*, 23 Up. Can. C. P. 143. See also *Harris v. Mobbs*, L. R. 3 Ex. D. 268. A man has no right to occupy one side of a street before his warehouses in loading and unloading his wagons, for several hours at a time, both day and night, so that no carriage can pass on that side of the street, although there be room for two carriages to pass on the opposite side of the street. *King v. Russell*, 6 East, 427. If a man does anything or permits anything on his premises in view of the public, and crowds of persons are thereby attracted by it, to the inconvenience of the public, that thing he cannot be allowed to do. *King v. Carlile*, 6 C. & P. 636. Attracting and keeping crowds of people an unreasonable time by reason of speeches may be subject to prosecution. *Rex v. Sarmon*, 1 Burr. 516; *Barker v. Commonwealth*, 19 Pa. St. 412.

The acts of several persons in obstructing a highway may together constitute a nuisance which the Court of Chancery will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable. *Thorpe v. Brumfitt*, L. R. 8 Ch. Ap. 650; *Cline v. Cornwall*, 21

Grant Ch. (Ont.) 129; *Harr. Munic. Man.* (5th ed.) 434. *Biggar, Mun. Man.* (Canada, 1900) 656.

¹ *Ante*, §§ 1123, 1124; *post*, §§ 1222-1225, 1245.

² *Story v. New York Elev. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268; *Barnett v. Johnson*, 15 N. J. Eq. 481; *ante*, § 1123; *post*, §§ 1222-1225, 1245.

³ *Fritz v. Hobson*, L. R. 14 Ch. Div. 542; s. c. 19 Am. Law Reg. (N. S.) 615, with a valuable note referring to many English and American cases. The well-considered judgment in this case is based upon two grounds: 1. Private, special, particular, substantial damage, resulting from a public nuisance. 2. The owner of land "has a right to have access thereto, which is a totally different right from the public right of passing and repassing along the highway"; and an unlawful obstruction of this right gives a right of action. The action in the case cited was brought by the occupier of premises to recover of the defendant, a builder, damages caused by unlawfully obstructing access to the plaintiff's premises, by piling building material in the public ways near to the same. In speaking of the second above-mentioned ground of judgment, *Fry, J.*, after stating that it appeared that the plaintiff had sustained loss in his business as a result of the defendant's

§ 1169. Temporary Obstructions for Loading and Unloading Goods.

— The *temporary obstruction* of public travel for the purpose of *loading and unloading vehicles* in front of business premises is recognized as a necessary exception to the general rule that any obstruction of a street or encroachment thereon which interferes with public travel and transportation is a public nuisance. The owner or occupant of abutting premises is justified in making a reasonable use of the street for the purpose of conveying goods to or from his premises,¹ and for this purpose he may place temporary

building operations, and that the defendant's user of the public ways in front of or near to the plaintiff's premises was, under all the circumstances, unreasonable, says:

"Then arises the question, or questions, how far this state of circumstances gives rise to any legal right in the plaintiff. Now, the cases of *Rose v. Groves*, 5 M. & G. 613, and *Lyon v. Fishmongers' Co.*, L. R. 1 App. Cases, 662, in the House of Lords, appear to me to establish this: that where the private right of the owner of land to access to the road is interfered with, and unlawfully interfered with, by the acts of the defendant, he may recover damages from the wrongdoer to the extent of the loss of profits of the business carried on at that place. The case of *Rose v. Groves* was that of an owner of a riparian property; but it is referred to by the Lord Chancellor in the case of *Lyon v. Fishmongers' Co.*, and he cites there an observation of Lord *Hatherly* in another case to this effect: 'I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river.' Then the Lord Chancellor continues: 'The existence of such a private right of access was recognized in *Rose v. Groves*. As I understand the judgment in that case it went, not on the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with.' Then, after more fully examining that case, and expressing not the slightest intention to differ from it, his lordship says: 'Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something

quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right.' Applying that principle to the present case, it does appear to me that the evidence shows that the access to the plaintiff's door in the passage from the street was interfered with by the acts of the defendant, which I hold to be unreasonable, and therefore wrongful; and, that being so, the cases to which I have referred are authorities for the plaintiff on that ground, and entitle him to recover the amount of loss in his business carried on upon his property." See also *Rude v. St. Louis*, 93 Mo. 408 (quoting and approving the text).¹

Legislation authorizing the use of streets for elevated and subsurface as well as other railways, or authorizing other obstructions to this private right of access, presents questions of great interest, which, so far as they have been adjudged, are considered in the course of the present chapter, and the next.

¹ *Gassenheimer v. District of Columbia*, 25 App. D. C. 179; *Costello v. State*, 108 Ala. 45; *Brauer v. Baltimore Refrigerating Co.*, 99 Md. 367; *Gerdes v. Iron & Foundry Co.*, 124 Mo. 347, 354; *Weller v. McCormick*, 52 N. J. L. 470, 472; *Murphy v. Leggett*, 164 N. Y. 121, 125, aff'g 29 N. Y. App. Div. 309; *O'Reilly v. Long Island R. Co.*, 4 N. Y. App. Div. 139; *People v. Brookfield*, 6 N. Y. App. Div. 398; *Odell v. Bretney*, 62 N. Y. App. Div. 595; *Kelly v. Otterstedt*, 80 N. Y.

erections or obstacles such as skids across the sidewalk.¹ But the right of the abutter to use the street for these purposes is subject to necessary limitations and restrictions. The obstruction must be temporary in its nature and such as is reasonably necessary for the transaction of business or the enjoyment of the premises.² Mere necessity in the business of the abutter is not sufficient of itself to justify the obstruction. The obstruction must also be reasonable with reference to the rights of the public whose interests in the street may not be sacrificed or disregarded.³ The right to so obstruct the street or sidewalk must also be exercised with a due regard to the rights and safety of pedestrians and others lawfully using the streets.⁴ If the obstruction continues for such a period as to amount

App. Div. 398; Vallo v. United States Express Co., 147 Pa. 404. See also People v. Horton, 64 N. Y. 610, aff'g 5 Hun (N. Y.), 516; *supra*, § 1168.

There is no distinction in the quality of the right or in the degree of care to be used in exercising it between the right of the owner of abutting property to use a street for the purpose of going to or coming from his premises, and the right of the ordinary travellers on the street. Schindler v. Schroth, 146 Cal. 433. Merely *permitting an automobile to stand in front of a hotel* for two hours is not in itself an obstruction or encroachment of the street. Gassenheimer v. District of Columbia, 25 App. D. C. 179. Similarly, it is not *per se* an obstruction or encroachment to permit a carriage to stand in the street for three hours in front of a carriage repository. Probey v. District of Columbia, 26 App. D. C. 1.

¹ Welsh v. Wilson, 101 N. Y. 254; Mathews v. Kelsey, 58 Me. 56. See also Gates v. Richmond, 103 Va. 702.

² Callanan v. Gilman, 107 N. Y. 360, 365; Flynn v. Taylor, 127 N. Y. 596, 599; Tinker v. New York, O & W. R. Co., 157 N. Y. 312, 318, aff'g 92 Hun (N. Y.), 269; Murphy v. Leggett, 164 N. Y. 121, 125, aff'g 29 N. Y. App. Div. 309.

³ Brooks v. Atlanta, 1 Ga. App. 678; Mathews v. Kelsey, 58 Me. 56; Brauer v. Baltimore Heating Co., 99 Md. 367; Gerdes v. Iron & Foundry Co., 124 Mo. 347, 354; Callanan v. Gilman, 107 N. Y. 360, 365; Cohen v. New York City, 113 N. Y. 532, 534; Flynn v. Taylor, 127 N. Y. 596, 599; Tinker v. New York, O & W. R. Co., 157 N. Y. 312, aff'g 92 Hun (N. Y.), 269; Murphy v. Leggett, 164 N. Y. 121, 125, aff'g 29 N. Y. App.

Div. 309; Kurlanchick v. Sklamberg, 56 N. Y. Misc. 473; Linehen v. Western Electric Co., 29 N. Y. App. Div. 462; Odell v. Bretney, 62 N. Y. App. Div. 595, 597; Wynn v. Yonkers, 80 N. Y. App. Div. 277; Manley v. Leggett, 62 Hun (N. Y.), 562; Richardson & Boynton Co. v. Barstow Stove Co., 13 N. Y. Supp. 358; Vallo v. United States Express Co., 147 Pa. 404; Stahle v. Poth, 220 Pa. 335; Rex v. Jones, 3 Campb. 230.

In *Williams v. District of Columbia*, 22 App. D. C. 471, it was held that if a marshal, in dispossessing a tenant, places the goods on the sidewalk where they are allowed to remain an unnecessarily long time, the offence is that of the owner of the goods and not of the marshal. The marshal discharges his duty when he removes the goods from the premises and places them on the sidewalk. But in *Commonwealth v. Lennen*, 172 Mass. 434, it was held that a constable removing furniture from a house under a writ is liable for obstructing the sidewalk if he leaves the furniture thereon contrary to a city ordinance. He may store the goods at the owner's expense and require a bond from the person who calls upon him to serve the writ. It is not within the power of a city to grant a permit to keep a wagon in the street in front of the abutter's premises in the absence of express statutory authority therefor. *Cohen v. New York City*, 113 N. Y. 532. See also *Farley v. New York City*, 152 N. Y. 222.

⁴ Vallo v. United States Express Co., 147 Pa. 404; Stahle v. Poth, 220 Pa. 335; McCormack v. Boston El. R. Co., 188 Mass. 342. Where it did not appear that the obstruction was main-

to an unreasonable interference with the public travel, it is unlawful and a nuisance.¹ The question whether an obstruction in a street is necessary and reasonable is generally a question of fact to be determined by the court or jury from the evidence relating thereto.² An adjoining proprietor who is specially damaged by the acts of the owner or occupant of premises in obstructing the sidewalk and street to an unreasonable or unnecessary extent in loading or unloading goods may in proper cases obtain relief by injunction.³

§ 1170. **Temporary Obstructions by Building Material.** — Similar considerations determine the lawfulness of temporary obstructions of city streets by *building material*, or in connection with the improvement of the street itself, or for the purpose of constructing a public improvement or work therein. The temporary and necessary obstruction of public travel for these purposes is justified.⁴ But the obstruction must be reasonably necessary, due precautions to avoid injury to travellers must be taken, and the obstruction must not

tained unreasonably or for an unnecessary length of time, it was said by the court that the defendant was under no obligation to furnish to a traveller a safe passageway around the obstruction. *Welsh v. Wilson*, 101 N. Y. 254, 257.

¹ Goods were delivered from trucks in front of defendant's premises. The trucks were placed on the street adjoining the sidewalk, and then a bridge made of two skids planked over, making a plankway about three feet wide and fifteen feet long, was placed over the sidewalk, with one end resting on the stoop of defendant's store and the other end upon a wooden horse at the outside of the sidewalk near the truck. This bridge was usually removed when not in use, but there was uncontradicted evidence that it sometimes was permitted to remain in position when not in use. Sometimes it remained in position when in use for one hour, one hour and a half, and sometimes two hours. It was found by the court that it remained in position four or five hours each business day between 9 A. M. and 5 P. M. and obstructed the sidewalk the greater part of every business day. It was held that *this was a practical appropriation by the defendant of the sidewalk to his private use in disregard of the public convenience and was unlawful*. The court also held that even if in some sense the use was necessary to the convenient and profitable transaction of defend-

ant's business, these circumstances did not justify the obstruction. *Callanan v. Gilman*, 107 N. Y. 360.

² *Gassenheimer v. District of Columbia*, 25 App. D. C. 179; *Costello v. State*, 108 Ala. 45; *Hesselbach v. St. Louis*, 179 Mo. 505; *Callanan v. Gilman*, 107 N. Y. 360; *Flynn v. Taylor*, 127 N. Y. 569, 600; *Murphy v. Leggett*, 164 N. Y. 121, 126; *Lewis v. Ballston Terminal R. Co.*, 45 N. Y. App. Div. 129, 131; *Kelly v. Otterstedt*, 80 N. Y. App. Div. 398; *Kurlanchick v. Sklamberg*, 56 N. Y. Misc. 473; *Vallo v. United States Express Co.*, 147 Pa. 404; *Davis v. Corry City*, 154 Pa. 598.

³ *Brauer v. Baltimore Heating Co.*, 99 Md. 367; *Callanan v. Gilman*, 107 N. Y. 360; *Flynn v. Taylor*, 127 N. Y. 596. As to the general requirement that ordinances must be reasonable, see Index, *Ordinances*.

⁴ *Costello v. State*, 108 Ala. 45; *Adair v. Atlanta*, 124 Ga. 288; *Wood v. Mears*, 12 Ind. 515; *Stephens v. Macon*, 83 Mo. 345; *Hesselbach v. St. Louis*, 179 Mo. 505; *Westliche Post Assoc. v. Allen*, 26 Mo. App. 181; *Frick v. Kansas City*, 117 Mo. App. 488; *State v. Omaha*, 14 Neb. 265; *Friedman v. Snare & Triest Co.*, 71 N. J. L. 605; *Hatfield v. Straus*, 189 N. Y. 208, 214; *Turl v. N. Y. Contracting Co.*, 46 N. Y. Misc. 164; *Lund v. St. Paul, M. & M. R. Co.*, 31 Wash. 286; *supra*, §§ 1168, 1169, 1172.

continue for an unreasonable length of time.¹ In this connection the important principle has been held that the city, in constructing a public improvement in the street, cannot appropriate the surface of the street and erect *thereon a building to continue during the entire construction of the improvement throughout its entire length, and not merely in so far as it may be necessary for the construction of the improvement in the vicinity of the property.* In this case the contractors for the construction of the subway railroad in New York City had erected on Union Square an air power plant in front of the plaintiff's hotel for the purpose of furnishing compressed air power to different parts of the work as it progressed. It was held that although the city and its contractors for the subway were entitled to make a reasonable use of the street for temporary purposes, yet this plant could not be considered as temporary merely, since its use was not limited to the construction in the street in the vicinity of plaintiff's premises, but extended to the construction over a distance of about two miles. The court declared that the necessary injuries and annoyances inflicted upon the plaintiff in the proper prosecution of the work arose from the opening of the street on the east side of his property and the construction of the subway by blasting and other necessary work involving obstruction, noise, and general inconvenience. When this portion of the work was accomplished and the street restored to its normal condition opposite his property, the annoying situation would cease as to him. If, however, the structures complained of were to be maintained during the entire prosecution of the work undertaken by the contractor, the plaintiff was subjected to annoyance and injuries which were neither necessary nor reasonable.²

§ 1171 (731). **Municipal Control over Use of Streets by Deposit of Building Materials.** — As a city corporation may be compelled to

¹ *Senhenn v. Evansville*, 140 Ind. 675; *Frick v. Kansas City*, 117 Mo. App. 488; *Weller v. McCormick*, 52 N. J. L. 470, 472; *Culberson v. Alexander*, 17 Okla. 370.

² *Bates v. Holbrook*, 171 N. Y. 460, aff'g 67 N. Y. App. Div. 25. When a municipal corporation has general authority by statute to make a public improvement in a public street, which does not involve direct encroachment upon private property, it is *not liable for consequential damages* unless they are caused by negligence, misconduct, or want of skill on the part of its servants or agents. *Uppington*

v. New York City, 165 N. Y. 222, aff'g 44 N. Y. App. Div. 630; *supra*, §§ 1168, 1169. Index, *Consequential Injuries*. Where damage was caused by blasting whilst constructing a sewer in the street, but it resulted only from the concussion and not from an actual trespass on the property by throwing rocks and stones thereon, it is to be regarded as consequential only, and in the absence of negligence there can be no recovery therefor. *Holland House Co. v. Baird*, 169 N. Y. 136. See also *Cherryvale v. Studyvin*, 76 Kan. 285.

pay damages caused by the negligent manner in which persons occupy or use sidewalks and streets with *building material*, it may impose reasonable conditions on those who wish thus to use or occupy the streets or sidewalks, — as, for example, require them, by ordinance, to give bond to indemnify the city against losses or damages caused by the manner in which the privilege to use and occupy the sidewalks and street is exercised.¹

§ 1172 (732). **Same Subject.** — A city council, having “exclusive power over streets,” has the right to determine, by ordinance, to what extent and under what circumstances they may be incumbered with *building materials*, and such an ordinance will protect parties acting under it, not only from a prosecution by the city, but from actions by third persons, when such actions are not grounded upon the negligence of the defendant.²

§ 1173 (733). **Same Subject.** — Authority by the charter to a municipal council to make “salutary and needful by-laws” authorizes an ordinance *prohibiting the obstruction of any street for the purpose of building* “without the written license of the mayor and aldermen;” and under such an ordinance an agreement made in consideration of such license from the mayor *alone* is void, and no action lies thereon.³

§ 1174. **Public Displays, Shows, Exhibitions, &c.** — The decisions justify the use of the streets, under suitable restrictions and conditions, for *public displays on occasions of celebrations of holidays, or the commemoration of important public events*. Thus, it has been pointed out that the practice of making the *display of fire-works* a part of the entertainment furnished by municipalities on occasions of celebrations of holidays or the commemoration of important public events is almost universal in cities and villages; and the

¹ *McCarthy v. Chicago*, 53 Ill. 38. The conditions contained in a permit to use a street for the deposit of building material must be complied with. If material be placed on a part of the street other than that specified in the permit, it is a nuisance. *Mulvey v. New York City*, 114 N. Y. App. Div. 526, *aff'd* 189 N. Y. 564.

² *Wood v. Mears* (action against builder for injuries caused by building materials deposited in street), 12 Ind. 515, distinguishing *Ball v. Armstrong*,

10 Ind. 181; *Sinclair v. Baltimore*, 59 Md. 592. A city may close a street temporarily to permit adjacent owners to make improvements, but, in doing so, it must notify the public of its exclusion, in order to protect itself from liability for injuries sustained by one who attempts to use the street in ignorance of its being closed to traffic. *Stephens v. Macon*, 83 Mo. 345; *supra*, § 1168, note, 1170.

³ *Lowell v. Simpson*, 10 Allen (Mass.), 88.

Court of Appeals of New York declared that it was not prepared to say that this might not be done, and that streets and public places might not be used for this purpose under the supervision of municipal authorities, due care being used both as to the place selected and the management of the display, without creating a nuisance.¹ It has accordingly held that a display of fire-works in certain streets may or may not be a nuisance according to the circumstances, which usually present a question of fact; and the question whether such a display may be permitted by the municipal authorities without creating a nuisance is to be determined by the circumstances attending it.² But it is to be observed of these displays that they are incident to public occasions; and it would seem that the use of the city streets for displays and exhibitions of a purely private character for purposes of gain do not come within the principle, and cannot be permitted without creating a nuisance.³

¹ *Speir v. Brooklyn*, 139 N. Y. 6; *Landau v. New York City*, 180 N. Y. 48, rev'g 93 N. Y. App. Div. 613; *Melker v. New York City*, 190 N. Y. 481, aff'g 117 N. Y. App. Div. 923.

In some cases it has been held that the discharge of fire-works in the streets of villages or cities is a nuisance *per se* and subjects persons engaged in the transaction to responsibility for any injury to person or property resulting therefrom. See *Jenne v. Sutton*, 43 N. J. Law, 257; *Conklin v. Thompson*, 29 Barb. (N. Y.) 218. But it has been doubted whether the doctrine in its full breadth can be maintained. *Speir v. Brooklyn*, 139 N. Y. 6, 11.

In *Pennsylvania* it is held that the erection of "liberty poles" in city and village streets is sanctioned by custom, and unless forbidden by the authorities such poles are a lawful use of the street. *Allegheny v. Zimmerman*, 95 Pa. 287. A temporary obstruction by reason of a rope stretched across a street is lawful. *Simon v. Atlanta*, 67 Ga. 618. An ordinance prohibiting the explosion of fire-crackers, Roman candles, etc., without the written consent of the mayor specifying the time and place, is valid. *Centralia v. Smith*, 103 Mo. App. 438.

² *Landau v. New York City*, 180 N. Y. 48; *Crowley v. Rochester Fire-works Co.*, 183 N. Y. 353, rev'g 95 N. Y. App. Div. 13; *De Agramonte v. Mt. Vernon*, 112 N. Y. App. Div. 291. A discharge of fire-works on an

extensive scale at the junction of two narrow streets in a large city, completely built upon and where any misadventure in managing the display would be likely to result in injury to persons or property, constitutes a public nuisance. *Speir v. Brooklyn*, 139 N. Y. 6.

³ The use of a highway as a race course for automobiles competing against time is unlawful, and cannot be authorized by the municipality. *Johnson v. New York City*, 186 N. Y. 139, rev'g 109 N. Y. App. Div. 821. An overhead wire stretched from the roof of a court-house building to a post on the further side of the street to facilitate the performance of a female acrobat, is an unlawful use of the street and a nuisance. *Wheeler v. Ft. Dodge*, 131 Iowa, 566. A so-called fair occupying seventy-five or eighty feet in width, and four blocks in length, of an important business street in the city, and consisting of numerous tents, enclosing shows and exhibits in front of which are stationed men blowing horns and talking through megaphones to attract attention, together with various other stands, booths, structures, ferris-wheels, merry-go-rounds, and other devices for the amusement of the public and profit of the owners, a company of the State militia, and intended to continue for a week, is a public nuisance. *Augusta v. Reynolds*, 122 Ga. 754. In this case the court discussed the use of streets and highways in England for

§ 1175. **Erection of Public Buildings in Street.** — The erection of a *public building, such as a market house*, within the lines of a street, interfering with travel and rendering the highway less commodious, is a *nuisance* which may be enjoined.¹ Similarly, an *abutting owner* specially injured by the erection of a *town hall and a building in a street* is entitled to maintain an action against the city to abate the nuisance and to recover damages, although the buildings may have been erected and maintained for a long period of years.² Similar principles have been applied to the holding of *public markets within the street*, although no buildings were erected and people were simply permitted to sell from wagons and temporary stands. It has been held that such a use of the city streets without legislative authority is unlawful, and may be enjoined.³

§ 1176. **Appropriation to Private Uses.** — In speaking of the uses to which streets may be devoted, it has been said that not even the

fairs, and pointed out that such use appeared to be founded upon immemorial custom, and that in any event the English fair was different from that involved in the case before the court. A platform twelve feet wide, sixty-four feet long, and six feet high, erected for the purpose of exhibiting a cake walk and other exhibits is a nuisance *per se*. *Richmond v. Smith*, 101 Va. 161. But in *Indiana*, it has been held that under authority to license and regulate places for sports and public exhibitions, the municipal authorities may permit the temporary use of the streets by a society for the purposes of a *carnival or festival*. *State v. Stoner*, 39 Ind. App. 104.

In *Pennsylvania*, it has been said that it is questionable whether any power exists in a city to grant to a private individual, not the owner of abutting property, a special license to erect a *structure for a reviewing stand* during a public parade, within the lines of a public street. *Clothier v. Philadelphia*, 22 Pa. Super. Ct. 608, 612.

¹ *State v. Mobile*, 5 Port. (Ala.) 279; *Lutterloh v. Cedar Keys*, 15 Fla. 306; *Columbus v. Jacques*, 30 Ga. 506; *Savannah v. Wilson*, 49 Ga. 476; *Ketchum v. Buffalo*, 14 N. Y. 356, 374, *per Wright, J.*; *Wartman v. Philadelphia*, 33 Pa. 202.

² *Pettit v. Grand Junction*, 119 Iowa, 352. *Voting booth* held to be an illegal obstruction of a street, unless

its erection and maintenance within the street is clearly authorized by statute. *Haberlil v. Boston*, 190 Mass. 358. The county court of a county, by virtue of its incidental control of the court-house, has no power to create a nuisance by the erection of *horse racks in the public square of a city*. *Samuels v. Nashville*, 3 Sneed (Tenn.), 298.

³ *Richmond v. Smith*, 148 Ind. 294. See also *McDonald v. Newark*, 42 N. J. Eq. 136. But the *contrary view* was adopted in *State v. Smith*, 123 Iowa, 654, where the conclusion arrived at by the court was that *such a public market* established by ordinance in a portion of a city street is not a nuisance *per se*, where it constitutes only a temporary or partial obstruction of the street. The court expressed the opinion that in order to establish the fact that the market was a nuisance, it was necessary to show something more than the mere fact that it was held in the city street.

In *State v. Laverack*, 34 N. J. L. 201, it is held that the legislature cannot authorize a *market to be held in a public street* without providing for compensation to the abutters who own the fee of the street. The use of the street for market purposes imposes an additional burden on the fee. *Sed quare* whether the legislative authority over streets and their uses is thus restrained in favor of the rights real or supposed of the abutter.

legislature can authorize the condemnation of private property for other than public use; hence, the appropriation of a *street to a private purpose* cannot be justified even by legislative authority.¹ It is, however, to be noted that in the cases in which this language was used, the question arose as against an adjoining proprietor, and the circumstances of the cases involved the destruction or impairment of the rights of light, air, and access of adjoining property without any proceeding to vacate the street, and without compensation for private property taken or impaired. But whatever the power of the legislature may be, to justify a use of a street or an act which would constitute a nuisance without making compensation therefor to those who are specially injured and without their consent, the statute must be express or the right to permit such act given by a clear and unquestionable implication from the powers expressly conferred, so that it can be fairly said that the legislature contemplated the doing of the very act which occasioned the injury, and it may not be presumed from a general grant of authority.² Hence, without express or plain authority of this nature, a city cannot grant a permanent right or easement in a street for the benefit of private parties and for an exclusively private purpose.³ In the absence of such authority the city cannot grant permission to a railroad company to lay a *spur or siding in a street and into private premises* for the use and benefit of the owner of the premises;⁴

¹ *Ackerman v. True*, 175 N. Y. 353, 365, rev'g 71 N. Y. App. Div. 143; *People v. Ahearn*, 124 N. Y. App. Div. 840, 847; *People v. Keating*, 62 N. Y. App. Div. 348, 350, rev'd 168 N. Y. 390.

² *Augusta v. Burum*, 93 Ga. 68; *Delaware, L. & W. R. Co., v. Buffalo*, 158 N. Y. 266, 268; *Ackerman v. True*, 175 N. Y. 353, 366, rev'g 71 N. Y. App. Div. 143; *Hatfield v. Straus*, 189 N. Y. 208, 217.

³ *Snyder v. Mt. Pulaski*, 176 Ill. 397; *Pennsylvania Co. v. Chicago*, 181 Ill. 289; *Heineck v. Grosse*, 99 Ill. App. 441; *Adams v. Ohio Falls Car Co.*, 131 Ind. 375; *Ackerman v. True*, 175 N. Y. 353, 364; *Hatfield v. Straus*, 189 N. Y. 208, aff'g 117 N. Y. App. Div. 671.

The municipality cannot authorize the construction of a *bulkhead or platform* the entire width of the sidewalk for the convenience of the occupants of a building in loading and unloading goods. *Chicago Cold Storage Warehouse Co v. People*, 224 Ill. 287.

A city cannot grant *the right to lay pipes in the streets for the purpose of distributing ammonia gas for refrigerating purposes*, particularly where it appears that the enterprise is undertaken for the advantage of a limited number of people within a limited district. *Rhinehart v. Redfield*, 93 N. Y. App. Div. 410, aff'd 179 N. Y. 569. The city cannot lease a portion of a certain street for a *private purpose*. It was so held in a case where the street adjoined a river which had washed away a portion of the street rendering travel impossible. The washed out portion was leased to defendant, who filled it in and erected buildings on the filled land. It was held that the lease was invalid, and the erection and maintenance of the buildings was enjoined at the suit of a property owner whose lots abutted on the opposite side of the street. *Labry v. Gilmour*, 121 Ky. 367.

⁴ *Macon v. Harris*, 73 Ga. 428; s. c. 75 Ga. 761; *Heath v. Des Moines & St. L. R. Co.*, 61 Iowa, 11; *Mikesell*

nor can it grant to an individual the right to construct a *bridge* across a street at an elevation to connect opposite buildings,¹ or to construct or use a *well*,² or to permit the construction of an *ice chute* across a street,³ nor, as has been held, can it authorize the erection and maintenance of *private scales* in connection with the business of an abutter.* A city cannot farm out the streets for a private business, as by authorizing an individual to place boxes for waste paper along the curb line, and to collect money from advertisements placed thereon.⁵ Founded upon custom and necessity it

v. Durkee, 34 Kan. 509; s. c. 36 Kan. 97; *Glaessner v. Anheuser-Busch Brewing Assoc.*, 100 Mo. 508; *Montgomery v. Trenton*, 36 N. J. L. 79; *Swift v. Delaware, L. & W. R. Co.*, 66 N. J. Eq. 34; *Hatfield v. Straus*, 189 N. Y. 208, 217, aff'g 117 N. Y. App. Div. 671; *Cereghino v. Oregon S. L. R. Co.*, 26 Utah, 467. See also *Bradley v. Pharr*, 45 La. An. 426; *Kuhl v. St. Bernard Rend. & Fert. Co.*, 117 La. 86.

But the rule is otherwise when the switch may be used by any person desiring to send freight, *Stockdale v. Rio Grande W. R. Co.*, 28 Utah, 201. It has been held that an ordinance authorizing the construction and maintenance of a railroad switch on a public street for the use of a stockyards company created for the convenience of drovers, dealers, and the public at large, is not invalid as enacted for private purposes. The switch as constructed under this ordinance is for a public use. *Knapp v. St. Louis Transfer Co.*, 126 Mo. 26. Similarly, it has also been held that an express company, engaged in receiving and delivering merchandise in the city and in suburban towns and villages, is engaged in public service and is not a strictly private business, and the municipality may authorize a switch to connect its warehouse with the tracks of a street railroad. The switch under these circumstances is for a public purpose. *Dulaney v. United Railways & El. Co.*, 104 Md. 423.

¹ *Field v. Barling*, 147 Ill. 556; *Bybee v. State*, 94 Ind. 443; *Townsend v. Epstein*, 93 Md. 537; *Beecher v. Newark*, 64 N. J. L. 475, aff'd 65 N. J. L. 307; *Tilly v. Mitchell & L. Co.*, 121 Wis. 11. But a bridge connecting a station on an elevated railroad with a department store building, and available to all persons travelling on

the railroad, is not a private use, and may be authorized by the municipality with the assent of the abutting owner. *Rothschild v. Chicago*, 227 Ill. 205, rev'g 130 Ill. App. 542.

In *Townsend v. Epstein*, 93 Md. 537, buildings on the opposite sides of a street had been connected both by a tunnel and by a covered bridge. The court held that there was sufficient evidence of special injury to an adjoining proprietor by reason of the construction and maintenance of the bridge and sustained an injunction, but refused to enjoin the tunnel on the ground that it did not appear that the plaintiff was injured thereby.

² *Snyder v. Mt. Pulaski*, 176 Ill. 397.

³ *Young v. Rothrock*, 121 Iowa, 588.

⁴ *Tell City v. Bielefeld*, 20 Ind. App. 1; *Cline v. Cornwall*, 21 Grant (Ont.), 129. See also *Berry-Horn Coal Co. v. Scruggs-McClure Coal Co.*, 62 Mo. App. 93.

But in *Iowa*, it is held that the municipality may authorize the erection of weigh-scales in the street in front of the premises of the property owner, when it does not interfere with public travel. Having granted a permit, the city cannot revoke it unless the public interests require revocation. *Spencer v. Andrew*, 82 Iowa, 14. But if the permit or license is revoked for proper cause, then maintenance of the scale becomes wrongful. *Emerson v. Babcock*, 66 Iowa, 257. A platform and shed with machinery therein, such as farm scales, corn-sheller operated by steam, &c., are unlawful obstructions when constructed upon or over a sidewalk, and cannot without plain legislative authority be authorized by the municipality. *State v. Vandalia*, 119 Mo. App. 406.

⁵ *State v. St. Louis*, 161 Mo. 371.

has been held that the city may, to a limited extent and for a reasonable time, permit a *private person to lay water pipes* for purely private use, and that such a use of the streets neither perverts them from the public use for which they are held, nor confers a cause of action upon the owner of the fee.¹ Similarly it has also been held that a city which has no sewer system of its own may grant to a property owner, under proper circumstances and under reasonable restrictions, the right to construct a *private sewer* in the streets at his own expense, and such sewer may be used by him without interference by other citizens and property owners,² but other decisions deny the power of the city to permit the laying of drains in a street for purely private purposes.³

§ 1177. **Obstructions: Fruit, Candy, and Market Stands.** — It is a diversion of the public streets to a private use to use them for *fruit, candy, news, and market stands* of all kinds, particularly when it is done in such a manner as to cause substantial and permanent obstruction to public travel; and such a use of the streets cannot, without plain legislative authority, be authorized by the city.⁴ The

¹ *Smith v. Simmons*, 103 Pa. 32; *Susquehanna Depot v. Simmons*, 112 Pa. 384. But compare *Van Dyne v. Knox Hat Mfg. Co.*, 71 N. J. Eq. 375, where it was held that the city could not grant any such right in a street of which the title to the fee was in another, because "the easement of a highway is limited to public uses."

In *California*, it has been held that the owner of the fee of the street has the right to use it to lay water pipes for private purposes across the street, and cannot be prevented from so using it by the municipality, although the right is subject to reasonable regulation in the interests of the comfort and convenience of the community as a whole. *Colegrove Water Co. v. Hollywood*, 151 Cal. 425. Where the fee of the street was in the abutters, it was held that they might stretch a wire across it at a height of eighty feet for the purpose of transmitting electric current from one property to another. *Henry v. Cincinnati*, 25 Ohio Cir. Ct. 178. A city has no power to grant a permanent and irrevocable right to maintain a water pipe for exclusively private use, and a permit therefor will be construed as a revocable license only. *Elster v. Springfield*, 49 Ohio St. 82. See also

as to *private drain*, *Eddy v. Granger*, 19 R. I. 105.

² *Boyden v. Walkley*, 113 Mich. 609; *Wood v. McGrath*, 150 Pa. 451. See also *Stevens v. Muskegon*, 111 Mich. 72.

³ *Murray v. Gibson*, 21 Ill. App. 488; *Bennett v. Mt. Vernon*, 124 Iowa, 537.

⁴ *Costello v. State*, 108 Ala. 45; *Heineck v. Grosse*, 99 Ill. App. 441; *Pagames v. Chicago*, 111 Ill. App. 590; *Chicago v. Pooley*, 112 Ill. App. 343; *Chicago v. Verdon*, 119 Ill. App. 494; *State v. Berdett*, 73 Ind. 185; *State v. Messolongitis*, 74 Minn. 165; *Commonwealth v. Wentworth*, Bright. (Pa.) 318. See also *Wade v. Nunnally*, 19 Tex. Civ. App. 256.

Without express statutory authority the municipal government cannot grant to any person the right to erect and maintain, in the public street, a structure such as a *permanent fish-box* for his private and exclusive use. *Laing v. Americus*, 86 Ga. 756. Charter authority "to regulate all matters connected with the public wharves and all business conducted thereon, and with all parks, places, and streets of the city," only authorizes the regulation of proper and lawful uses of the streets, such as the deposit of building materials, the unloading of vehicles, &c., and does not

fact that the abutting owner has consented to such use of the public streets does not confer the right to so use them.¹ The maintenance of these *market stands* is a public nuisance and indictable at common law as such.²

§ 1178 (699). **Openings in Sidewalks; Vaults under Sidewalks and Streets.**—In many cities lot proprietors upon streets are permitted or not forbidden to make openings in the sidewalks, in order to obtain an entrance into the basement or cellar. It is also the usage that owners of buildings may make openings *under* the sidewalk or street to obtain additional cellar room. If the fee of the street is in the municipality in trust for the public uses, as it

authorize an ordinance for granting permits to use a portion of the sidewalk for displaying goods and merchandise. *People v. Willis*, 9 N. Y. App. Div. 214.

It has been held that under statutory authority the city of New York may authorize the *maintenance of news stands* under the portions of the streets occupied by the stairways of elevated railroads, such portions of the street not being available for ordinary purposes of passage. *People v. Keating*, 168 N. Y. 390, rev'g 62 N. Y. App. Div. 348; *People v. New York City*, 20 N. Y. Misc. 189. Where a village ordinance provided that the sidewalk in front of certain stores should be fourteen feet wide, and that the outside ten feet should be of uniform grade and kept clear of all obstructions, but the inside four feet were left ungraded, and might be occupied for stairways, show tables, &c., by the owners of said stores, and plaintiff within said four feet kept a stand for the sale of lemonade, it was held that such stand was not an obstruction, and plaintiff was not liable to arrest for keeping the same, although a crowd may have been collected in front of it so as to obstruct the street. *Barling v. West*, 29 Wis. 307. An ordinance declaring it to be unlawful to place goods for sale upon the sidewalk to a greater distance than that prescribed, implies that goods may be so placed within such limit. *Philadelphia v. Sheppard*, 158 Pa. 347.

¹ *Pagames v. Chicago*, 111 Ill. App. 590; *Commonwealth v. Wentworth*, Bright. (Pa.) 318.

² *Costello v. State*, 108 Ala. 45; *State v. Berdetta*, 73 Ind. 185; *State*

v. Messolongitis, 74 Minn. 165; *Commonwealth v. Wentworth*, Bright. (Pa.) 318. On an indictment for maintaining a municipal nuisance, viz., a fruit stand on a sidewalk, the public need not show any injury to the public rights. *Costello v. State*, 108 Ala. 45.

An ordinance which prohibits the placing of materials so as to incommode or obstruct free passage or use of the sidewalk is violated by placing boxes, &c., upon the sidewalk in front of defendant's store and suffering them to remain there. Proof that some person had been actually interfered with or obstructed in his use of the sidewalk is unnecessary. *People v. Van Houten*, 13 N. Y. Misc. 603. A city ordinance prohibiting the hanging of goods or other things in front of a building at a greater distance than one foot does not apply to a temporary structure such as a hanging ladder erected for the purpose of repairing the building. *Hexamer v. Webb*, 101 N. Y. 377, 386.

Stationary *lunch-stands and wagons* in the public streets are an illegal obstruction and cannot without plain legislature authority be authorized by the municipality. *Commonwealth v. Morrison*, 197 Mass. 199; *Spencer v. Mahon*, 75 S. Car. 232. A license to follow the avocation of a peddler or hawker or a street vendor, does not confer the right to maintain a stationary lunch-stand or wagon. *Commonwealth v. Morrison*, 197 Mass. 199; *Galloso v. Sikeston*, 124 Mo. App. 380. Power to regulate the city streets does not authorize the municipality to enact an ordinance leasing spaces in a street to produce dealers. *Schopp v. St. Louis*, 117 Mo. 131.

frequently is, it extends to the whole street, including the sidewalk; and the adjoining lot-owner has, it seems clear, no absolute right, as against the public or the municipality charged with the control of the streets, to appropriate them to this use. And in our judgment the lot-owner's right is not substantially greater even if he has the fee in the street. In either case, to recognize such a *right* except subject to municipal regulation would be inconsistent with the public rights, which are paramount in the whole street to the extent of all legitimate street uses and servitudes required, or which may be required, for the public benefit and convenience. The lot-owner's rights are subject to the paramount rights of the public; and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial legitimate street uses, as the public good or convenience may from time to time require. The use of the streets for sewers, tunnelling, public cisterns, gas-pipes, water pipes, and other improvements, might be seriously affected by the recognition of a *right* in the abutter to make at pleasure openings in, or even under, the sidewalk or street, except subject to reasonable municipal regulation. It is clear that all rights of this character are subject to legislative and municipal regulation.¹

§ 1179 (700). **Same Subject.** — Speaking of this subject, the Supreme Court of Illinois remarks: "We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal-cellar under it; but as such a privilege is a great convenience in a city, and may, with proper care, be exercised with little or no inconvenience to the public, we think that the authority to make such cellars may be implied, in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work. . . . But," the court adds, "while we infer a license thus to use a part of a public street, it is on the condition that the person doing so shall use *more than ordinary care* and *expedition* in the prosecution of the work. Neither the public nor other individuals derive any possible advantage from such a use of the sidewalk, but it is solely for the benefit of the person thus using it, and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible."²

¹ *Winter v. Montgomery*, 83 Ala. 589; *Babbage v. Powers*, 130 N. Y. 281, 291, citing text; *infra*, § 1179. ² *Nelson v. Godfrey*, 12 Ill. 22, 23. Followed: *Gridley v. Bloomington*, 68 Ill. 47, 50. See also *Heineck v. Grosse*,

§ 1180. **Areas, Cellar-ways, and Vaults.** — The right of an abutter to construct *vaults* under sidewalks, or to make openings therein for *cellar-ways*, or to enclose *areas*, within the line of the street, is *not an incident of ownership* of the adjacent premises, or implied from such ownership, however convenient or even necessary the exercise of such an authority may be to the full enjoyment thereof. The implication of such a right as one annexed to the land and arising out of ownership merely would lead to embarrassing complications and interfere with the control and regulation of streets which in the interests of the public is reposed in the public authorities.¹ It is, however, competent for the legislature to authorize a limited use of the sidewalks in front of buildings in cities and villages for *area-ways, cellar openings, or underground vaults*, for the more convenient and beneficial enjoyment of the adjacent premises.² The *use of the sidewalk* for these purposes restricts somewhat the free and unembarrassed use of the sidewalk for pedestrians, but it is justified on the ground that the general interests are served, by making available to the greatest extent valuable property, increasing business facilities, giving encouragement to

99 Ill. App. 441; West Chicago M. Ass'n v. Cohn, 192 Ill. 210, citing cases; Babbage v. Powers, 130 N. Y. 281, 291, citing text; *supra*, § 1131, note. In *New York*, in a case where the lot-owner owned the fee to the centre of the street, it was held that he has the right to excavate the soil *under the surface*, and to use the space for a basement or other uses which do not interfere with the public rights in the street. McCarthy v. Syracuse, 46 N. Y. 194. See also cases cited in the last note; Fisher v. Thirkell, 21 Mich. 1, referred to *post*, §§ 1725, 1726, note. "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation and much on public usage. The general use and acquiescence of the public is evidence of the right." O'Linda v. Lothrop, 21 Pick. (Mass.) 292, 297; Papworth v. Milwaukee, 64 Wis. 389; *infra*, §§ 1183, 1224, 1687-1691.

¹ Jorgensen v. Squires, 144 N. Y. 280, 284; Donnelly v. Rochester, 166 N. Y. 315; Potter v. Interborough R. T. Co., 54 N. Y. Misc. 423, *aff'd* 124 N. Y. App. Div. 920.

But in *Massachusetts*, it is held that when the *fee of the highway or street* is vested in the abutter, he has a right to excavate under the sidewalk to con-

struct a vault, if he thereby violates no ordinance or regulations of the city, and interferes with no existing public use of the street. Allen v. Boston, 159 Mass. 324. A similar right in the owner of the fee to construct and maintain an area was also sustained in Dell Rapids Merc. Co. v. Dell Rapids, 11 S. Dak. 116.

Where a bridge was constructed to carry a street over railroad tracks, it was held that the railroad company, being the owner of the fee of the street, might use the space underneath the bridge in any manner not inconsistent with the right of public travel, and could therefore appropriate the space underneath the bridge to railroad purposes. Adair v. Atlanta, 124 Ga. 288. In Henry v. Cincinnati, 25 Ohio Cir. Ct. 178, it was held that the owners of the fee of the street were entitled, by virtue of their ownership, to stretch a wire across the street at a height of eighty feet to transmit electric current from one building to another. See also Brigantine v. Holland Trust Co., (N. J.) 35 Atl. Rep. 344.

² Jorgensen v. Squires, 144 N. Y. 280; Louth v. Thompson, 1 Pen. (Del.) 149; Perry v. Castner, 124 Iowa, 386; s. c. 130 Iowa, 703; Gustafson v. Hamm, 56 Minn. 334.

improvement, and adding to taxable values.¹ The legislative power to permit the use of the streets and sidewalks for these purposes *may be delegated* to the municipal authorities.² A vault constructed under a permit from the municipality is in itself a species of property; it is regarded in New York as in the *nature of an easement appurtenant* to the abutting property, and the owner of the abutting property may protect it as against all trespassers as fully as any other property.³ The rights, we think, of such an abutter in vaults constructed under municipal authority are strictly speaking not *easements* in a legal sense, but are *rights* or *privileges* based on a revocable consent or license. The owner of the abutting property may, it is justly held, recover damages from one negligently injuring the sidewalk or roof of the vault, rendering its

¹ Jorgensen v. Squires, 144 N. Y. 280, 284; Donnelly v. Rochester, 166 N. Y. 315, 318. In Hatfield v. Straus, 189 N. Y. 208, 214, it is said of the right to construct and maintain areas, cellar-ways, and vaults, that "These and all similar uses of the public streets for private use are either expressly authorized by statute, or sanctioned by the courts as being exceptions to the general rule, born of necessity and justified by public convenience and custom."

² In *Illinois*, the use of the space underneath the sidewalks for vaults, &c., may be permitted, provided its use does not interfere with the free use of the street by the public. Gregsten v. Chicago, 145 Ill. 451; West Chicago Masonic Assoc. v. Cohn, 192 Ill. 210, 216; Heineck v. Grosse, 99 Ill. App. 441. By virtue of its control over the streets, the city council may, by ordinance, prohibit the construction of vaults under the "roadway." Burton Co. v. Chicago, 236 Ill. 383. A city ordinance which prohibits the construction of cellar doors extending more than five feet into the street and which directs that every uncovered entrance or flight of steps projecting into the street shall be enclosed with a railing, by implication permits the construction of cellar-ways within the limits prescribed and not in other respects transgressing the ordinance. Jorgensen v. Squires, 144 N. Y. 280.

The city may authorize the use of the space underneath the sidewalks for vaults, &c., provided it does not by so doing interfere with the full, free, and safe use of the street in all its

parts by the public. West Chicago M. Assoc. v. Cohn, 192 Ill. 210, 216; Heineck v. Grosse, 99 Ill. App. 441. A city may impose conditions upon the abutter in respect of excavation of areas under sidewalks, and until such conditions are complied with, it may forbid such excavation. Davis v. Clinton, 50 Iowa, 585. Permission from the city council to construct a basement staircase opening in the sidewalk rebuts any presumption that the opening is a nuisance. Everett v. Marquette, 53 Mich. 450.

In the construction of a vault beneath the sidewalk, pursuant to the permit of a city, the owner of the abutting premises is liable for damages to pipes and other structures of a corporation maintained in the city streets under a franchise from the legislature caused by the removal of the support of such pipes and structures, although there may be no negligence on the part of the abutting owner. The abutter must so exercise his privilege of constructing a vault as not to injure the pipes and structures in the city streets. New York Steam Co. v. Foundation Co., 195 N. Y. 43, rev'g 123 N. Y. App. Div. 254.

³ Parish v. Baird, 160 N. Y. 302, aff'g 19 N. Y. App. Div. 629; Matter of Brooklyn Un. El. R. Co., 105 N. Y. App. Div. 111. Where the abutting owner owned the fee of the street, it was held that he was entitled to compensation for the construction of the pillar of an elevated railroad in a vault beneath the sidewalk. Matter of Brooklyn Union El. R. Co., 105 N. Y. App. Div. 111.

repair or rebuilding necessary.¹ The giving of *consent* to the maintenance of a *vault* beneath a sidewalk is said to be an executive act, which, from its nature, does not require an ordinance or resolution, as in the case of a legislative act, or a written decision, as in the case of a judicial act. It *may be given orally*.² Permission to construct a vault may be inferred from acquiescence in its maintenance for many years.³ The presumption of the assent of the public authorities applies not only as between the owner of the property and a third person, but also as against the city, if there is no proof to overthrow it.⁴ But this presumption is not that the owner or his grantors acquired any right to the use of the street by prescription, or without the consent of the proper authorities, but that from such use it may be presumed that the proper consent was given. It is a presumption only, and may be displaced by proof; it is not a presumption of a grant of the title, or of a permanent

¹ Westliche Post Assoc. v. Allen, 26 Mo. App. 181; Parish v. Baird, 160 N. Y. 302.

A contractor for paving the city street under a contract with the city was required to pile on the sidewalk along the line of the work a certain quantity of the stone to be used. In performing his contract he threw the stone on the sidewalk in such a negligent manner as to injure the roof of a vault. It was held that he was answerable to the owner of the abutting premises for the resulting damages, and that the measure of damages was the cost to the abutting owner of restoring the vault to its original condition. Parish v. Baird, 160 N. Y. 302. When the ordinance provides that no *area* shall extend more than one-fifteenth part of the width of any street, nor in any case more than five feet into the street, a permit authorizing the owner to construct a *vault* under the sidewalk will not justify the maintenance of an open area-way extending more than five feet from the building line. The opening beyond that distance is unauthorized and constitutes a nuisance *per se*, and no lapse of time will justify its maintenance or deprive the public of the right to have the encroachment removed and the highway restored. New York City v. De Peyster, 120 N. Y. App. Div. 762, *aff'd* 190 N. Y. 547. Index, *Limitations of Actions*.

A city ordinance purporting to permit abutting proprietors on a street to enclose a court fifteen feet wide with an iron railing in front of their lots

does not authorize an abutter to excavate a vault, place a boiler and machinery in the same for private use, and to construct over the vault a raised platform enclosed by a railing in place of the court. People v. Ahearn, 124 N. Y. App. Div. 840. To enable an abutting proprietor to construct an area-way eighty-five feet long, five feet wide, to give access to the cellar of a new building (the area-way being enclosed by a stone wall and iron rail), the city attempted to vacate that portion of the street. The ordinance showed on its face the purpose for which the vacation of that portion of the street was attempted. It was held that the ordinance attempted to vacate the city street for a private purpose and was invalid; that the area-way, wall, and rail were an unauthorized purpresture, and must be removed; and that the city could not by ordinance grant the right to maintain them. Smith v. McDowell, 148 Ill. 51. Index, *Vacation of Streets*.

² Babbage v. Powers, 130 N. Y. 281, 291.

³ Chicago v. Robbins, 2 Black (U. S.), 418, 425; Robbins v. Chicago, 4 Wall. (U. S.) 657, 679; Gridley v. Bloomington, 68 Ill. 47; Gregsten v. Chicago, 145 Ill. 451; Jennings v. Van Schaick, 108 N. Y. 530; Babbage v. Powers, 130 N. Y. 281; Jorgensen v. Squires, 144 N. Y. 280; Canandaigua v. Foster, 156 N. Y. 354; Deshong v. New York City, 176 N. Y. 475, 483.

⁴ Deshong v. New York City, 176 N. Y. 475, 483.

right in the street, as no power exists in the authorities to make such a grant or to confer any such right.¹ Hence, where an office is provided for by statute and ordinance, in which records of all applications and permits for vaults are filed and indexed, and diligent examination of such records shows that no permit for building a vault in front of a lot has been granted, the presumption of municipal consent arising from the maintenance of the vault for twenty-one years is overcome.² But although an area-way, cellar opening, or vault within the limits of a street is not a trespass if made with the municipal assent, express or implied, or a nuisance *per se*, it may be a nuisance if the municipal authorities fail to take steps to see that it is properly guarded and due provision made for the safety of the public.³ And the person who receives a permit for the construction of such an opening impliedly agrees to perform the act permitted with due care for the safety of the public and is liable for any violation of duty in this regard.⁴ Whenever the existence of the vault or opening interferes with the public use of the street, the right to maintain it terminates; the rights of individuals under such permits must be regarded as subordinate to the necessities or requirements of the public.⁵ The permit may be revoked when the space is required for municipal or other public purposes.⁶

§ 1181. **Stepping Stones, Hitching Posts, Shade Trees, &c.** — The use of city streets for the erection of certain conveniences in connection with the abutting premises is also recognized; but it is to be observed that such uses, so far as recognized, have a close connec-

¹ *Deshong v. New York City*, 176 N. Y. 475, 483.

² *Deshong v. New York City*, 176 N. Y. 475.

³ *Donnelly v. Rochester*, 166 N. Y. 315. A property owner cannot so construct a *cellar-way* as to appropriate the sidewalk in front of his neighbor's property for a landing. *Perry v. Castner*, 124 Iowa, 386; s. c. 130 Iowa, 703.

⁴ *Jennings v. Van Schaick*, 108 N. Y. 530; *Babbage v. Powers*, 130 N. Y. 281, 286; *Canandaigua v. Foster*, 156 N. Y. 354; *Devine v. National Wall Paper Co.*, 95 N. Y. App. Div. 194, aff'd 182 N. Y. 565.

⁵ *Deshong v. New York City*, 176 N. Y. 475, 480; *Potter v. Interborough R. T. Co.*, 54 N. Y. Misc. 423, aff'd 124 N. Y. App. Div. 920. See also *Shelton Co. v. Birmingham*, 61 Conn. 518.

⁶ *Winter v. Montgomery*, 83 Ala. 589; s. c. 93 Ala. 539; *Lincoln Safe*

Deposit Co. v. New York City, 96 N. Y. App. Div. 624; *Potter v. Interborough R. T. Co.*, 54 N. Y. Misc. 423, aff'd 124 N. Y. App. Div. 920.

A permit to construct a vault under a sidewalk is a mere license which *may be revoked* by the city, and the vault filled up at any time. *Winter v. Montgomery*, 93 Ala. 539. But in *Gregsten v. Chicago*, 145 Ill. 451, it was held that when a city gives a permit for a vault and exacts a valuable consideration therefor, and the permit expressly states that it is subject to the right to revoke it and re-enter whenever the public interests require, and also for failure to comply with the terms and conditions thereof, the permit is only revocable by the city when the public interests require it, and the city is estopped from revoking it for other reasons, *e. g.*, for the benefit and advantage of an adjoining owner.

tion with and relation to the public enjoyment. Thus the abutting owner may, with the assent of a municipality, express or implied, erect *hitching posts* for the use and convenience of himself and the public without creating a nuisance, provided such hitching posts do not materially interfere with or obstruct the public travel.¹ Similarly, as long as a sufficient way is left for the public convenience, he may erect *stepping stones*.² So, too, the municipality, or the abutting owner with the assent and permission of the municipality, *may lay out grass plots* on the sides of the streets, set out trees therein, and protect both grass and trees from injury by fences or other reasonable means. It may thus to a reasonable extent and for a useful public purpose narrow the driveway and exclude teams altogether from the sides of the street.³ The municipality may also, under reasonable regulations and conditions, permit *private driveways* to be built from the lands of abutting owners to the driveway of the street, and when they pass near trees or grass plots protect them from trespass from those driving in or out. For this purpose they may bend the line of the curbing in towards the sidewalk so that it will limit the driveway and prevent teams from passing over the grass or running against the trees, or for this purpose it may permit the use of stones.⁴

§ 1182. **Porches, Bay Windows, Cornices, and Ornamental Projections.**—No uniform rule appears to be adopted in the different

¹ *Macomber v. Taunton*, 100 Mass. 255. See also *Louth v. Thompson*, 1 Pen. (Del.) 149.

² *Wolff v. District of Columbia*, 196 U. S. 152, aff'g 21 App. D. C. 464; *Dubois v. Kingston*, 102 N. Y. 219; *Robert v. Powell*, 168 N. Y. 411, aff'g 40 N. Y. App. Div. 613; *Cincinnati v. Fleischer*, 63 Ohio St. 229; *Louth v. Thompson*, 1 Pen. (Del.) 149. *Contra*, *Davis v. Austin*, 22 Tex. Civ. App. 460.

"There are some objects which may be placed in or exist in a public street, such as *water hydrants, hitching posts, telegraph poles, awning posts, or stepping stones*, such as the one described in this case, which cannot be held to constitute a nuisance. They are in some respects incidental to the proper use of the street as a public highway. A hitching post, for instance, in front of a private residence, is intended, not only for the convenience of the private individual, but for the safety of the public as well,

since it is intended to guard against accidents resulting from runaway teams or horses. It is quite conceivable that a shade tree located within the boundaries of the street or highway may cause an accident or injury to a private individual using the street. But it does not follow that it constitutes a public nuisance in the highway." *Per O'Brien, J.*, in *Robert v. Powell*, 168 N. Y. 411, 414. Whether a *stepping stone* is a nuisance so as to render its owner liable in damages to a person injured by a collision therewith is a question of fact, the determination of which is dependent upon the character, location, and effect of the alleged obstruction. *Nutter v. Pearl*, 71 N. H. 247.

³ *Dougherty v. Horseheads*, 159 N. Y. 154, 158, rev'g 5 N. Y. App. Div. 625.

⁴ *Dougherty v. Horseheads*, 159 N. Y. 154, 158, rev'g 5 N. Y. App. Div. 625.

jurisdictions on the question whether *porches, bay windows, cornices, and other ornamental projections* encroaching on the street, may lawfully be erected with the assent of the municipality, express or implied. In some States the decisions declare that the legislature has power to authorize these structures within reasonable limits, and that such a use of the streets is not a perversion of the streets from their proper and legitimate uses.¹ In these States it is also held that this power may be delegated to the municipality, which, by virtue of its control over the city streets, may make proper and reasonable regulations as to the erection of these projections; and that such structures erected under permits from the municipality are not illegal encroachments or obstructions.² On the other hand,

¹ *Massachusetts*. A statute providing that *doorsteps* shall not project into a city street for more than a given distance is valid under the constitution. This statute, although negative in form, confers implied authority to occupy the street to the extent indicated, and justifies the use of the privilege on the part of an abutter. *Cushing v. Boston*, 122 Mass. 173; s. c. 124 Mass. 434; 128 Mass. 330. Statutory provisions authorizing cities to "make such rules and regulations for the erection and maintenance of balustrades or other projections upon the sides or roofs of buildings therein as the safety of the public requires," and to make "all such salutary and needful by-laws as towns by the laws of this Commonwealth have power to make," do not authorize a city to pass an ordinance prohibiting the maintenance of doorsteps within the limits of a highway. Doorsteps do not come within the terms of these provisions. *Cushing v. Boston*, 128 Mass. 330.

In *Farnsworth v. Rockland*, 83 Me. 508, 512, the court expressed the opinion that the *ownership of the fee* justifies the maintenance of *small balconies, bay windows, and cornices* overhanging the sidewalk, if they do not interfere with travel. *Walton, J.*, said: "Not only cornices, but small balconies and bay windows, often overhang sidewalks. And if they do not interfere with or incommode public travel, such structures are not unlawful. The owner of land over which a public way passes has a right to occupy the land above and below its surface to any extent that will not impair its usefulness for a way. Of course, a bay window, or a balcony, or a cornice

even, may be so low down, and project so far into a street, as to obstruct or incommode the public travel; and in such a case the structure would be a public nuisance, and its removal compelled. But an eight-inch cornice on the gable-end of a two-story building could never be so regarded. And whether in any particular case such a structure is or is not a nuisance is to be decided in the exercise of sound practical common sense, and not on merely imaginary or theoretical grounds. The public must not be made to suffer any real inconvenience, nor should the owner be deprived of any such reasonable use of his land as will not incommode the public." In *Hay v. Weber*, 79 Wis. 587, it was held that an abutting owner could not maintain a private action to enjoin the construction and maintenance of a *bay window* projecting eighteen inches over the sidewalk, when the window did not interfere with public travel. The bay window in this case interfered with the view of the plaintiff's premises only. It was held that the damage was too remote and speculative to justify a private action by an abutter.

A statute which prohibited any *projection in front of any building* over or upon the sidewalk was construed to have no application to projections upon the front of a building which were too high up to interfere with free passage along the sidewalk. *Goldstraw v. Duckworth*, L. R. 5 Q. B. Div. 275. But see to the contrary, *Garland v. Towne*, 55 N. H. 55; *State v. Kean*, 69 N. H. 122.

² *Pennsylvania*. In *Livingston v. Wolf*, 136 Pa. 519, it was held that

other decisions declare that a projection of this nature is not a proper street use; that the city merely by virtue of its control over the streets has no power to permit the erection or construction of porches, bay windows, &c., projecting beyond the street line; and that an encroachment of this nature cannot be justified under a municipal permit or license.¹ The decisions, however, appear

the *footways*, no less than the carriage ways, in cities and boroughs are under municipal control, and the authorities may determine the extent to which sidewalks may be obstructed by door-steps, bay windows, cornices, and the like. But this power must be exercised under regulations that are general and uniform, as well as reasonable and certain, and in conformity with the constitution and laws. Hence, in the same case it was held that a borough ordinance authorizing the use of three feet six inches of the foot-way for cellar entrances and prohibiting the erection of bay windows projecting more than twenty-eight inches upon a street sixty feet wide is not unreasonable, and that an overhanging balcony and bay window projecting less than twenty-eight inches will not be enjoined. Although the ordinance does not expressly declare that bay windows, &c., may project, yet the forbidding the extension of such structures beyond a fixed limit by necessary implication permits their erection within that limit. Statutory authority to the city council to make and establish rules and regulations for the erection of *bay windows* does not authorize the council to grant a permit by *special* ordinance for the construction of a bay window beyond the building line on *one particular house*. Reimer's Appeal, 100 Pa. 182.

On a bill in equity by the State to restrain an encroachment on a sidewalk, it appeared that a bank in erecting its bank building on the corner of a main street of the borough proposed to take along the side street for the *purpose of an area* a strip of ground forty-two feet in length, two feet nine inches in width, and five feet two inches in depth. And also a shorter strip of the sidewalk for the approaches and steps into the second story of the building of a width of about three feet. The side street was about forty feet wide, having a sidewalk about seven feet wide. There

was no municipal regulation as to encroachments on sidewalks, but throughout the borough there were many encroachments on streets for alley ways, cellar doors, steps, porches, and verandas. The bank building was the most costly building in the borough, and a former owner of the lot had an area which encroached on the street. The lower court dismissed the bill on the ground that in the absence of municipal regulation lot-owners might, for purposes of necessity, ornament, or convenience, partially obstruct a highway in a reasonable manner so as not to prevent the use of the highway by the public, and that the encroachment in this case was not unreasonable. The Supreme Court being equally divided in opinion, the judgment was affirmed without an opinion by any of the judges. *Commonwealth v. First Nat. Bank*, 207 Pa. 255. Where the ashlar or true line of a building conforms to the line of the street, but the ornamental parts encroach on it, an injunction will not be granted to restrain the maintenance of such buildings, especially when justified by the custom of years, and the city council has not legislated on the subject. *Philadelphia v. Presbyterian Board*, 9 Phila. 499. *Infra*, § 1183. The *attorney-general* may maintain an action in the name of the State to enjoin the unlawful construction of a *bay window*. Reimer's Appeal, 100 Pa. 182.

A permit to *construct a veranda* over the sidewalk is merely a *revocable license* and contains none of the elements of a contract. *Winter v. Montgomery*, 83 Ala. 589. So held also with reference to a license or *permit for a stoop*. *New York City v. United States Trust Co.*, 116 N. Y. App. Div. 349.

¹ *People v. Harris*, 203 Ill. 272; *Anisfield Co. v. Grossman*, 98 Ill. App. 180; *Cincinnati, R. & M. R. Co. v. Millet*, 36 Ind. App. 26; *Forbes v. Detroit*, 139 Mich. 280. An ordinance permitting the construction of a *bay*

uniformly to recognize the fact that if a structure of this kind be erected without the consent of the municipality, either express or

or *show window* encroaching on the sidewalk eighteen inches in consideration of an annual payment to the city for the privilege and for a limited term, is void as authorizing an encroachment upon the street, although it is revocable at pleasure. *Anisfield Co. v. Grossman*, 98 Ill. App. 180. A *permanent outside stairway* erected over the sidewalk is an encroachment and a nuisance, and cannot be authorized by the council. *McCormick v. Weaver*, 144 Mich. 6.

New York. In this State the earlier decisions appear to have recognized the power of the municipality, acting under delegated authority, to license and permit the construction of *porches, bay windows, &c.*, encroaching on the street, but the trend of the later decisions seems to be adverse to the existence of any such power, either in the legislature or in the municipality. In *Wormser v. Brown*, 149 N. Y. 163, aff'd 72 Hun (N. Y.), 93, the question arose between two adjoining property owners whether the defendant might lawfully erect a bay window extending six feet beyond the building line but within the stoop line of the street. The commissioners of public parks, acting under statutory authority, had granted a permit to the defendant for the erection of the window. The plaintiffs contended that the commissioners had no authority to grant the permit, but the court held that authority for that purpose, so far as it existed, was conferred upon the department of parks, and not upon the city council. It appeared that the bay window erected by the defendants did not extend beyond the building line of the street a greater distance than the stoop upon the plaintiffs' adjoining property, and that therefore there was no practical interference with the use of the street so far as the plaintiffs were concerned. The court used *dicta* as to the power of the legislature to authorize structures in the street, which without such authority and under the common law would be encroachments or obstructions. But the case appears to have been decided upon the ground that under the peculiar circumstances the plaintiffs failed to establish any damage to their property interests,

and therefore the court in the exercise of its discretionary power was justified in refusing an injunction. That this case was really decided upon the ground that an injunction was properly denied in the discretion of the court appears from the remarks of the Court of Appeals in *Conabeer v. New York Cent. & H. R. R. Co.*, 156 N. Y. 474, 489, and in *Ackerman v. True*, 175 N. Y. 353, 365. In the latter case it was said that the earlier decision had carried the doctrine of the power of the legislature to legalize temporary erections and other encroachments to its extreme limit; "but that case was sustained upon the ground that there was no practical interference with the street arising chiefly from the fact that upon the plaintiff's adjoining property there was an erection which extended into the street a greater distance, that there was no finding or proof of any pecuniary damage or material injury by reason of such erection, and that the discretion of the trial court in denying relief by injunction would not be disturbed in the absence of any proof or finding of substantial damage."

In *Broadbelt v. Loew*, 15 N. Y. App. Div. 343, aff'd 162 N. Y. 642, the plaintiff brought an action to compel the specific performance of a contract for the exchange of real estate. Plaintiff tendered a deed of the premises to be conveyed by him to the defendant. The tender was rejected and defendant refused to consummate the transaction upon the ground that plaintiff could not convey a marketable title by reason of encroachments on the public street. The particular encroachments involved in the case were the *encroachment of two bay windows* less than eight inches and the *encroachment of the stoop* a little over six feet. The lower appellate court appears to have been of the opinion that the alleged encroachments were not of such a character that an adjoining proprietor could complain thereof, for it remarked that, upon the facts, the question of the right to maintain the bay windows and stoop could only arise between the municipal authorities and the owner of the building fronting on the public street, but the so-called ob-

implied, it is an illegal obstruction which may be removed at the suit of the proper public authorities, or of an adjoining owner who suffers special damage by reason thereof.¹

structions were not of such a character as to constitute a public nuisance affecting a private right. The lower appellate court, however, held that the bay windows and stoop were authorized by ordinance permitting the construction of bay windows not extending beyond the house line more than one foot and the construction of porches extending into the street not more than one-tenth part of the width thereof, nor more than seven feet, and it held that none of the objections taken affected the marketability of the title to the property. This decision was affirmed by the Court of Appeals upon the opinion of the court below. See to the same effect, *Levy v. Hill*, 50 N. Y. App. Div. 294; *Close v. Witbeck*, 126 N. Y. App. Div. 544.

In *Ackerman v. True*, 175 N. Y. 353,

rev'g 71 N. Y. App. Div. 143, the defendant erected a house on a lot adjoining the property of the plaintiff. The northerly wall of this house was extended three feet six inches beyond the easterly line of the street and had what is known as a *swell front* or *bay window* extending into Riverside Drive. This swell front or bay window was so erected as to form a curve terminating on the party or dividing wall of the defendant's building. It was sought to justify this erection under a permit issued to the defendant pursuant to a statute which authorized the park commissioner to regulate the projections and determine the lines of curb and other surface constructions of all streets lying within any park, &c., in his jurisdiction, or within a distance of three hundred and fifty feet from

¹ The following projections maintained without statutory authority and without municipal consent were held to be unlawful obstructions: *Front steps* projecting into street, *Commonwealth v. Blaisdell*, 107 Mass. 234; *stone columns* extending twenty-two to twenty-six inches beyond the building line, *First Nat. Bank v. Tyson*, 144 Ala. 457; s. c. 133 Ala. 459; *bay window* projecting four feet seven inches beyond the street line, but situated eight feet above the sidewalk, *State v. Kean*, 69 N. H. 122; *second story bay window*, *Commonwealth v. Kembel*, 30 Pa. Super. Ct. 199; *balcony* projecting six feet, but sixteen feet above the street, *McCormick v. South Park Com'rs*, 150 Ill. 516; *projecting cornice*, *Grove v. Ft. Wayne*, 45 Ind. 429; *overhanging roof*, *Garland v. Towne*, 55 N. H. 55. See also *People v. Maher*, 141 N. Y. 330.

A *bay window* projecting over four feet and beginning eight feet above the surface is an encroachment and a nuisance at common law; and is indictable both at common law and under a statute which declares that "if any building, structure, or fence is erected or continued upon or over any highway, so as to obstruct the same or lessen the full width thereof, it shall be deemed a public nuisance." *State v. Kean*, 69 N. H. 122. A *roof* overhanging a city

street is also indictable under this statute. *Garland v. Towne*, 55 N. H. 55.

When a *second-story bay window* is erected in disregard of a notice by the proper municipal authorities, and without any ordinance making provision for the erection thereof, the reasonableness or unreasonableness of the obstruction of the street, and its necessity, convenience, or ornament, are not matters to be submitted to the jury, upon the question of nuisance or not. In the absence of an express municipal authorization, evidence that other bay windows extending over the building line are permitted to exist is not admissible as a defence. *Commonwealth v. Kembel*, 30 Pa. Super. Ct. 199. Park commissioners may be vested by the legislature with the same powers in respect to parks and streets leading thereto as are conferred upon cities, and in such a case their powers were held not concurrent with the city, but exclusive. Where a *balcony* is proposed to be projected over into a street, their permission is necessary; and when it is refused it is no answer that such structures have been repeatedly allowed by the city, plans having in each case been submitted to and approved by the city authorities. *McCormick v. South Park Com'rs*, 150 Ill. 516. See also *Wormser v. Brown*, 149 N. Y. 163, cited *supra*.

§ 1183 (734). **Abutter's Rights in Respect of Doors, Shutters, Iron Gratings, &c.; Usage.** — The owners of lots bordering upon streets

the outer boundary thereof. The court, however, held that this statute did not authorize the park commissioner to give a permit to an abutting owner to encroach upon the street by the erection of permanent and substantial structures therein, and *Martin, J.*, who delivered the opinion of the court, declared: "Moreover, if that statute were to be thus construed, its constitutionality would be at least doubtful, for even the legislature cannot authorize the condemnation of private property for other than public uses." In *McMillan v. Klaw & Erlanger Const. Co.*, 107 N. Y. App. Div. 407, a city ordinance provided for permits to the owners of buildings to construct *ornamental projections* extending beyond the building line not more than two feet on certain specified streets, and not more than five feet on other streets "provided in the opinion of the officer having jurisdiction no injury will come to the public thereby." These projections were defined as "all decorative projections on the face of a building beyond the building line, in the nature of *porches, arches, porticos, pedestals, free-standing masonry, columns, and pillars*, which are erected purely for the enhancement of the beauty of the building from an artistic standpoint." It was held that the ordinance was an unconstitutional interference with the easements of property of adjoining owners in the street, and that the defendant could not justify the erection of an ornamental projection thereunder when it interfered substantially with the use and enjoyment of the adjoining premises. The court declared that the particular encroachment involved in the case imposes "a new, unusual, and additional burden upon the street and diminishes the plaintiff's easements without compensation. No municipal or legislative enactment can justify or sanction such an invasion of the rights of private property guaranteed to the citizen by both State and Federal Constitutions."

In *Williams v. Silverman Realty & Const. Co.*, 111 N. Y. App. Div. 679, the construction of a "setback" agreement between adjoining proprietors was involved. By this instrument it was agreed that all buildings should

recede ten feet from the building line of the street, and that no building should be erected beyond that limit "other than such as now is or hereafter may be permitted by law to be built or erected in said city between what is known as the exterior building or house line and the exterior area or stoop line." Defendant proposed to erect a building upon which there were two so-called *bay windows*, one having a frontage of eighteen feet eight inches and the other of nineteen feet three inches, extending three feet beyond the agreed line. The rest of the building was to be built on the line. These bay windows were conceded to be part of the permanent front of the building constructed of masonry and extending from the foundation to the roof. It was claimed that they were permitted under the terms of the agreement because an ordinance provided that bay windows might be erected extending three feet beyond the building line. The court held that it was not within the power of the municipality to grant licenses to encroach upon the street in this manner, and that therefore the proposed projections were an unlawful encroachment and a violation of the setback agreement. In *Sautter v. Utica City Nat. Bank*, 45 N. Y. Misc. 15, aff'd 119 N. Y. App. Div. 898, the court sustained a permit to allow columns in front of a building to encroach upon the street for a distance of not more than twenty-four inches, when such permit was issued under a statutory provision authorizing the city to permit the use of the sidewalk for business purposes which do not interfere with the public use and to permit "columns, pilasters, and ornamental portions of any building to encroach upon any street," and refused an injunction in the absence of evidence that an adjoining owner had sustained private and peculiar injury therefrom in a substantial degree. See also to the effect that *porches and other structures* encroaching upon the streets are illegal and not authorized by the municipality, *New York City v. Knickerbocker Trust Co.*, 52 N. Y. Misc. 222; s. c. 104 N. Y. App. Div. 223; 121 N. Y. App. Div. 740; *Levy v. Murray*, 56 N. Y. Misc. 354; *New York City v. Rice*, 56 N. Y. Misc. 360.

or ways have, or may have, in other respects, a right to make a *reasonable and proper use* of the street or way. What may be deemed such a use depends, in the absence of legislative or authorized municipal declaration, much upon the local situation and public usage, — that is, the use which others similarly situated make of their land, — this being evidence of a reasonable use.¹ Conformably to these principles, it was held that common and well-established usage in the city of Boston justified the owners of land in erecting thereon warehouses, on the line of the street or way, with *doors and windows opening upon the way or street*, and shutters projecting into the same, when open, and with sidewalks in front, having on their surface *iron gratings*, for admitting light to, and *trap-doors* for communicating with, the cellar or underground apartments of the warehouses, and used for putting in and taking out goods.² So, for the same reasons, it is not an unreasonable use of a street in a populous place, where land is valuable, so to erect structures that the *gates and doors*, when opened, swing over the line of the street. Whatever may be the rights of the public, certain it is that these acts do not constitute a trespass upon the owner of the soil of the street.³

§ 1184 (734 a). **Abutter's Rights; Porches and Bay Windows in or over Streets.** — The right of the owner of a lot abutting on a public street to use, under legislative sanction and municipal regulation, a *portion of the street for the purpose of a stoop, porch, or portico*, as against the objection of an adjoining owner who suffers inconven-

¹ O'Linda v. Lothrop, 21 Pick. (Mass.) 292, 297; Gerard v. Cook, 2 Bos. & Pul. 109; Underwood v. Carney, 1 Cush. (Mass.) 285, 292, *per Forbes, J.* See generally, as to rights of abutting owners on streets, 24 Cent. L. J. 51; Index, tit. *Abutters*.

² Underwood v. Carney, 1 Cush. (Mass.) 285; O'Linda v. Lothrop, 21 Pick. (Mass.) 292, 297, *supra*; *ante*, § 1178; Irvine v. Wood, 51 N. Y. 224. As to liability of city for these openings, if unsafe and dangerous, see Bacon v. Boston, 3 Cush. (Mass.) 174; Lowell v. Spaulding, 4 Cush. 275; *post*, §§ 1687, 1691, 1725, 1726.

³ O'Linda v. Lothrop, 21 Pick. (Mass.) 292; *supra*, § 1161, *et seq.* Paxon, J., of the Common Pleas Court in Philadelphia, in Philadelphia v. Presbyterian Board of Publication, held that where the ashlar or true line of a building conformed strictly to the line of the street, but the ornamental parts

encroached on it, an injunction would not be granted to restrain the erection of such building, especially as this has been the custom for years in Philadelphia, and councils have not legislated on the subject. 29 Leg. Int. 53; *supra*, § 1131; Commonwealth v. Blaisdell, 107 Mass. 234, *supra*, § 1182.

Strictly speaking, no one has a right to project his building or any part of it beyond the line of road. But this does not necessarily mean a strict mathematical line. Tear v. Freebody, 4 C. B. n. s. 228. See also St. George's Vestry v. Sparrow, 16 C. B. n. s. 209. An obstruction beyond a substantially regular line must, if insisted upon by the municipal authorities, be removed. Bauman v. St. Pancreas, L. R. 2 Q. B. 528; Ecclesiastical Commissioners v. Clerkenwell, 4 L. T. n. s. 599; s. c. 3 DeG. F. & J. 688; Queen v. Jay, 8 E. & B. 469.

ience or damage thereby, was considered by the Court of Appeals of Maryland in a case between two prominent citizens which excited at the time considerable attention.¹ The legislature authorized the

¹ *Garrett v. Janes*, 65 Md. 260. The court held that the damage to the complainant was *damnum absque injuria*. The inconvenience suffered is that incident to residing in a city where the houses are necessarily close together and the legitimate use of his property by a neighbor will unavoidably cause discomfort. It added: "As to any interruption of the plaintiff's facility of outlook in the sense of view merely, it has been long ago decided that for mere interference with prospect, it not being an incident of the estate, no remedy lies apart from contract. *Aldred's Case*, 9 Coke, 59; *Butt v. Imperial Gas Co.*, L. R. 2 Ch. App. 158." While this statement may be true as between adjoining owners, and as to erections by one such owner upon his own land which is not situated on a street, yet a different rule exists as to erections on a way or street. An owner of land has, as a rule, no easement over his neighbor's land; but an owner of land abutting on a street has, as elsewhere shown in this chapter, an easement, or at all events a private right, in and over the street. And such easement includes a right to light and air, as well as the right to travel upon the street. *Story v. N. Y. El. R. Co.*, 90 N. Y. 122. The existence of such easement does not depend upon whether the abutter owns the fee in the street. *Lahr v. Metrop. El. Ry. Co.*, 104 N. Y. 268; *ante*, §§ 1123, 1124, 1154, 1168, 1179, 1245. There seems to be no good reason why such private right or easement should not include also the right (within reasonable limits) to an unobstructed view; and hence the right to insist upon the removal of an obstruction in the street which interferes materially and in an unusual manner with the abutter's prospect, even though light, air, and travel be not materially interfered with by such obstruction. The cases cited by the court in *Garrett v. Janes*, *Aldred's Case*, 9 Rep. 58 b, and *Butt v. Imperial Gas Co.*, L. R. 2 Ch. App. 158, were both cases between adjoining owners, and did not in any way involve the consideration of the nature of an abutter's rights or easements in a street. See later Maryland case of *Townsend v. Epstein*, 93 Md. 537, where *Garret v. Janes* is distin-

guished and explained. In Maryland the court says "that owners of lots or ground abutting upon the public streets have rights in the easement [in the street] which are valuable, and are in addition to those which they have in common with the general public, is recognized in our statute law." The city of Baltimore was invested by statute with the title to and general control of the public streets for the benefit, use, and convenience of the general public. The defendant owned stores on opposite sides of a public street, and under a special ordinance, passed by the city, was authorized to construct an elevated structure or bridge connecting his two buildings on the opposite sides of the street, which structure being seventeen feet above the surface of the street did not interfere with traffic on the street, but did obstruct the light and air of the adjacent property owners, and such structure was, as to them, held to be a nuisance, inflicting special damage, and as the nuisance was a continuing one such adjacent owners thus specially damaged were entitled to relief by injunction. The court, by *Jones, J.*, says: "The abutting lot holder has the right to the enjoyment of the light and air which the highway affords. To deprive him of this right would be to impair, or, it might be, to destroy, the comfort, enjoyment, or use to be derived from the easement to which he is entitled; and we find this recognized by very high authority." Citing *Dill. Mun. Corp.* (§ 712, 4th Ed., § 1245 of this edition), and the case of *Barnett v. Johnson*, 15 N. J., Eq. 481, 487, 488. The court then adds: "Nor is there anything, as counsel for appellee insist, in the case of *Garrett v. Janes*, 65 Md. 260, in denial of the right we are here considering. The structure complained of in that case as interfering with the light and air from the street was erected under the authority of an act of assembly and an ordinance in pursuance thereof, which extended and secured to all persons alike who resided within the limits designated in the ordinance the right to erect, under regulations prescribed, 'steps, porticos, or porches, or other architectural ornaments to houses fronting on Mount Vernon Place.' This was a privilege in

city of Baltimore to pass ordinances regulating the limits within which it should be lawful to erect stoops, porticos, porches, or other architectural ornaments to houses, under which authority the city passed an ordinance making it unlawful for any person to erect any porticos, stoops, or other ornamental structures a greater distance than nine feet from the building line. With such legislation and ordinance in force, Garrett erected a structure in front of his house on Mount Vernon Place which extended nearly nine feet from the building line, rectangular in shape, with an elevation of twenty-two feet from the ground and twenty-two feet in length. The face of this structure was of brown stone, the same as the house, with an ornamental panel in front. At the west end there was a stained-glass window, and at the east end it was approached by steps, and through it an entrance was gained to the main hall of the building through three arcades or doorways set in the wall on the building line, and capable of being left open or closed by doors or hangings. The primary purpose of the structure was as a means of access to the building through the three doorways. It was held to be essentially an enclosed porch or portico. The owner of the adjoining property (Janes) filed a bill in equity charging that this structure in front of Garrett's house was a nuisance, in that it took a portion of the highway and deprived the complainant of sunshine, air, and view, thereby greatly diminishing the value of his property and preventing the comfortable enjoyment thereof, and asking for its abatement and removal. The court below sustained the bill; but this decree was reversed by the Court of Appeals and the bill dismissed, on the ground that the structure was such as was authorized by the legislative act and ordinance. No question seems to have been made — certainly none decided — that the legislative act was an invasion of any proprietary rights or ease-

the interest of the general public, and tending to the general comfort and enjoyment of the homes in the district to which the ordinance applied. The court found that the structure complained of was one of a kind which the ordinance authorized, and was, therefore, a lawful structure, and refused to have it abated as a nuisance, which it was claimed to be."

In a number of cases, it has been held that the private right or easement of the abutter includes *the right of view*, not only in front of his property, but on either side up and down the street, so that the space above the street should

be kept open to permit signs or goods displayed in his premises to be seen. *First Nat. Bank v. Tyson*, 133 Ala. 459; s. c. 144 Ala. 457; *Williams v. Los Angeles R. Co.*, 152 Cal. 592; *Dill v. Camden Board of Education*, 47 N. J. Eq. 421. But in *Wormser v. Brown*, 149 N. Y. 163, 172, cited and explained *supra*, § 1182, note, the court declared that *the interference with the view* from abutting premises did not, under the circumstances, entitle the owner of the abutting property to an injunction. Citing *Aldred's Case*, 9 Coke, 59; *Butt v. Imperial Gas. Co.*, L. R. 2 Ch. App. 158.

ments of the complainant in the street; and considering that this structure, unlike an ordinary porch or portico, had solid walls, which not only interfered with the complainant's view, but obstructed light and air, the case would certainly seem to go to the limit (if it does not pass it) of legitimate legislative regulation, whatever view may be taken of the nature and extent of an abutter's rights.

§ 1185 (734 *b*). **Same Subject; Massachusetts Cases.** — Certain persons owning land as tenants in common, in the city of Boston, laid it out so as to construct, among other things, a *passageway or court*, and afterwards erected buildings fronting on the court. A few years later they made partition of their land, and the partition deed bounded the land upon the court, and provided that the way "shall be left and always lie open for the passageway or court aforesaid, for the common use and benefit of both of said parties and their respective estates." It was held that under this deed the right of an abutting owner was not simply a right of way, but a right to the use and benefit of an open court, extending as well to the light and air above as to actual travel upon the surface of the street; and that this right was violated by the *erection of a bridge over the court or passageway*, to connect two estates on opposite sides of the court.¹ So, where it was provided that "a passageway sixteen feet wide is to be laid out in the rear of said premises, and to be kept open and maintained by the abutters in common," it was held that the right in the way extended to light and air above as well as to a way upon the surface, and that the building of *bay windows* from a point eight feet above the sidewalk to the top of the house and extending three or four feet into the passageway, violated this right.²

§ 1186. **Awnings.** — The right of an abutting owner to construct and maintain *awnings* extending into the street in front of his premises is dependent upon the assent or license, either express or implied, of the municipal authorities, to whom the care and control of the streets of the municipality is delegated. When constructed with the consent or by the permission of the municipality, express

¹ *Salisbury v. Andrews*, 128 Mass. 336.

² *Attorney-General v. Williams*, 140 Mass. 329. The two Massachusetts cases above cited arose under certain grants which served as dedications of the ways therein mentioned. But it is

doubtful if there was anything, either in the grants themselves or in the circumstances of those cases, to make the rights therein conferred any more extensive than the rights which the law will imply in the ordinary case of the dedication of a way.

or implied, an awning is not a nuisance or illegal encroachment.¹ But under statutory authority, the municipality may, by ordinance, regulate the erection of awnings, and may require a permit for their erection, or may forbid their erection. A permit therefor granted pursuant to legislative authority, *cannot confer a permanent right* to maintain the awning, but is only a *revocable license*.² If an awning is erected, and conforms to the requirements of an ordinance providing for its maintenance, it is not an illegal obstruction of the street, and the city cannot remove it while the ordinance permitting its erection remains unrepealed.³ But if the erection and maintenance of awnings is prohibited or is regulated by ordinance or by statute, an awning which is maintained contrary to the provisions of the ordinance or statute is an illegal structure and a nuisance, and may be removed as such.⁴

§ 1187 (667). Prescription and Adverse Possession; Statute of Limitations. — Concerning rights and remedies with respect to

¹ See *Preston v. Likes*, 103 Md. 191; *Hawkins v. Sanders*, 45 Mich. 491; *Hisey v. Mexico*, 61 Mo. App. 248.

² *Hibbard v. Chicago*, 173 Ill. 91; *Ivins v. Trenton*, 68 N. J. L. 501, *aff'd* 69 N. J. L. 451.

Assuming that the legislature may authorize the permanent maintenance of an awning in the city streets, the city cannot grant the right to do so without legislative authority expressly conferred. *Augusta v. Burum*, 93 Ga. 68. The city may, by ordinance, prohibit the further maintenance of awnings and order their removal, although they may have been erected pursuant to permits issued by it. *Augusta v. Burum*, 93 Ga. 68; *Small v. Edenton*, 146 N. Car. 527. An ordinance prohibiting heavy awnings over sidewalks without consent of the municipal authorities is reasonable and valid. *Pedrick v. Bailey*, 12 Gray (Mass.), 161. A city may prohibit the erection of stationary or swing signs or stationary awnings in streets in the *business portion* of the city. Such ordinance is not invalid as discriminating between the business and residence portions of the city. *Ivins v. Trenton*, 68 N. J. L. 501. Under authority to prevent the encumbrance of the streets, a city may not only forbid the setting of posts in a street supporting an awning, but may remove or cause to be removed posts already set for that purpose. *Fox v. Winona*, 23 Minn. 10. An ordinance

prohibiting the maintenance of awnings over the sidewalk, "except the same be upon a suitable frame," without specifying what should be a suitable frame, or delegating power to determine to some person or tribunal, held void for uncertainty. *State v. Clarke*, 69 Conn. 371. A city which has power by statute to remove nuisances, to prohibit and prevent encroachments on streets and sidewalks, and to regulate the erection of awnings, has no power to remove an awning over a sidewalk which is a safe structure and does not materially interfere with the free use and enjoyment of the sidewalk by the public. *Hisey v. Mexico*, 61 Mo. App. 248. But *quære?*

³ *Hoey v. Gilroy*, 129 N. Y. 132.

⁴ *Hibbard v. Chicago*, 173 Ill. 91, *aff'd* 59 Ill. App. 470; *Bitzer v. Leverton*, 9 Kan. App. 76; *Preston v. Likes*, 103 Md. 191; *Pedrick v. Bailey*, 12 Gray (Mass.), 161; *Fox v. Winona*, 23 Minn. 10; *Simis v. Brookfield*, 13 N. Y. Misc. 569; *Small v. Edenton*, 146 N. Car. 527. A permanent wooden awning or roofing covering the sidewalk of a street and resting for support upon posts bedded in the street, if insecurely supported so as to be dangerous to persons using the street, is a nuisance. *Hume v. New York City*, 74 N. Y. 264. See also *Mansfield v. New York City*, 119 N. Y. App. Div. 199; *Bieling v. Brooklyn*, 120 N. Y. 98.

streets and public places, an interesting topic remains on which the judicial judgments are not agreed, and that is, whether the rights of the municipality or of the public may be lost by non-user or adverse possession. There may be instances where the non-user has continued so long, and private rights have grown up of such a nature, as to amount to an *equitable estoppel*, or an estoppel *in pais*, on the public, which the courts will enforce upon principles of justice; but such cases are exceptional in their character, and while some courts have distinctly recognized such a principle, others have denied its applicability to public rights.¹ The state of the law, aside from positive enactment, can best be exhibited by referring to the leading adjudications.

§ 1188 (668). **Same Subject.** — The doctrine is well understood, that to the sovereign power, the maxim, "*Nullum tempus occurrit regi*," applies, and that the United States and the several States are not, without express words, bound by statutes of limitation.² Although municipal corporations are public agencies, exercising, on behalf of the State, public duties, yet they also exercise and acquire what the courts have called rights in a private and proprietary capacity rather than in a public and governmental capacity, and such corporations are not exempt from the operation of limitation statutes in cases wherein arise questions involving property or contracts which do not pertain to the authority of the State which is exercised through them, but pertain to the *private and contractual rights* of the municipality, and such statutes run in favor of and against these corporations with respect to these private and pro-

¹ *Lane v. Kennedy*, 13 Ohio St. 42, 49, *per Peck, J.*; *Heddeleston v. Hendricks*, 52 Ohio St. 460; 3 Kent Com. 451, note, where Chancellor *Kent*, noticing the case of *New Orleans v. United States*, 10 Pet. (U. S.) 662, suggests that there may be such non-user by the public, and such adverse claims by the original owner, as may, in time, bar the public; "for in this country," he adds, "time may [by legislation] create a bar to the sovereign's right." *De Vaux v. Detroit, Harring. Ch.* (Mich.) 98; the text approved, *Brooks v. Riding*, 46 Ind. 15. Where a city sought to enjoin the erection of a building projecting over the line of a street, after twenty-five years' open, continued, and adverse possession, it was held that the defendant had gained title thereto as against the public. *Big*

Rapids v. Comstock, 65 Mich. 78; *Cheek v. Aurora*, 92 Ind. 107; *Driggs v. Phillips*, 103 N. Y. 77, where occupancy of an alley by fencing it up was held not to be an adverse possession when done by permission of the city. *Carter v. LaGrange*, 60 Tex. 636.

² *United States v. Hoar*, 2 Mason C. C. R. 134; *Johnson v. Irwin*, 3 Serg. & Rawle (Pa.), 291; *Allston's Lessee v. Saunders*, 1 Bay (S. Car.), 30; *People v. Gilbert*, 18 Johns. (N. Y.) 227; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 735; *Dickinson v. New York*, 92 N. Y. 584; *Angell on Limitations*, 36; *ante*, § 976, note. A State statute cannot bar the United States, nor in general can laches be imputed to the United States. *United States v. Thompson*, 98 U. S. 487.

prietary rights and obligations in the same manner and to the same extent as against natural persons.¹

¹ *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1; *Lincoln County v. Luning*, 133 U. S. 529; *Boone County v. Burlington & M. R. R. Co.*, 139 U. S. 684; *San Francisco v. Straut*, 84 Cal. 124; *Bannock County v. Bell*, 8 Idaho, 1 (overruling *Fremont County v. Brandon*, 6 Idaho, 482); *Piatt County v. Goodell*, 97 Ill. 84; *School Directors v. School Directors*, 105 Ill. 653; *Hammond v. Shepard*, 186 Ill. 235; *Strosser v. Fort Wayne*, 100 Ind. 443; *Baker v. Johnson County*, 33 Iowa, 151; *Waterloo v. Union Mill Co.*, 72 Iowa, 437, 439; *Powers v. Council Bluffs*, 45 Iowa, 652; *Muscataine v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 645; *Abernethy v. Dennis*, 49 Mo. 468; *May v. School Dist.*, 22 Neb. 205, 206, citing text; *Arapahoe Village v. Albee*, 24 Neb. 242; *State v. School District*, 30 Neb. 520; *State v. King*, 34 Neb. 196; *State v. Boyd*, 49 Neb. 303; *Armstrong v. Dalton*, 4 Dev. (N. Car.) Law, 568; *Lancaster County v. Brinthal*, 29 Pa. 38; *Evans v. Erie County*, 66 Pa. St. 222; *Kearney v. West Chester Borough*, 199 Pa. 392; *Shelby County v. Bickford*, 102 Tenn. 395; *Johnson v. Llano County*, 15 Tex. Civ. App. 421; *Johnson v. Black*, 103 Va. 477, 492. As to the distinction between the "private" and "public" side of municipal corporations, see *Index, Action and Liability*.

There may be *adverse possession* of lands which are owned by municipalities which are not subject to any public trust or public use. *Evans v. Erie County* 66 Pa. St. 222; *Kearney v. West Chester Borough*, 199 Pa. St. 392; *Hammond v. Shepard*, 186 Ill. 235; *Johnson v. Llano County*, 15 Tex. Civ. App. 421; *San Francisco v. Straut*, 84 Cal. 124; *Bedford v. Willard*, 133 Ind. 562; *New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18, 26; *Helena v. Hornor*, 58 Ark. 151; *Palmer v. Jones*, 188 Mo. 163. See chap. on Corporate Property.

Actions to recover moneys collected by public officials are within the bar of the statute. *Clarke v. School Dist.*, 84 Ark. 516; *Bannock County v. Bell*, 8 Idaho, 1 (overruling *Fremont County v. Brandon*, 6 Idaho, 482); *Armstrong v. Dalton*, 4 Dev. Law. (N. Car.) 568; *Johnson v. Black*, 103 Va. 477, 492. An action by a city to recover damages for breach of a con-

tract by a railroad company to pave a city street within a reasonable time is within the bar of the statute. *Muscataine v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 645. See also *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1. An action by a county to set aside for fraud a decree declaring certain railroad taxes to be illegal, held to be within the statutory limitation. *Boone County v. Burlington & M. R. R. Co.*, 139 U. S. 684.

The statute of limitations does not, in any event, begin to run against the inhabitants of a town until they are incorporated, and thus capacitated to sue. *Reilly v. Chouquette*, 18 Mo. 220; *Sims v. Chattanooga*, 1 Lea (Tenn.), 694, approving text. It seems that the legislature may require a municipal subdivision of the State to pay a *just debt*, though barred by the statute of limitations. *Caldwell County v. Harbert*, 68 Tex. 321; see *ante*, chap. iv., as to extent of legislative power. See further as to *Limitations*, *post*, §§ 1194, 1414, note. *Inability to serve process* upon a city, caused by the designed elusion of it by its officers, is no excuse for not commencing an action within the period limited by law. *Amy v. Watertown* (No. 2), 130 U. S. 320; *Knowlton v. Watertown*, 130 U. S. 327.

Mississippi. By constitutional provision, municipalities are now placed upon the same footing as the State in respect to all its rights and causes of action, both public and private. Prior to the adoption of this constitutional provision, it was held that the streets of a city could not be possessed adversely so as to bar the city's right. *Vicksburg v. Marshall*, 59 Miss. 573; *Witherspoon v. Meridian*, 69 Miss. 288; *Bay St. Louis v. Hancock County*, 30 Miss. 364. But, on the other hand, the court also held that by adverse possession the right of a county to recover lands by ejectment might be barred. *Brown v. Issaquena County*, 54 Miss. 230; *Warren County v. Lamkin*, 93 Miss. 123; 46 So. Rep. 497. Similarly, an action by a county to recover on notes given it for money loaned belonging to the school fund was barred by the statute of limitations. *Money v. Miller*, 21 Miss. 531; *Madison County v. Powell*, 71 Miss. 618; *Chamberlain v. Lawrence County*, 71 Miss. 949, 958.

§ 1189 (669). **No Title by Adverse Possession as against the Public.**—As regards the effect of encroachments upon, and adverse possession of, streets and highways, there is a diversity of opinion in the courts. In a number of cases it is held that the *public may lose their rights* to streets and public places by long-continued adverse occupation by private individuals.¹ But, on the other hand, it has been repeatedly held by the Supreme Court of Pennsylvania “that the lapse of time furnishes no defence for an encroachment on a public right,” such as an obstruction on a street or a public square. The view of the court is, in substance, this: Streets and public squares are dedicated or acquired for the *public use*, and not alone for that of the people of the city, the corporation being the mere trustee for the public; that erections by private persons on property thus dedicated or acquired, cannot be authorized by the original proprietor, or by the city corporation, and can be authorized only by act of the legislature; that unauthorized obstructions and erections thereon are public nuisances, and may be prosecuted by indictment or other proceedings on behalf of the public, and that no length of time, unless there be a limit *by statute*, will legalize a public nuisance, or bar the right of the public to proceed by indictment to abate it; and that, in the absence of a grant shown from a competent source, no presumption from mere lapse of time can be made to support a nuisance which is an encroachment on the public right. In one case Mr. Justice Sergeant forcibly observes: “These principles pervade the laws of the most enlightened nations, as well as our own code, and are essential to the protection of public rights, which would be gradually frittered away if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right.”²

But by constitutional provision it is now declared that “statutes of limitation in civil causes shall not run against the State or any subdivision or municipal corporation thereof.” Miss. Const. 1890, § 104. The effect of this constitutional provision was to stop the running of the statute against municipalities on pending contracts, where the bar was not complete, as well as on future contracts. *Adams v. Illinois Cent. R. Co.*, 71 Miss. 752; *Wayne County v. Helton*, 79 Miss. 122.

¹ *Supra*, §§ 1187, 1188; *infra*, § 1193.

² *Per Sergeant, J.*, *Commonwealth v. Alburger*, 1 Whart. (Pa.) 469, 488. See also *Commonwealth v. McDonald* (indictment for “actual obstruction,” &c.), 16 Serg. & Rawle (Pa.), 390; *Barter v. Commonwealth* (ownership of wells in streets), 3 Pa. 253; *Susquehanna County v. Deans*, 33 Pa. 131; *Kittanning Academy v. Brown*, 41 Pa. 269; *Philadelphia v. Philadelphia & R. R. Co.*, 58 Pa. 253, 263; *Kopf v.*

§ 1190 (670). **Same Subject; Civil Law Doctrine.**—In Louisiana, also, it is considered, that streets, levees, commons, or public

Utter, 101 Pa. 27; Commonwealth v. Moorehead, 118 Pa. 344; Wakeling v. Cocker, 23 Pa. Super. Ct. 196; Washington v. Steiner, 25 Pa. Super. Ct. 392, 402.

In *Barter v. Commonwealth*, 3 Pa. 253, *Gibson*, C. J., remarks: "The title of the corporation [of Lancaster] to the soil [of the streets] for uses that conduce to the public enjoyment and convenience, is paramount and exclusive; and no private occupancy, for whatever time, and whether adverse or by permission, can vest a title inconsistent with it. The case of *Commonwealth v. McDonald*, by which this salutary principle has been conclusively established, is founded in the purest reason, and fortified by the strongest authorities." *Ib.* 259; *Rung v. Shoneberger* (claim of ownership in public square), 2 Watts (Pa.), 23. This position was adhered to in *Kopf v. Utter*, 101 Pa. St. 27, where the right of the municipality to part of a street, which has been fenced in by an adjoining owner for over twenty-one years, was sustained. As to title by adverse possession, compare with remarks by *Gibson*, C. J., above quoted, *Commonwealth v. Alburger* (indictment for erecting church in Franklin Square, Philadelphia), 1 Whart. (Pa.) 469; *Penny Pot Landing Case*, 16 Pa. St. 79, 94, citing and reaffirming the foregoing cases; *Philadelphia v. Phila. & R. R. Co.*, 58 Pa. St. 253. It is a fair deduction from the foregoing cases, that a prescriptive right to maintain an encroachment upon the public streets or squares cannot be set up as against the public, and that, as against the public, a title by adverse possession cannot be acquired by individuals. The above-cited cases in *Pennsylvania* were approved in *Burbank v. Fay*, 65 N. Y. 57, 71.

The doctrine that a right to a portion of a public street may be acquired as against the public by prescription or adverse possession, was rejected, and characterized "eminently disastrous to the public interests," by *Whelpley*, J., in *Jersey City v. Morris Canal & B. Co.*, 12 N. J. Eq. 547, 561, denying the correctness of *Knigh v. Heaton*, 22 Vt. 480, and similar cases, which hold that the enclosure and occupation of lands within the limits of a

highway for twenty years, under a claim of right, make title in the occupier by prescription as against the public. *Smith v. State*, 23 N. J. L. 712. In *Manko v. Chambersburgh*, 25 N. J. Eq. 168, the court refused under the circumstances to dissolve an injunction to restrain the municipal authorities from removing a building alleged to encroach upon the street, on which it had been erected under a claim of right on a line on which for thirteen years numerous other houses had been built. A street when dedicated was eighty feet in width, and subsequently, under proceedings void in law, twenty feet were vacated, leaving the street sixty feet wide, to which width only did the municipal authorities work it, and adjacent lot-owners improved with reference to its being a sixty-foot street. It was the opinion of the Chief Justice that the city, acting under the mistake of supposing the proceedings to vacate to be binding upon it, was not thereby estopped to insist that the street was eighty feet wide. *Jersey City v. State*, 30 N. J. L. 521; *Cross v. Morristown*, 18 N. J. Eq. 305.

The reader will find a review of some of the more important decisions on the subject of prescriptive rights as against the public, in the able and learned opinion of Mr. Commissioner *Dwight* in *Burbank v. Fay*, 65 N. Y. 57. The conclusions arrived at are that, as the theory of prescription rests upon a supposed grant, no grant can be presumed where the grant would be unlawful or in violation of law; and that no length of user can confer a right contrary to the provisions of a statute. "Where no express grant can be allowed the law will not resort to the fiction of an implied grant so as to create a prescriptive right. If it would, the whole policy of the prohibitory statute might be subverted by the supineness or wilful frauds of public officers. This doctrine is clearly maintained by the following authorities: *Staffordshire & W. Canal Nav. v. Propr. Birmingham Nav.*, Law Rep. 1 E. & I. Appeals, 254; *Rochedale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Elwell v. Prop. Birmingham Canal Nav.*, 3 H. of Lords Cases, 812; *Grand Surrey Canal Co. v. Hall*, 1 M. & G. 392."

Mr. Digby maintains with force and

grounds, &c., are lands which are *out of commerce*, incapable of being alienated, and must ever remain free to the public. It is therefore held that no silence or length of time can deprive a public corporation of its power over public places; that its inaction may give an

apparent correctness that the doctrine of the English law, that all *prescriptive* rights must be such as could have originated in a valid grant, has arisen from false historical notions, and is in reality a legal fiction. Digby Hist. Law of Real Prop., chap. iii. § 2, note, p. 156.

The constant and exclusive use by a railroad company of part of a street of a town, *as and for a right of way*, cannot in any time ripen into an absolute ownership of such part. *Indianapolis, P. & C. R. Co. v. Ross*, 47 Ind. 25.

Ohio decisions: In *Cincinnati v. First Presbyterian Church*, 8 Ohio, 299, the question was most thoroughly argued and examined by able lawyers, and no cases precisely in point as to municipal corporations were produced. The doctrine of the text was distinctly decided, and was adhered to and applied in the later cases of *Cincinnati v. Evans*, 5 Ohio St. 594, and *Oxford Township v. Columbia*, 38 Ohio St. 87. As a result of this doctrine, these cases hold that notorious and uninterrupted possession by a private individual or private corporation, under a claim of right to land dedicated to a city for public squares or streets for the period of the statutes of limitations, will bar the city of the claim to its use. In *Lane v. Kennedy*, 13 Ohio St. 42, the prior cases in that State are noticed; and it was held that a partial encroachment by a fence on a surveyed highway was not necessarily adverse to the public nor inconsistent with the easement of the public, the court, by *Peck, J.*, observing that the case was distinguishable from *Cincinnati v. Evans*, 5 Ohio St. 594; and the principle was adopted that where the circumstances surrounding the possession are entirely reconcilable with a continued recognition of the ultimate right of the public, the possession is not adverse. Referring to *Cincinnati v. Evans*, *supra*, in which there was an encroachment of a permanent character on the street, the learned judge just named observed: "That case was, in this view of it, rightly determined; but it might, with equal if not greater propriety, have been placed [not upon the statute of limitations, but] upon the

ground of an *estoppel in pais*, on the part of the city authorities, the building having been located by the *city surveyor* upon the lines *previously established and built upon*." But these *Ohio* decisions are to be considered in connection with the decision of the same court in *Heddlston v. Hendricks*, 52 Ohio St. 460, 465, where it was held that the right of an adjacent landowner to enclose by a fence a portion of a public highway cannot be acquired by adverse possession however long continued. *Minshall, C. J.*, who delivered the opinion of the court, said: "The general rule is that the statute of limitations does not apply as a bar to the rights of the public, unless expressly named in the statute; for the reason that the same active vigilance cannot be expected of it as is known to characterize that of a private person, always jealous of his rights and prompt to repel any invasion of them. But in the cases of *Cincinnati v. First Presbyterian Church*, 8 Ohio, 299, and of *Cincinnati v. Evans*, 5 Ohio St. 594, a different rule was applied; and in the first case, the right of the city to a portion of its public square occupied by the church, and, in the other case, its right to a portion of one of its streets, encroached upon by the building of the defendant, a private person, was, in each case, held barred by an adverse possession of twenty-one years. But these cases are regarded as exceptional; and confined to municipal corporations in cases where their possession has been disturbed by the *erection of large and valuable structures* under such circumstances as preclude the idea that the encroachment was simply permissive on the part of the municipality." See also *McClelland v. Miller*, 28 Ohio St. 488; *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338, 349; *Lawrence R. Co. v. Mahoning County*, 35 Ohio St. 1, 8; *Wright v. Oberlin*, 23 Ohio Cir. Ct. 509, 515. In *Ohio* it has also been decided that the use, by a gas company, of the streets of a city for twenty years does not bar an inquiry by the State into the rightfulness of the use. *State v. Cincinnati Gas Co.*, 18 Ohio St. 262.

occupier an estate at sufferance, but nothing more; and that inasmuch as such property is not susceptible of alienation by the corporation, no prescriptive or adverse right thereto can be acquired, since prescription presupposes a title fairly acquired, but not now capable of proof.¹

§ 1191 (671). **Statutes of Limitation; Estoppel; Illinois Doctrine.**—In Illinois, where the statute of limitations protects an actual possession of lands, under a *bona fide* claim or color of title, for seven years, to the extent and according to the purport of the possessor's paper title, it is held that this statute does not apply to a suit brought by a municipal corporation to recover possession of property which was dedicated to it for the use of the public, since the corporation has no power to *alien* or *dispose* of the property, and hence there could be no paper title to be protected such as the statute contemplated. Whether an adverse possession for twenty years would defeat an action by the corporation, no opinion was given.² As an incorporated town or city holds the title to its streets and alleys for the use of the public, and has no rightful authority to grant the streets for any purpose inconsistent with the public

¹ *New Orleans v. Magnon*, 4 Martin (La.), 1; *New Orleans v. Maggioli*, 4 La. An. 73; *Ingram v. St. Tammany Par. Police Jury*, 20 La. An. 226; *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. An. 217; *Lafitte v. New Orleans*, 52 La. An. 2099, 2101; *Minor v. New Orleans*, 115 La. 302, 308. Text cited and approved, *Sims v. Chattanooga*, 1 Lea (Tenn.), 694. See also *Delabigarre v. Second Municipality*, 3 La. An. 230, 237; *Shreveport v. Walpole*, 22 La. An. 526. Acts of city authorities, in ignorance of its rights, and prejudicial to those rights with respect to streets and commons, are not binding upon the corporation. *Lewis v. San Antonio* (Exidos grant for pasturage, &c.), 7 Tex. 288; *New Orleans v. United States*, 10 Pet. (U. S.) 662; *Plaquemines Par. Pol. Jury v. Foulhouze*, 30 La. An. 64, approving text.

As to title against the public, or a municipal corporation, by *adverse possession*, see further 1 Domat, 492; *Henshaw v. Hunting*, 1 Gray (Mass.), 203; *Jersey City v. Morris Canal & B. Co.*, 12 N. J. Eq. 547; *Manko v. Chambersburgh*, 25 N. J. Eq. 168; *Fox v. Hart*, 11 Ohio, 414; *Rowan's Ex. v. Portland*, 8 B. Mon. (Ky.) 232, 259; *Georgetown*

Street Com'rs v. Taylor, 2 Bay (S. Car.), 282; *Galveston v. Menard*, 23 Tex. 349; *Onstott v. Murray*, 22 Iowa, 466; *McFarlane v. Kerr*, 10 Bosw. (N. Y.) 249; *Kellogg v. Thompson*, 66 N. Y. 88; *Litchfield v. Wilmot*, 2 Root (Conn.), 288; *State v. Pettis*, 7 Rich. (S. Car.) Law, 390; *Memphis v. Lenore*, 6 Coldw. (Tenn.) 412; *Bowen v. Team*, 6 Rich. L. (S. Car.) 298; *Pella Christian Church v. Scholte*, 24 Iowa, 283; *Brooks v. Riding*, 46 Ind. 15, 19.

Mere *non-user* of an easement acquired in real property by a city—in this case by condemnation for public use—will not extinguish the right to the use. An *abandonment* of a right so acquired can only be established by proving acts of a conclusive character, such as show an *intention* to abandon the use. *Curran v. Louisville*, 83 Ky. 628.

² *Alton v. Illinois Transportation Co.*, 12 Ill. 38. Approved, *Chicago v. Wright*, 69 Ill. 318, 327; *Turney v. Chamberlain* (as to adverse possession), 15 Ill. 271. See also to the same effect, *Elster v. Springfield*, 49 Ohio St. 82, citing text; *Eddy v. Granger*, 19 R. I. 105, citing text; *Sims v. Chattanooga*, 1 Lea (Tenn.), 694, citing text.

use, it follows that an individual cannot acquire a prescriptive right therein for any private use.¹ But, although the courts of Illinois do not permit rights to be acquired in city streets and public places by mere adverse possession, yet they have frequently held that the *doctrine of estoppel in pais* is applicable to municipal corporations, and that they will be estopped or not as justice and right may require; that there may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud, as where a party acting in good faith under affirmative acts of the city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired. Under such circumstances the doctrine of equitable estoppel will be applied. The court does not consider that there is either danger to the public or injustice in the application of the doctrine of estoppel under such circumstances. In the exercise of proper diligence the public authorities may prevent encroachments upon public streets, and if they do not, any citizen may take the necessary steps to do so; and if there is not only a failure to act by either, but affirmative action with the apparent approval of every one interested, and the situation is changed by permanent improvements being made, the principles of equity require that the public should be estopped.²

¹ Quincy v. Jones, 76 Ill. 231; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25, 40; Logan County v. Lincoln, 81 Ill. 156, citing text; Lee v. Mound Station, 118 Ill. 304, 316; Greenwood v. La Salle, 137 Ill. 225; Catlett v. People, 151 Ill. 16; Joliet v. Werner, 166 Ill. 34; Jordan v. Chenoa, 166 Ill. 530; Sullivan v. Tichenor, 179 Ill. 97, 101; Itasca v. Schroeder, 182 Ill. 192; De Kalb v. Luney, 193 Ill. 195; Shirk v. Chicago, 195 Ill. 298; Russell v. Lincoln, 200 Ill. 511; Lee v. Harris, 206 Ill. 428; Owen v. Brockport, 208 Ill. 35; Peoria v. Central Nat. Bank, 224 Ill. 43, 67; El Paso v. Hoagland, 224 Ill. 263.

² Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25; Chicago & N. W. R. Co. v. Elgin, 91 Ill. 251; Martel v. East St. Louis, 94 Ill. 67; Piatt County v. Goodell, 97 Ill. 84; Lee v. Mound Station, 118 Ill. 304; Auburn v. Goodwin, 128 Ill. 57; People v. Maxon, 139 Ill. 306; Chicago v. Union Stockyards & T. Co., 164 Ill. 224; Joliet v. Werner, 166 Ill. 34; Jordan v. Chenoa, 166 Ill. 530; Carlinville v. Castle, 177 Ill. 105;

Sullivan v. Tichenor, 179 Ill. 97, 102; Itasca v. Schroeder, 182 Ill. 192; De Kalb v. Luney, 193 Ill. 185; Shirk v. Chicago, 195 Ill. 298; Russell v. Lincoln, 200 Ill. 511; People v. Rock Island, 215 Ill. 488, 495; Peoria v. Central Nat. Bank, 224 Ill. 43; El Paso v. Hoagland, 224 Ill. 263; Chicago v. Illinois Steel Co., 229 Ill. 303, 312; People v. Wieboldt, 233 Ill. 572, 581; Dickerson v. Le Roy, 72 Ill. App. 588.

In Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25, the right of way of a railroad company over public grounds of the city was questioned after it had been used by the railroad company for upwards of twenty years. A valuable station building had been erected in the city and the right of way in question was necessary to reach it. It was held that the city was estopped to deny a grant of the right of way. In People v. Rock Island, 215 Ill. 488, a city for a valuable consideration granted to a railroad company the right to erect structures and lay tracks on a portion of a public street consti-

§ 1192 (673). **Adverse Possession of Streets; West Virginia.** — The diversity of opinion in the courts on the question whether there may be title by *adverse possession* of a street or highway or by *equitable estoppel* is well illustrated by the course of decision of the Supreme Court of Appeals of West Virginia. That court at first held that in a city or town adverse possession of a street for the statutory period would give title to the occupier. In so deciding, the court remarked, that “the reason sometimes assigned why no laches shall be imputed to the king, is that he is continually busied for the public good, and has not leisure to assert his right within the period limited to subjects. A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. This reason certainly is equally if not more cogent in a representative government where the power of the people is delegated to others, and must be exercised by them if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country when they succeeded to the rights of the king of Great Britain and formed independent governments within the respective States. This principle we approve, and regard the exemption from the effect of limitation statutes as essential to the well-being of the government of the States; but this exemption belongs and appertains to sovereignty alone. The reason for it is very apparent. If the statutes of limitation would run against the State, her public lands, if she had any, would be liable to be taken possession of by squatters, who would hold them for the time required by the statute and defy the State; and the State in that portion being sparsely populated, there would be few or none to complain, as it would be the cheapest way to obtain lands from the State. The highways of the State would be liable to be impaired or destroyed by encroachments, and the country not being thickly settled, and the neighbors all acquainted with each other, and the State officers being remote from these highways, there would perhaps be little complaint. But in a city or town, where so many people are to suffer inconveniences by such encroachments, and the officers of the city or town are on the spot, such encroachments are not apt to be tolerated for a long period, and they would be less likely to be tolerated if it was known that an uninterrupted possession of a street,

tuting the river front. A portion of the street of ample width for public travel was left. The company incurred great expense in making permanent improvements, such as the erection of a depot and freight house, in reliance on the grant. It was held that the public, which had apparently acquiesced in such action for many years, was estopped to assert the right to have such improvements removed.

alley, or square would, in a certain number of years, give title to the occupier.”¹ After this decision had been followed and applied a number of times,² the same court reconsidered its decision and squarely overruled it, and held that no title to a public street or highway could be acquired by adverse possession, however long continued. After characterizing the earlier decision as a palpable misapplication of the statute of limitations to the sovereign rights of the people, the court remarked that there could be no question but that the statute of limitations applied to municipal corporations, nor could there be any question but that it applied to the State in like manner as to individuals by express statutory provision, but it did not apply to the sovereign rights of the people, except as they are restricted in the Constitution by their manifest will therein contained. Statutes of limitation which are made to apply to the State do not apply to the people or public rights, and they only apply to the State in the same cases that they apply to individuals, — the entry upon or recovery of lands held for sale, suits on bonds, contracts, evidences of debt or for torts, — all these, though the State is a party, are subject to bar. As to all such things, there is no reason why the State should have any longer time than an individual. But this does not apply to the public rights of the State; it does not apply to the right of taxation, the right of eminent domain, the right to use the public highways, and other rights which pertain only to the sovereignty of the people. No individual can destroy or impair any of these rights by his own act. If the public easement is interfered with by an individual, such interference is a public nuisance, and it matters not how long it is continued; it can never destroy the easement, for the nuisance is under the ban of the law and is subject to abatement at any time.³ Having determined to deny the application of the statute of limitations, the court felt bound to go further, and denied that any principle of equitable estoppel could be applied to affect the public right in streets and highways.⁴

¹ *Wheeling v. Campbell*, 12 W. Va. 36.

² See *Forsyth v. Wheeling*, 19 W. Va. 318; *Mason City S. & M. Co. v. Mason*, 23 W. Va. 211, 218; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326; *Miller v. Aracoma*, 30 W. Va. 606, 618; *Taylor v. Phillipi*, 35 W. Va. 554, 556; *Teass v. St. Albans*, 38 W. Va. 1, 14.

³ *Ralston v. Weston*, 46 W. Va. 544. This decision has been followed and applied in *McClellan v. Weston*, 49

W. Va. 669, 678; *Foley v. Doddridge County Court*, 54 W. Va. 16; *Clifton v. Weston*, 54 W. Va. 250.

⁴ In *Ralston v. Weston*, 46 W. Va. 544, the court said with reference to the doctrine of estoppel: “The statute of limitations is a mere legal estoppel, and, if not applying to legalize a public nuisance, neither does equitable estoppel; for equity follows the law, and will grant no relief to a lawbreaker or wrongdoer. Clean hands and a

§ 1193 (674). **Adverse Possession of Streets and Highways.**—

A careful examination of the decisions shows that the generally accepted doctrine is that the maxim, *Nullum tempus occurrit regi*, is not restricted in its application to sovereign States or governments, but that its application extends to and includes public rights of all kinds, and that it applies to municipal corporations as trustees of the rights of the public, and protects from invasion and encroachment the property of the municipality which is held for and devoted to public use, no matter how lax the municipal authorities may have been in asserting the rights of the public. Hence, no adverse possession *merely as such*, however long continued, of a public street or highway will in many States suffice to destroy the rights of the public in such street or highway and vest title thereto in the person possessing it.¹ But on the other hand there are some States in

clear title are always equitable requirements. . . . How can equitable estoppel, any more than the statute of limitations, deprive a sovereign of his rights, and permit his subjects to destroy them by their wrongful conduct? The use of the highways is a sovereign right, common to all the people, and of which they cannot be divested, except in accordance with their will and appointment for the public weal. The law is best enunciated in the case of *Webb v. City of Demopolis*, 95 Ala. 116, where it is held that 'a city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, nor laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of a city to maintain a suit in equity to remove the obstruction.' . . . The words 'holds them in trust,' are objectionable; for the reason that the people generally hold them and own the public easement, and the municipality merely has authority to supervise and keep them in repair and free from obstruction for the benefit of the whole people and the stranger within their gates."

¹ *Grogan v. Hayward*, 4 Fed. Rep. 161; 6 *Sawyer C. C.* 498; *Reed v. Birmingham*, 92 Ala. 339; *Webb v. Demopolis*, 95 Ala. 116, 134; *Harn v. Dadeville*, 100 Ala. 199, 203; *Mobile Transportation Co. v. Mobile*, 128 Ala.

335, 351; *Weiss v. Taylor*, 144 Ala. 440; *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 447; *Visalia v. Jacobs*, 65 Cal. 434; *Yolo County v. Barney*, 79 Cal. 375; *Orena v. Santa Barbara*, 91 Cal. 621; *Ames v. San Diego*, 101 Cal. 390; *Holladay v. San Francisco*, 124 Cal. 352; *Southern Pac. Co. v. Hyatt*, 132 Cal. 240, 244; *Mouat Lumber Co. v. Denver*, 21 Colo. 1, 8; *Denver v. Girard*, 21 Colo. 447; *Augusta v. Burum*, 93 Ga. 68, 73; *Norrell v. Augusta R. & E. Co.*, 116 Ga. 313; *Langley v. Augusta*, 118 Ga. 590, 601; *Kelsoe v. Oglethorpe*, 120 Ga. 951, 955; *Robins v. McGehee*, 127 Ga. 431, 433; *Peoria v. Johnston*, 56 Ill. 45; *Quincy v. Jones*, 76 Ill. 231; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25, 40; *Lee v. Mound Station*, 118 Ill. 304, 316; *Greenwood v. La Salle*, 137 Ill. 225; *Catlett v. People*, 151 Ill. 16, 23; *Joliet v. Werner*, 166 Ill. 34; *Jordan v. Chenoa*, 166 Ill. 530; *Sullivan v. Tichenor*, 179 Ill. 97; *Itasca v. Schroeder*, 182 Ill. 192; *DeKalb v. Luney*, 193 Ill. 185, 189; *Shirk v. Chicago*, 195 Ill. 298, 312; *Russell v. Lincoln*, 200 Ill. 511, 522; *Peoria v. Central Nat. Bank*, 224 Ill. 43, 67; *Brown v. Trustees of Schools*, 224 Ill. 184; *El Paso v. Hoagland*, 224 Ill. 263, 265; *Pew v. Litchfield*, 115 Ill. App. 13; *Sims v. Frankfort*, 79 Ind. 446; *Cheek v. Aurora*, 92 Ind. 107; *Wolfe v. Sullivan*, 133 Ind. 331; *Schmidt v. Draper*, 137 Ind. 249; *Hall v. Breyfogle*, 162 Ind. 494, 500; *Waterloo v. Union Mill Co.*, 72 Iowa, 437; *Taraldson v. Lime Springs*, 92 Iowa, 187; *Chicago, R. I. & P. R. Co. v. Council*

which the application of the maxim is restricted to those cases in which the sovereign State is a party and in which it is held that municipal corporations, like natural persons, are subject to the statute of limitations, even in cases involving the public interest and property; and therefore in those States by adverse possession or prescriptive encroachment, the right of the public in the streets

Bluffs, 109 Iowa, 425; Markham v. Anamosa, 122 Iowa, 689; Vorhes v. Ackley, 127 Iowa, 658; Biglow v. Ritter, 131 Iowa, 213; Quinn v. Baage, 138 Iowa, 426; 114 N. W. Rep. 205; Webb v. Butler County, 52 Kan. 375, 378; Eble v. State, 77 Kan. 179; 93 Pac. Rep. 803; New Orleans v. Magnon, 4 Martin (La.), 1; Thibodeaux v. Maggiolo, 4 La. An. 73; Ingram v. St. Tammany Par. Police Jury, 20 La. An. 226; Sheen v. Stothart, 29 La. An. 630; Louisiana Ice Mfg. Co. v. New Orleans, 43 La. An. 217; Lafitte v. New Orleans, 52 La. An. 2099, 2101; Minor v. New Orleans, 115 La. 302, 308; Ulman v. Charles St. Ave. Co., 83 Md. 130; Baldwin v. Trimble, 85 Md. 396, 403; Vicksburg v. Marshall, 59 Miss. 573; Witherspoon v. Meridian, 69 Miss. 288; Bay St. Louis v. Hancock County, 80 Miss. 364; Territory v. Deegan, 3 Mont. 82; State v. Franklin Falls Co., 49 N. H. 240; Thompson v. Major, 58 N. H. 242, 244; Collins v. Howard, 65 N. H. 190, 192; Manchester v. Hodge, 74 N. H. 468; Jersey City v. State, 30 N. J. L. 521, 527; Bodine v. Trenton, 36 N. J. L. 198, 201; Hoboken Land & Imp. Co. v. Hoboken, 36 N. J. L. 540, 549; Price v. Plainfield, 40 N. J. L. 608, 614; Laing v. United N. J. R. & C. Co., 54 N. J. L. 576; Jersey City v. Morris Canal & B. Co., 12 N. J. Eq. 547, 561; Cross v. Morristown, 18 N. J. Eq. 305, 311; Tainter v. Morristown, 19 N. J. Eq. 46, 60; Simis v. Brookfield, 34 N. Y. Supp. 695, citing text; Buffalo v. Delaware, L. & W. R. Co., 39 N. Y. Supp. 4; Walker v. Caywood, 31 N. Y. 51; St. Vincent Orphan Asylum v. Troy, 76 N. Y. 108, 114; Driggs v. Phillips, 103 N. Y. 77; Hughes v. Metropolitan El. R. Co., 130 N. Y. 14, 26; Cohoes v. Delaware & H. Canal Co., 134 N. Y. 397, 406; People v. Maher, 141 N. Y. 330, 336; Buffalo v. Delaware, L. & W. R. Co., 190 N. Y. 84, 96, rev'g 114 N. Y. App. Div. 915; Mangan v. Sing Sing, 26 N. Y. App. Div. 464, aff'd 164 N. Y. 560; Buffalo v. Delaware, L. & W. R. Co., 68 N. Y. App. Div. 488, aff'd 178 N. Y. 561; Knickerbocker Ice Co. v. Forty-Second St. R. Co., 85 N. Y. App. Div. 530, 540, aff'd 176 N. Y. 408; New York City v. De Peyster, 120 N. Y. App. Div. 762, 765, aff'd 190 N. Y. 547; Moose v. Carson, 104 N. Car. 431; State v. Godwin, 145 N. Car. 461, 465; Heddeston v. Hendricks, 52 Ohio St. 460 (distinguishing and qualifying Cincinnati v. First Presbyterian Church, 8 Ohio, 299, and Cincinnati v. Evans, 5 Ohio St. 594); Schooling v. Harrisburg, 42 Oreg. 494, 499; Oliver v. Synhorst, 48 Oreg. 292; Christian v. Eugene, 49 Oreg. 170; Rung v. Shoneberger, 2 Watts (Pa.), 23; Commonwealth v. McDonald, 16 S. & R. (Pa.) 390, 401; Penny Pot Landing, *In re*, 16 Pa. 79; Susquehanna County v. Deans, 33 Pa. 137; Kittaning Academy v. Brown, 41 Pa. 269; Philadelphia v. Philadelphia & R. R. Co., 58 Pa. 253, 263; Kopf v. Utter, 101 Pa. 27; Commonwealth v. Moorehead, 118 Pa. 344; Wakeling v. Cocker, 23 Pa. Super. Ct. 196; Washington v. Steiner, 25 Pa. Super. Ct. 392, 402; McGuire v. Wilkes-Barre, 36 Pa. Super. Ct. 418; Simmons v. Cornell, 1 R. I. 519; Almy v. Church, 18 R. I. 182; Matteson v. Whaley, 20 R. I. 412, 413; Knowles v. Knowles, 25 R. I. 325; Crocker v. Collins, 37 S. Car. 327; Sims v. Chattanooga, 1 Lea (Tenn.), 694; Memphis v. Lenore, 6 Coldw. (Tenn.) 412; Raht v. Southern R. Co. (Tenn. Ch. App.) 50 S. W. Rep. 72; Taylor v. Commonwealth, 29 Gratt. (Va.) 780; Yates v. Warrenton, 84 Va. 337; Buntin v. Danville, 93 Va. 200, 208; Depriest v. Jones (Va.), 21 S. E. Rep. 478; Bellet v. Richmond, 108 Va. 314; 61 S. E. Rep. 785; West Seattle v. West Seattle L. & I. Co., 38 Wash. 359; Rapp v. Stratton, 41 Wash. 263; Ralston v. Weston, 46 W. Va. 544 (overruling Wheeling v. Campbell, 12 W. Va. 36); McClellan v. Weston, 49 W. Va. 669; Childs v. Nelson, 69 Wis. 125; Chase v. Oshkosh, 81 Wis. 313, 316; Nicolai v. Davis, 91 Wis. 370; Queen v. Brewster, 8 Upper Can. C. P. 208.

and highways may be ousted by individuals.¹ A number of States which at first permitted the public easement to be destroyed by

¹ *Ft. Smith v. McGibbin*, 41 Ark. 45; *Broad v. Beatty*, 73 Ark. 106; *El Dorado v. Ritchie Grocery Co.*, 84 Ark. 52; *Rowans' Executor v. Portland*, 8 B. Mon. (Ky.) 232, 259; *Dudley v. Frankfort*, 12 B. Mon. (Ky.) 610, 617; *Alves v. Henderson*, 16 B. Mon. (Ky.) 131, 171; *Bosworth v. Mt. Sterling*, 12 Ky. Law Rep. 157; 13 S. W. Rep. 920; *Cornwall v. Louisville & N. R. Co.*, 87 Ky. 72; *Big Rapids v. Comstock*, 65 Mich. 78; *Essexville v. Emery*, 90 Mich. 183; *Flynn v. Detroit*, 93 Mich. 590; *Vincent v. Kalamazoo*, 111 Mich. 230; *Vier v. Detroit*, 111 Mich. 646; *Moon v. Mills*, 119 Mich. 298; *Darrow v. Homer*, 122 Mich. 229; *Schneider v. Detroit*, 135 Mich. 570; *Knight v. Heaton*, 22 Vt. 480. It is, however, to be noted that, in *Kentucky*, it is now provided by statute that possession of a public street or highway does not become adverse until notice in writing has been given to the municipality of adverse claim thereto. See *Cornwall v. Louisville & N. R. Co.*, 87 Ky. 72; *Covington v. Hall* (Ky.), 98 S. W. Rep. 317.

Some States provide, in effect, by statute for the adverse possession of highways, though the result is usually reached by indirection.

Massachusetts. In the absence of a statutory provision the rule adopted in this State is that an obstruction within a highway is a nuisance and unlawful however long it may continue. *Morton v. Moore*, 15 Gray (Mass.), 573, 576; *New Salem v. Eagle Mill Co.*, 138 Mass. 8. But by statute it is provided that when the boundary of a highway is not known and cannot be ascertained from the records, twenty years' maintenance of fences, &c., shall be deemed to show the true boundaries, and that if the boundaries of such ways or places can be made certain, any building or fence thereon may, upon the presentment of a grand jury, be removed as a nuisance, unless it has continued at least forty years. In construing the latter provision, the court has held that though it is negative in form, it is intended to be affirmative in substance, and confers the right to maintain obstructions which have continued for the stated period. *Cutter v. Cambridge*, 6 Allen (Mass.), 20, 24; *Gifford v. Westport*, 190 Mass. 323,

325. When a fence has been maintained for twenty years and the boundaries are not known and cannot be ascertained from the records, it becomes *prima facie* evidence of the true boundary. *Sprague v. Waite*, 17 Pick. (Mass.) 309; *Horne v. Haverhill*, 110 Mass. 527, 528. If the boundaries are known and a fence has been maintained for forty years, the fence may be continued under the statute, and an injunction will issue to restrain officers who threaten to remove it. *Winslow v. Nayson*, 113 Mass. 411; *Attorney-General v. Tarr*, 148 Mass. 309, 313; *Attorney-General v. Revere Copper Co.*, 152 Mass. 444, 453. See also *Commonwealth v. Blaisdell*, 107 Mass. 234. A *prescriptive right* may be acquired against the State since the enactment of a statute applying to it the limitation of real actions. Thus, in *Attorney-General v. Revere Copper Co.*, 152 Mass. 444, it was held that in the case of a great pond, the title to which was in the commonwealth or in the town for the benefit of the public, the right of the State was barred by adverse possession. The court said that the rule that no length of time will legalize a public nuisance did not apply, where no other nuisance existed than the abridgment of the public's enjoyment of property, such as a great pond, by the long continued use of some part of it by an individual under a claim of right.

Connecticut. In this State the statutory period applicable to real actions is fifteen years. Another statute relating to encroachments on highways declared that if any person had within fifteen years enclosed any highway, &c., the town authorities after warning might pull down and remove the encroachments. It was held that by virtue of these statutes the enclosure of a highway for fifteen years created an adverse right therein. *Litchfield v. Wilmot*, 2 Root (Conn.), 288. In *Beardslee v. French*, 7 Conn. 125, it was held that, *entire non-user for ninety years* of a way and exclusive possession thereof by an individual extinguished the public right. See also *Brownell v. Palmer*, 22 Conn. 107, 121. When the use of a highway has been discontinued, the person taking adverse possession thereof acquires

adverse possession for the statutory period have by statutory enactment adopted the contrary rule.¹

title against the owner, whatever the effect may be as against the public easement. *Cady v. Fitzsimmons*, 50 Conn. 209.

New York. In this State it is provided by statute that "all highways that have ceased to be travelled or used as highways for six years shall cease to be a highway for any purpose." This statute is applicable to a street in a village incorporated under the general act. *Horey v. Haverstraw*, 124 N. Y. 273; *Excelsior Brick Co. v. Haverstraw*, 142 N. Y. 146, 150. It is not essential to the operation of the statute that the entire street or highway be abandoned. Non-user of a portion for the prescribed period of time operates as a relinquishment by the public of the part so abandoned as a highway. *Mangam v. Sing Sing*, 11 N. Y. App. Div. 212. When the non-user has continued for the prescribed period, it ceases to be a highway for any purpose, and the owner of the fee is entitled to recover the possession of the premises. *Mangam v. Sing Sing*, 11 App. Div. 212, 215. But to give effect to the statutory provision the abandonment must be throughout the entire width of the highway. Where a part only of the breadth is not traversable or used by the public, but the remainder is worked and is traversable, there is no such non-user as is required by the statute to effect an abandonment of any part of the highway. *Mangam v. Sing Sing*, 26 N. Y. App. Div. 464, 468, aff'd 164 N. Y. 560. Where a road has not been used and traversed as a highway for six years, and has during that period been rendered impassable for vehicles by fences or excavations, its legal character as a highway is destroyed, and this result follows although in the beginning the non-user was caused and the road was rendered impassable by a trespasser. *Horey v. Haverstraw*, 124 N. Y. 273; *Excelsior Brick Co. v. Haverstraw*, 142 N. Y. 146. See also *Buffalo v. Delaware, L. & W. R. Co.*, 68 N. Y. App. Div. 488, 506, aff'd 178 N. Y. 561; *Townsend v. Bishop*, 61 N. Y. App. Div. 18; *Buffalo v. Hoffeld*, 6 N. Y. Misc. 197.

¹ *Minnesota.* Prior to the adoption of the statute of 1899, the courts held that the public easements in streets

might be lost by adverse possession. *St. Paul v. Chicago, M. & St. P. R. Co.*, 45 Minn. 387; *Glencoe v. Wadsworth*, 48 Minn. 402; *Wayzata v. Great Northern R. Co.*, 50 Minn. 438; *Northern Pac. R. Co. v. Townsend*, 84 Minn. 152, 158; *Hastings v. Gillitt*, 85 Minn. 331; *Haramon v. Krause*, 93 Minn. 455, 457; *Murtaugh v. Chicago, M. & St. P. R. Co.*, 102 Minn. 52.

Missouri. The earlier decisions held that the maxim *Nullum tempus occurrit regi* did not except municipalities from the operation of statutes of limitations, even in the case of lands devoted to public use, as highways, &c., and hence the title thereto might be acquired by prescription. See *St. Charles County v. Powell*, 22 Mo. 525; *Callaway County v. Nolley*, 31 Mo. 393; *Abernethy v. Dennis*, 49 Mo. 468; *St. Charles School Dir. v. Goerges*, 50 Mo. 194; *Burch v. Winston*, 57 Mo. 62; *Cunningham v. Snow*, 82 Mo. 587; *Connecticut Mut. L. Ins. Co. v. St. Louis*, 98 Mo. 422, 425; *Mississippi County v. Vowels*, 101 Mo. 225. But in 1865, the legislature changed the rule by the enactment of a statute which declared that no statute of limitation should apply to any lands appropriated to any public use. See *St. Louis v. Missouri Pac. R. Co.*, 114 Mo. 13, 25; *Brown v. Carthage*, 128 Mo. 10; *Hannibal & St. J. R. Co. v. Totman*, 149 Mo. 657, 660; *Wright v. Doniphan*, 169 Mo. 601, 615; *Columbia v. Bright*, 179 Mo. 441; *State v. Vandalia*, 119 Mo. App. 406, 424.

Nebraska. In this State the court seems to have made a distinction between public roads in the country and city streets. It held that no title to any part of a public road can be acquired by adverse possession. *Krueger v. Jenkins*, 59 Neb. 641; *Lydick v. State*, 61 Neb. 309; *McLucas v. St. Joseph & G. I. R. Co.*, 67 Neb. 603. But on the other hand, adverse possession of a city street for the prescriptive period conferred title. *Schock v. Falls City*, 31 Neb. 599; *Meyer v. Lincoln*, 33 Neb. 566; *Lewis v. Baker*, 39 Neb. 636; *Webster v. Lincoln*, 56 Neb. 502; *Wahoo v. Netheway*, 73 Neb. 54. In *Krueger v. Jenkins*, 59 Neb. 641, which involved the adverse possession of a country highway, the court, by *Sullivan, J.*, distinguished

§ 1194 (675). **Same Subject; The Author's View and Suggestions as to the True Doctrine.**—Upon consideration, it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, are regarded as having, in some respects, a double character, — one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them unless excluded from them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations.¹

country highways and city streets, using the following language: "It would seem that there is in this State much reason for holding that incorporated cities should, in actions relating to their streets, be subject to the operation of the statute of limitations. They own in fee simple the streets, alleys, and other public places within their corporate limits. They may maintain ejectment to recover possession of them; they may, generally speaking, vacate them either in whole or in part. The right is given to sell and dispose of them, and apply the money derived from the sale to any legitimate municipal purpose. In other words, municipal corporations are invested with a sort of proprietary interest in this class of property, and may be required, therefore, to guard it with the same degree of vigilance as that which is exacted of private owners. It is believed that the authorities are all agreed upon the proposition that as to property which is held in private ownership, and not upon public trusts, municipal corporations are on the same footing with private individuals and equally affected by the limitation laws." In 1899, it was provided by statute that "There shall be no limitation to the time within which any county, city, town, village, or other municipal corporation may begin an action for the recovery of the title or possession of any public road, street, alley, or other public grounds or city or town lots." See *Krueger v. Jenkins*, 59 Neb. 641, 644. In *McLucas v. St. Joseph & G. I. R. Co.*, 67 Neb. 603, it was held that, under the provisions of the Constitution and the statute, a railroad is a public highway, and that title to its right of way cannot be divested by adverse possession.

Texas. Under the decisions, title to public streets might be acquired by adverse possession. *Galveston v. Menard*, 23 Tex. 349, 408; *Ostrom v. San Antonio*, 77 Tex. 345. But compare *Coleman v. Thurmond*, 56 Tex. 514. In *Houston & T. C. R. Co. v. Travis County*, 62 Tex. 16, the court refused to apply the statute of limitations to a county when representing the State in the care of highways. In 1887, it was declared by statute that no person should acquire by adverse possession any right or title to any part of any roads, streets, or grounds which belonged to any town, city, or county, or which had been donated or dedicated for public use, with the proviso that the statute should not apply to any alley laid out across any block or square in any city or town. See *Sayles Tex. Civ. Stat. § 3351*; *San Antonio v. Rowley*, 48 Tex. Civ. App. 376; 106 S. W. Rep. 753. *An artificial lake* which has been dedicated to public use is "public grounds" within the meaning of this statute. *Gilleen v. Frost*, 25 Tex. Civ. App. 371. Although the statute operates to protect the municipality against adverse possession of a city street, it does not operate to protect the owner of the fee. *Cocke v. Texas & N. O. R. Co.*, 46 Tex. Civ. App. 363; 103 S. W. Rep. 407.

¹ *Ante*, § 1188. Whilst there will generally be no difficulty in applying the statute of limitations, yet in cases near the boundary line there will be considerable difficulty in determining whether the rights of the municipality are of a *public and governmental nature*, or *merely private and proprietary*. This difficulty is illustrated by the case of *Brown v. Trustees of Schools*, 224 Ill. 184, where it was held that there might be *adverse possession of a part of a*

But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers

school-house lot held by school trustees for school purposes. The court declared that to exempt municipal corporations from the operation of statutes of limitations as respects property held for public use, the use must be for the public at large, as in the case of streets, and not merely for the inhabitants of a particular district. Hence, as the school-house lot was held for the benefit of the particular district, and not for the benefit of the State in general, the defence of twenty years' adverse possession was available. *Cartwright, J.*, said: "The question in this case is whether there is an implied exemption from the statutes of limitation in favor of trustees of schools with respect to property held for the use of a particular school district, and that depends on the meaning of the term 'public rights' as used in the decisions. In one sense, all property held by a municipal corporation is held for public use, and the public at large, or some portion of the public, have rights or interests in such property. It may be held for the use of the people of the State generally, or the use may be limited to the inhabitants of the local subdivision or municipality, such as the city, village, or school district, and the question whether the statute applies in the latter class of cases was considered in *Piatt County v. Goodell*, 97 Ill. 84. That case involved the title to swamp lands owned by the county, in which the inhabitants of the county were interested. It was held that the public right and public use must be in the people of the State at large, and not in the inhabitants of a particular local district. It was said that there is a well-founded distinction between cases where the municipality is seeking to enforce a right in which the public in general have an interest in common with the people of such municipality, and cases where the public have no such interest; that the public generally had no interest in the tract of land in question in that case in common with the voters and tax-payers of Piatt County, and that the county for that reason was subject to the limitation laws. There are numerous cases, where it has been held that municipalities or minor police subdivisions of the State are not subject to limitation

laws in respect to streets and public highways; but streets and highways are not for the use of the inhabitants of any municipality or locality alone, but for the free and unobstructed use of all the people in the State. Such rights are clearly distinguishable from the rights or interests of the inhabitants of a locality in property acquired for a mere local use, such as city offices, a library site, or the use of the fire department. Such property is held and used for strictly local purposes. In *Greenwood v. La Salle*, 137 Ill. 225, where it was held that an action by the town to recover taxes was not barred by any statute of limitation, the taxes were levied for purposes in which the public generally are directly interested, such as repairing bridges, roads, or causeways, in which the public at large are as much interested as the people of the township." The court does not appear to have considered the fact that a public school system is a part of a public duty assumed and controlled by the State at large and frequently provided for by the Constitution. A contrary decision was rendered in *San Francisco Board of Education v. Martin*, 92 Cal. 209, where it was held that a school-house site is held for a public purpose and that there can be no adverse possession of it. See also *Murtaugh v. Chicago, M. & St. P. R. Co.*, 102 Minn. 52. Lands purchased for and used as a *county hospital* were held for county purposes and could not be adversely possessed. *Yolo County v. Barney*, 79 Cal. 375. Lands held by a *district agricultural society* are held for a public purpose and cannot be possessed adversely. *Sixth Dist. Agric. Assoc. v. Wright*, 154 Cal. 119; 97 Pac. Rep. 144.

As to *actions to recover taxes and assessments*, the decisions are conflicting. Thus it has been held that a cause of action for taxes owing a city does not come within the bar of the statute. *Elliott v. Williamson*, 11 Lea (Tenn.), 38; *Memphis v. Looney*, 9 Baxt. (Tenn.) 130; *Greenwood v. La Salle*, 137 Ill. 225. But the contrary view has also been adopted. See *Burlington v. Burlington & M. R. R. Co.*, 41 Iowa, 134, 140; *Mellinger v. Houston*, 68 Tex. 37. It has been held that

can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found, that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes.¹ It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of

the statute does not bar the right of a city to enforce a special assessment. *Magee v. Commonwealth*, 46 Pa. 358. But see to the contrary *St. Louis v. Newman*, 45 Mo. 138; *Jefferson v. Whipple*, 71 Mo. 521; *Turner v. Burns*, 42 Mo. App. 94, 96. If a county collects taxes levied by a city and diverts the money to its own use, an action by the city to recover the money collected does not come within the bar of the statute. *Osawatimie v. Miami County*, 78 Kan. 270; 96 Pac. Rep. 670. See also *State v. Columbia* (Tenn. Ch. App.), 52 S. W. Rep. 511.

An action by a town from which territory was taken against the town to which it was added to compel a contribution to the payment of the indebtedness is within the bar of the statute of limitations. *People v. Oran*, 121 Ill. 650.

¹ *Text cited and approved*: *District of Columbia v. Washington & G. R. Co.*, 1 Mackey (D. C.), 361; *Reed v. Birmingham*, 92 Ala. 339, 349; *Webb v. Demopolis*, 95 Ala. 116, 134; *Harn v. Dadeville*, 100 Ala. 199, 203; *Mobile Transportation Co. v. Mobile*, 128 Ala. 335, 351; *Weiss v. Taylor*, 144 Ala. 440; *Mouat Lumber Co. v. Denver*, 21 Colo. 1, 8; *Augusta v. Burum*, 93 Ga. 68, 73; *Norrell v. Augusta, R. & E. Co.*, 116 Ga. 313; *Elmore, &c. Counties v. Alturas County*, 4 Idaho, 145, 151; *Sims v. Frankfort*, 79 Ind. 446; *Waterloo v. Union Mill Co.*, 72 Iowa, 437; *Vicksburg v. Marshall*, 59 Miss. 573; *Simis v. Brookfield*, 34 N. Y. Supp. 695; *Schooling v. Harrisburg*, 42 Oreg. 494, 499; *Memphis v. Looney*, 9 Baxt. (Tenn.) 130; *West Seattle v. West*

Seattle Land & Imp. Co., 38 Wash. 359. In *Brown v. Trustees of Schools*, 224 Ill. 184, 186, *Cartwright, J.*, thus stated his views of the law on the subject: "Statutes of limitation do not run against the State, in respect to public rights, unless the State is expressly included within the terms of the statute. The rule is founded on the maxim of the common law, *Nullum tempus occurrit regi*. It was supposed that the time and attention of the sovereign were occupied by the cares of the government, and there could not be negligence of laches on his part. The same prerogative extends to the State, in its sovereign capacity, as to all governmental matters. As to them no delay in resorting to the remedy will bar the right; but if the State becomes a partner with individuals, or engages in business, it divests itself of its sovereign character and is subject to the statute (*Governor v. Woodworth*, 63 Ill. 254). In such relations it does not exercise sovereignty, but acts merely as an individual and cannot claim the exemption. The rule that statutes of limitation do not run against the State also extends to minor municipalities created by it as local governmental agencies, in respect to governmental affairs affecting the general public. The exemption extends to counties, cities, towns, and minor municipalities in all matters respecting strictly public rights as distinguished from private and local rights, but as to matters involving private rights they are subject to statutes of limitation to the same extent as individuals."

the case to hold the public estopped or not, as right and justice may require.¹

¹ The principle of estoppel *in pais* has been applied to exceptional cases where the elements calling for its exercise appear to have been an abandonment of the public use for the prescriptive period, enclosure and expensive improvements, such as large and costly buildings, or acts of the municipality inducing the abutter to believe that there is no longer any street, and the expenditure of money in reliance upon the acts of the municipality. The absolute *bona fides* of the abutter or adverse possessor is a most important factor where an estoppel *in pais* is claimed. The acts relied on must be of such character as to amount to a fraud, if the city were permitted to claim otherwise.

The following cases recognize the applicability of estoppel *in pais*. *Simplot v. Chicago, M. & St. P. R. Co.*, 16 Fed. Rep. 350, 360, quoting text; *Los Angeles v. Cohn*, 101 Cal. 373, quoting text; *Sacramento v. Clunie*, 120 Cal. 29; *Eureka v. McKay*, 123 Cal. 666, 673; *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, 222; *Mouat Lumber Co. v. Denver*, 21 Colo. 1, quoting text; *Denver v. Girard*, 21 Colo. 447, 453; *Fairplay v. Park County*, 29 Colo. 57, 60; *Arapahoe County v. Denver*, 30 Colo. 13, 16; *Elder v. Fox*, 18 Colo. App. 263, 266, quoting text; *Brooks v. Riding*, 46 Ind. 15; *Simplot v. Dubuque*, 49 Iowa, 630; *Smith v. Osage*, 80 Iowa, 84; *Johnson v. Burlington*, 95 Iowa, 197; *Uptagraff v. Smith*, 106 Iowa, 385; *Brown v. Cedar Rapids*, 117 Iowa, 302; *Blennerhassett v. Forest City*, 117 Iowa, 680; *Corey v.*

Ft. Dodge, 118 Iowa, 742; *Weber v. Iowa City*, 119 Iowa, 633; *Markham v. Anamosa*, 122 Iowa, 689; *Sioux City v. Chicago & N. W. R. Co.*, 129 Iowa, 694, 703; *Biglow v. Ritter*, 131 Iowa, 213; *Burroughs v. Cherokee*, 134 Iowa, 429; *Quinn v. Baage*, 138 Iowa, 426; 114 N. W. Rep. 205; *Baldwin v. Trimble*, 85 Md. 396, 403; *Witherspoon v. Meridian*, 69 Miss. 288, 295; *Schooling v. Harrisburg*, 42 Oreg. 494, 499; *Oliver v. Synhorst*, 48 Oreg. 292; *Almy v. Church*, 18 R. I. 182, 188; *Matteson v. Whaley*, 20 R. I. 412; *Crocker v. Collins*, 37 S. Car. 327, citing text; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 459, quoting text; *Reuter v. Lawe*, 94 Wis. 300, 305; *Madison v. Mayers*, 97 Wis. 399, 412; *Ashland v. Chicago & N. W. R. Co.*, 105 Wis. 398, 403; *Davis v. Appleton*, 109 Wis. 580, 588; *Ashland v. Northern Pac. R. Co.*, 119 Wis. 204; *Arnold v. Volkman*, 123 Wis. 54, 60. In *Illinois*, the principle of estoppel has also been fully recognized and fairly applied in exceptional cases, involving the appropriation of public streets. See *ante*, § 1191. On the other hand some States have declared that as the bar interposed by the statute of limitations is only a legal estoppel there can be no room for the application of the principle of equitable estoppel to public rights if the applicability of the statute of limitations to street cases be denied. See *Webb v. Demopolis*, 95 Ala. 116, 135; *Ralston v. Weston*, 46 W. Va. 544; *Krause v. El Paso* (Tex. Civ. App.), 101 S. W. Rep. 828.

CHAPTER XXV

STREET FRANCHISES

	Section		Section
Nature of Right or Privilege	1210	Municipal Control; <i>Davis v. New York</i>	1235, 1236
Extent of Public Right in Street:		Legislative Sanction necessary to authorize Railways in Streets and Highways	1237
Fee in Abutter	1211	Special Charter Provision construed	1238
Water Pipes and Mains	1212	Charter Power of Municipalities as to Street Railways	1239
Public Lighting no Additional Servitude	1213	Rights and Liabilities of the Company	1240
Gas Pipes and Electric Lighting Appliances in Public Streets	1214	Railroad Uses must not exclude Public Travel	1241
City cannot, without Express Legislative Authority, grant Exclusive Rights	1215	Contract Rights which cannot be impaired	1242
Municipal Grant of Exclusive Rights to lay down Gas Pipes; Connecticut Decisions	1216, 1217	Exercise of Conflicting Franchises	1243
Same Subject; Connecticut Decision commented on and criticised	1218, 1219	Unauthorized Use of Street for Railroads and other Utilities; Remedies	1244
Telegraph and Telephone Poles in Streets and Highways	1220	The Doctrine of Abutters' Easements	1245
Same Subject; Right of Abutter to Compensation; Additional Servitude	1221	Liability of City for Damages sustained by Abutter	1246
Scope of Legislative Power	1222	Legislative Authority protects from Public Prosecution, but not from Liability to Abutter where his Property Rights are invaded	1247
Special Constitutional Limitation on Legislative Power over Streets and their Uses	1223, 1224	Use for Horse Railway not an Additional Servitude	1248
Same Subject; New York Arcade Railway Cases	1225	Street Railways operated by Mechanical Power	1249
Municipal Consent; Essential to Exercise of Franchise Rights	1226	Railroads: Where the Fee is in the Public	1250
Municipal Consent; By what Body given	1227	Railroads: Where the Fee is in the Abutter	1251
Constitutional Requirement of Municipal Consent; Power of Legislature	1228	Steam Railroad an Additional Burden	1252
Consent of Municipality; Power to attach Conditions	1229	Railroads in Streets: Rule in Illinois	1253
Municipal Consent; Validity of Conditions	1230	Railroads in Streets: Rule in Missouri	1254
Time of Completion; Forfeiture and Damages for Breach of Condition	1231	Railroads in Streets: Rule in New York	1255
Railroads in Streets; Consents of Abutters	1232	Railroads in Streets: Rule in Pennsylvania	1256
Authority to occupy and use Streets; How conferred and construed	1233	Railroads in Streets: Rule in Texas	1257
Delegated Municipal Authority	1234	Interurban Street Railways	1258
Horse Railways in Streets; Mu-			

	Section		Section
Elevated Railways in Streets; New York Legislation and its Construction; Correlative Rights of the Abutting Owner and of the Public; Scope of Legislative Power	1259, 1260	Police Power as affecting Fran- chise Rights	1269
Same Subject; Nature and Ex- tent of Abutter's Rights	1261	Police Power; Reasonable Regu- lations	1270
Elevated Railroad Cases; De- velopment of the Law	1262	Franchise subject to Paramount Municipal Duty to maintain and improve Streets	1271
Measure of Damages; Benefits	1263	Municipal Control; Police Au- thority; Rate of Speed of Railway Trains; Obstruc- tions	1272
Remedies of Abutters at Law and in Equity: Right to Injunc- tion	1264	Police Power; Permits to open Streets	1273
Duration of Franchise; Rights in Perpetuity	1265	Police Power; Removal of Overhead Wires	1274
Duration of Franchise; Right Limited by Life of Public Easement	1266	Rental Charges; Charges for Inspection and Supervision	1275
Duration of Franchise; Term Limited by Life of Muni- cipality	1267	Railroads; Obligation to re- store Street; Paving and Re- paving	1276
Duration of Franchise; Term Limited by Corporate Life of Grantee	1268	Conclusions as to Railways in Streets summed up	1277-1280
		Concluding Observations	1281

§ 1210. **Nature of Right or Privilege.** — There still remains to be considered that large class of rights in public streets which are granted in furtherance of public purposes, but which, involving as they do the right to use the streets in various ways, give rise to a series of questions as between the grantee of the right on the one hand and the municipality or abutting owners on the other. For convenience, these rights are described as *franchises to use the public streets and highways*, and whether correctly or incorrectly denominated *franchises*, they answer in essential respects to the definition and elements of a franchise from the State. A franchise has been defined to be a particular privilege which does not belong to the individual or corporation as of right, but is conferred by a sovereign or government upon, and vested in, individuals or a corporation.¹

¹ Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 595; People's Pass. R. Co. v. Memphis City R. Co., 10 Wall. (U. S.) 38, 51; California v. Central Pac. R. Co., 127 U. S. 1, 40; Ashley v. Ryan, 153 U. S. 436, 441; *Ex parte Henshaw*, 73 Cal. 486; Londoner v. People, 15 Colo. 246; Crum v. Bliss, 47 Conn. 592, 602; Central R. & B. Co. v. State, 54 Ga. 401, 409; Chicago City R. Co. v. Story, 73 Ill. 541; Chicago Municipal G. L. & Fuel Co. v. Lake, 130 Ill. 42, 53; Young v. Webster City & S. W. R. Co., 75 Iowa, 140; Detroit v. Moran, 44 Mich. 602, 604; Hamtramck v. Rapid R. Co., 122 Mich. 472, 475; Dike v. State, 38 Minn. 366; Milhau v. Sharp, 27 N. Y. 611, 619; State v. Pittsburg, Y. & A. R. Co., 50 Ohio St. 239, 251.

Franchise defined. In California v. Central Pac. R. Co., 127 U. S. 1, 40, a case which involved the right of the State to tax a franchise to construct a railroad granted by the United States, Mr. Justice Bradley, with his accustomed clearness, said: "What is a franchise? Under the English law Blackstone de-

The essential element of a franchise is that it should be a privilege, right, or power which the individual cannot exercise as of right, and which depends for its lawful existence upon a grant from the government,¹ and we shall see as we proceed with the consideration of the subject that a grant from the State is the foundation of every privilege or right to an individual or corporation to use the city streets for public or *quasi*-public purposes for individual profit.² The courts have properly held the term *franchise* to be applicable to the right to construct, maintain, and operate railroads in the public

finer it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

"*Franchise*" and "*license*" distinguished. "A right or privilege which is essential to the performance of the general function or purpose of the grantee, and which is and can be granted by the sovereignty alone, such

as the right or privilege of a corporation to operate an ordinary or commercial railroad, a street railroad, city water-works or gas works, and to collect tolls therefor, is a franchise. A right or privilege not essential to the general function or purpose of the grantee, and of such a nature that a private party might grant a like right or privilege upon his property, such as a temporary or revocable permission to occupy or use a portion of some public ground, highway, or street, is a license and not a franchise." *Per Sanborn, C. J.*, in *McPhee & M. Co. v. Union Pacific R. Co.*, 158 Fed. Rep. 5, 10.

¹ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 595; *Blake v. Winona & St. P. R. Co.*, 19 Minn. 418, 425; *Davis v. New York*, 14 N. Y. 506; *Milbau v. Sharp*, 27 N. Y. 611; *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, 152; *Adee v. Nassau Elect. R. Co.*, 65 N. Y. App. Div. 529, 539; *State v. Scougal*, 3 S. Dak. 55.

² But the necessity for all purposes and under all circumstances of a grant from the government seems to be denied in *State v. Kansas Nat. Gas Co.*, 71 Kan. 508, which was an action in *quo warranto* by the State to determine the right and power of a *natural gas company* to place its mains in a highway. The gas company had the consent of the owners of the fee of the highway to the use of the highway for its mains, and the court held that such use was in furtherance of the natural purposes of the highway, — gas pipes and mains being merely a means of transportation, — and that the company might maintain its mains in the highway without any franchise or grant of the right from the State, such use not interfering, we suppose, with the paramount rights of the public in the highway for public uses. *Infra*, § 1213, note.

streets and highways,¹ or water mains and water works,² gas pipes and lighting works,³ and poles and wires for the transmission and distribution of electricity.⁴

§ 1211. **Extent of Public Right in Street: Fee in Abutter.** — Many, if not the greater part, of the city streets are held on behalf of the public by virtue of a mere easement or incorporeal right to use the land for all the legitimate purposes of a street or highway, the fee remaining in the original owner or vesting in the abutter. There is no conflict in the abstract rule laid down by the courts as to the nature and extent of the public easement or title to the street. The *easement acquired by the public* is intended, *inter alia*, for *purposes of travel and transportation* and as a means of communication with all the incidental rights which accompany these purposes. But although the courts substantially agree in this definition of the

¹ *Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 119; *People v. Sutter St. R. Co.*, 117 Cal. 604; *State v. Des Moines City R. Co.*, 135 Iowa, 694, 705; *Hamtramck v. Rapid R. Co.*, 122 Mich. 472; *Adee v. Nassau Elect. R. Co.*, 65 N. Y. App. Div. 529, 539; *State v. Madison St. R. Co.*, 72 Wis. 612, 620; *State v. Milwaukee, B. & L. G. R. Co.*, 116 Wis. 142; *infra*, § 1211.

But in *Illinois*, the courts have designated a right granted by the city council to a railroad company to lay its tracks and operate its cars in the street as a *mere license*, and not as a *franchise*. *Chicago City R. Co. v. Story*, 73 Ill. 541; *Board of Trade v. People*, 91 Ill. 80; *Chicago & W. I. R. Co. v. Dunbar*, 95 Ill. 571; *Quincy v. Bull*, 106 Ill. 337; *Chicago Municipal Gas Light & Fuel Co. v. Lake*, 130 Ill. 42; *Bellville v. Citizens' Horse R. Co.*, 152 Ill. 171; *Chester v. Wabash, C. & W. R. R. Co.*, 182 Ill. 382. The distinction seems to be one in name rather than in substance. In other jurisdictions such a right or privilege would be described as a franchise. When the grant is made for an adequate consideration and is expressly accepted by the grantee, or when the grantee has expended money on the faith of the grant and has thereby impliedly accepted it, it becomes a contract or property right which cannot be impaired, unless under a reserved right or power to do so. *Chicago Municipal Gas L. & Fuel Co. v. Lake*, 130 Ill. 42; *Bellville v. Citizens' Horse*

R. Co., 152 Ill. 171, 186; *Harvey v. Aurora & G. R. Co.*, 186 Ill. 283; *People v. Central Union Tel. Co.*, 192 Ill. 307; *infra*, § 1214; Index, *Constitutional Provisions; Contracts; Franchises; Legislature; Ordinances*. The grant can only be made by or pursuant to legislative authority, and the right to hold or exercise the license or privilege may be questioned by an information in the nature of *quo warranto* on the ground that it has been granted improperly or without warrant of law, or that it is so held and exercised. *Swarth v. People*, 109 Ill. 621; *Martens v. People*, 186 Ill. 314; *People v. Chicago Tel. Co.*, 220 Ill. 238, 245.

² *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 239; *Skaneateles Water Works Co. v. Skaneateles*, 161 N. Y. 154; *State v. Portage City Water Co.*, 107 Wis. 441; *infra*, §§ 1211, 1212.

³ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. An. 138; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *People v. Deehan*, 153 N. Y. 528; *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510; *State v. Cincinnati G. & C. Co.*, 18 Ohio St. 262; *infra*, § 1213.

⁴ *Purnell v. McLane*, 98 Md. 589; Index, *Electric Lighting; Gas and Gas Companies; Water and Water Works*.

purposes for which the public acquire an easement in the land occupied by a street or highway, yet a great difference of opinion has arisen in the practical application of the principle to the different uses to which streets and highways are put in the furtherance of the public interests. In Massachusetts, and some other States, the widest interpretation and application are given to the easement acquired by the public; and it is held that this easement includes every reasonable means of travel and transportation for persons and commodities and of transmission of intelligence, which the advance of civilization may render suitable for a highway. Under this description it is held that gas and water pipes, sewers, telephone, telegraph, electric light and power poles, wires and conduits, electric and horse railways, the Boston subway, and private railroads may be permitted within the limits of highways without involving any additional burden on the fee.¹ But we shall find that

¹ "The public secure by the location of a highway an easement of passage with all the powers and privileges which are necessarily implied as incidental to its exercise. The easement is coextensive with the limits of the highway. The fee of the land remains in the landowner, who may make any use of it not inconsistent with the paramount right of the public. The easement acquired by the public includes every reasonable means of transportation for persons and commodities, and of transmission of intelligence, which the advance of civilization may render suitable for a highway. Under this description, gas and water pipes, sewers, telephones, telegraph, electric light and power poles, wires and conduits, electric and horse railways, the Boston subway and private railroads, have been permitted within the limits of highways." *Per Rugg, J.*, in *Commonwealth v. Morrison*, 197 Mass. 199, 203.

A similar extended and comprehensive view of the nature of the public easements appears to be adopted in *Maine*. In *Taylor v. Portsmouth, K. & Y. St. R. Co.*, 91 Me. 193, 195, *Haskell, J.*, said: "What servitude [easement] then does the public acquire by the taking of land for a public way? It is the right of transit for travellers, on foot and in vehicles of all descriptions. It is the right of transmitting intelligence by letter, messages, or other contrivance suited for communication, as by telegraph or telephone. It is the right to transmit water, gas, and sewage for the use of the public.

It is a public use for the convenience of the public, to be moulded and applied as public necessity or convenience may demand and as the methods of life and communication may from time to time require. Society changes and new conditions attach themselves. The change evolves new ways of doing things, new methods of communication, new inventions for travel. When the way is constructed the land-owner has his compensation, not only for the land taken, but for the damages sustained, although usually benefits are conferred rather than injury inflicted. These damages are assessed as compensation for a surrender of his land to the public use for travel and transit, not only by the methods then applied, and for the volume then existing, but for all time and for such future use as the exigencies of the time may develop. . . . This doctrine allows the public to control the use of the public ways for travel and communication, as it may be pleased, from time to time, to do. The kind of use that may be permitted is of no consequence to the abutter. He must take his chance with the rest of the community in which he lives. Some cases may seem to work hardship, but it is better so than to embarrass the convenience of the people, and cripple and annoy enterprises which the present and future may recognize as necessary for the good and happiness of society. No matter whether the way be used by the lone traveller on foot or on his wheel, by the two-horse chaise or four-wheeled carriage, by

the views of the Supreme Judicial Court of Massachusetts to their full extent are not universally accepted by the courts of other States. As our examination of the subject proceeds we shall find that water mains and pipes, sewers, gas mains and electric light poles and wires are accepted with practical unanimity as proper uses of the streets and highways in urban communities, whatever may be the view of the courts as to rural districts; that street railways, meaning thereby railways taking up and letting down passengers at frequent intervals in the public streets and operated in substantially the same manner as other vehicles, are regarded by a majority of the courts as not imposing an additional servitude on the fee, although the State of New York in this respect forms a marked exception to the rule,¹ and that the courts are divided with respect to telegraph and telephone poles, wires and conduits, the weight of authority, perhaps, being to the effect that these impose an additional servitude, although a different view has been adopted in a large number of the States. In short, although the courts universally concede that the primary object of streets and highways is for travel and transportation and necessary incidental uses in connection therewith, yet in the concrete application of the principle the result has been a great diversity of opinion. It is only by considering each particular use of the streets and highways separately that a fair presentation of the law can be made.²

the dray, cart, or coach, or by cars that may be permitted to run in the street, whether propelled by beast, steam, electricity, or any other agency that may be discovered suitable for the purpose. No matter whether the vehicle carries passengers or freight, or passes intelligence along its contrivance. All these are public uses, and so long as they do not infringe the laws that regulate the use of highways, they cannot be prohibited either by the individual or public prosecutor."

"The public easement, as interpreted in this State [New Jersey], is primarily a right of passage over the surface of the highway and of so using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning, and lighting of the highway, the construction and maintenance of street railways with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and convenience of travellers while using the way. Secondly, the easement covers uses

which, though their relation to the right of passage is remote, or even fanciful, are so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent and custom than by logical deduction from the primary design, they are now recognized as legitimate. Such are the construction and maintenance of sewers, water pipes, and gas pipes for the convenience of persons occupying neighboring lands." *Nicoll v. New York & N. J. Tel. Co.*, 62 N. J. L. 733, 735, *per Dixon*, J.

¹ *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404; *Peck v. Schenectady St. R. Co.*, 170 N. Y. 298.

² In the important case of *Sauer v. New York City*, 206 U. S. 536, 548, Mr. Justice *Moody*, who delivered the opinion of the court, referred to the diversity of opinion as to the rights of abutting owners in the following terms: "The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State

§ 1212 (697). **Water Pipes and Mains.** — *A supply of water for a populous place* is a service of a clearly recognized public character, and is generally regarded as a proper municipal function.¹ The privilege of using the streets or highways of a municipality for water mains and pipes can only be exercised by a person or corporation having the right conferred upon it by statute.² Where the charter gives to the city the power to supply, or authorize the inhabitants to be supplied with water, the municipal council may use, or, as an incidental power, may permit the contractor to use, the streets for this purpose, and the *adjoining owner*, although he holds the fee to the centre of the street, *is not entitled to compensation* as for a new servitude; for it is not such, but only a proper or necessary use incident to a street in a populous place.³ Authority may be conferred

irreconcilable in principle. The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accord with its own view of the law and public policy." Index, *Abutter*; *Streets*; *Taxation*.

¹ See *post*, chapter xxvi, on "Public Utilities." Index, *Water and Water Works*.

² *Baltimore County Water Co. v. Baltimore County*, 105 Md. 154, 162; *State v. Monroe*, 40 Wash. 545, 548; Or, as in *California*, by the Constitution of the State.

³ *Bennett v. Mt. Vernon*, 124 Iowa, 537; *Baltimore County Water Co. v. Dubreuil*, 105 Md. 424; *Bishop v. North Adams Fire Dist.*, 167 Mass. 364, 370; *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606, 611; *Hazlehurst v. Mayes*, 84 Miss. 7, citing text; *Van Brunt v. Flatbush*, 128 N. Y. 50, 56; *Jayne v. Cortland Water Works Co.*, 107 N. Y. App. Div. 517, 522; *Milbau v. Sharp*, 15 Barb. (N. Y.) 193, 210, *per Edwards*, P. J.; *Kelsey v. King*, 32 Barb. (N. Y.) 410; *Crooke v. Flatbush Water Co.*, 27 Hun (N. Y.), 72; *Crooke v. Flatbush Water Co.*, 29 Hun (N. Y.), 245; *Whitcher v. Holland Water Works Co.*, 66 Hun (N. Y.), 619, *aff'd* 142 N. Y. 626; *Provost v. New Chester Water Co.*, 162 Pa. 275. A sidewalk is a part of the street, and water pipes and mains may be laid thereunder without creating any liability in favor of the abutter and owner of the fee other than such as flows from negligence. *Provost v. New Chester Water Co.*, 162 Pa. 275. In

Baltimore County Water Co. v. Baltimore County, 105 Md. 154, 162, it was held that the public easement in country or rural roads differs from that in city streets, and that country or rural roads cannot be used for water pipes without the consent of the abutter who owns the fee of the highway, or without compensation to him for the additional easement or servitude imposed upon the fee. Index, *Streets*.

A city as *riparian proprietor* merely has only such rights as other like proprietors, and cannot, as of right, take water from the stream or pond to supply the city with water. *Stein v. Burden*, 24 Ala. 130; s. c. 27 Ala. 104; 29 Ala. 127; *Stein v. Ashby*, 30 Ala. 363; *Lewis, Em. Dom.* § 62, and cases cited; *Wood v. National Water Works Co.*, 33 Kan. 590; *Quincy v. Bull*, 106 Ill. 337, holding also that an express power given to a city to supply or to authorize its inhabitants to be supplied with water, includes as a necessary incident the power to contract for the use of the streets for that purpose.

Water pipes in a country highway where the fee is in the adjoining proprietor entitles him to compensation. *Johnson v. Jaqui*, 27 N. J. Eq. 552. But this principle, it is believed, does not apply to streets in a city or incorporated place. *Jersey City & Hob. H. R. Co. v. Hudson*, 13 N. J. Eq. 420; *ante*, §§ 1034, 1214, note; *post*, § 1222 *et seq.* Power to "provide a supply of water" held to have been fully executed by the execution of a contract by which a proper supply was obtained and the city enjoined from granting to other persons the right to lay pipes for

by the legislature upon a municipality or water company to lay its pipes and mains in the streets of adjoining communities which are not served by it, when such use of the neighboring streets is reasonably necessary for conducting the water from the source of supply to the community intended to be served.¹ General authority to construct water-works will not authorize a municipality to occupy part of the surface of a street with a reservoir or tank.²

furnishing water. *Atlantic City Water Works v. Atlantic City*, 39 N. J. Eq. 367; distinguished, *Grand Rapids Elect. L. & P. Co. v. Grand Rapids Edison El. L. & F. G. Co.*, 33 Fed. Rep. 659; *post*, § 1218, note.

A legislative grant of an *exclusive* right to supply a city and its inhabitants with water, upon condition of the performance of the service, is the grant of a franchise, in consideration of such performance of a public service, and after service performed, is a contract within the meaning of the United States Constitution forbidding the States to make laws impairing the obligation of contracts. *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, where a grant by the city to an individual of the right to lay pipes to supply his premises with water was held to violate an exclusive franchise previously granted to a water company. The same point had been previously decided otherwise in the case of the *New Orleans Water Company v. Louisiana Sugar Refinery Co.*, 35 La. An. 1111, in which it was held that the city of New Orleans might permit the laying of water pipes in public streets by private parties for their own use, notwithstanding the Water Works Company has the *exclusive* privilege of supplying the city and its inhabitants with water, the court construing this privilege to extend only to the selling of water. An *exclusive franchise* or grant of the right to use the streets to supply water for street uses and for extinguishing fires, precludes both the city and individuals from using the streets for these purposes, but such grant does not prevent either from using the streets to supply water to the inhabitants for domestic and industrial purposes. *Mitchell v. Tulsa Water, L. H. & P. Co.*, 21 Okla. 243; 95 Pac. Rep. 961; Index — *Legislature*; *Monopolies*.

Water company's liability for negligent escape of water from pipes. *Blyth v. Birmingham Water Works Co.*, 11 Exch. (Hurl. & G.) 781. A city own-

ing water-works not liable beyond loss of water rents for defective supply to private consumer. *Smith v. Philadelphia*, 81 Pa. St. 38; see *Tainter v. Worcester*, 123 Mass. 311. In granting to a *water company*, the right to lay its pipes in the streets, a *city does not part with any power relating to the public health*, and may construct a sewer wherever the public interest requires, without becoming liable to the water company for the expense attending the removal of its pipes to make room for the sewer. *National Water Works Co. v. Kansas City*, 28 Fed. Rep. 921. Index, *Police Power*. A city in *Iowa*, held to have the power to contract with a foreign corporation for the construction of water-works, and to grant to it the use of the streets for its pipes, *Dodge v. Council Bluffs*, 57 Iowa, 560.

¹ *Pelham Manor v. New Rochelle Water Co.*, 143 N. Y. 532; *Rochester & L. O. Water Co. v. Rochester*, 176 N. Y. 36, aff'g 84 N. Y. App. Div. 71. See also *Rochester v. Rochester & L. O. Water Co.*, 189 N. Y. 323, modifying 114 N. Y. App. Div. 907.

² *Manhattan Co., Ex parte*, 22 Wend. 653; *Morrison v. Hinkson*, 87 Ill. 587. A city cannot, at least without express statutory authority, use a street for the erection and maintenance of a *stand pipe*. *Barrows v. Sycamore*, 150 Ill. 588. Water pipes may be laid beneath the surface of the land granted to the municipality on condition that they should be used only for a "common, park, or boulevard," but these lands cannot be appropriated to the erection of a pumping station. *Howe v. Lowell*, 171 Mass. 575. The erection of a water tank in the centre of a street, occupying one-half of the width thereof, and the erection and operation of a steam-engine in connection therewith, even for the purpose of supplying the city and residents thereof with water, is not one of the uses of a street as such, for which the ground may be appropriately used under a dedication thereof

§ 1213. **Public Lighting no Additional Servitude.** — We shall see hereafter that the furnishing of light both for the purpose of lighting the streets and public places, and for the use and consumption of the inhabitants of the municipality, is clearly recognized as a public use.¹ The privilege of using the streets and highways of a municipality for this purpose can only be exercised by some one having a grant thereof from the State.² The care, management, and control of the streets and public ways devolve upon the local municipal government in which they are located, and it is the duty of the local government to maintain them in such condition that the public, in the exercise of due care, may pass over them in safety. In the darkness of the night, in crowded thoroughfares, light is an important aid, largely tending to promote the convenience, as well as the safety, of the public. It is not only one of the uses to which the public streets and ways may be devoted, but in the case of crowded thoroughfares a duty devolves upon the municipality of supplying it. The control of the street or highway and the accompanying duty to keep the same in safe repair have been held to confer, by necessary implication, the power to light the same for the public convenience and safety.³ Hence, the use of a street of a city or other municipality for the purpose of placing *lamp-posts* or of laying *gas pipes and mains* therein, or erecting *electric poles and conductors*, for purposes of public lighting, is one of the burdens upon the fee which must be borne as an incident to the public right of travelling over the way, and is one of the uses for which the land was taken or dedicated as a public highway.⁴ But some

as a street. The owner of a lot adjoining a street does not take the same, subject to any such easement, and he may therefore maintain an action for damage done to his property in consequence of such use. *Morrison v. Hinkson*, 87 Ill. 587; *supra*, §§ 1156, *post*, 1214.

¹ *Post*, chap. xxvi, on "Public Utilities." *Ante*, § 1154.

² *Purnell v. McLane*, 98 Md. 589; *Attorney-General v. Walworth L. & P. Co.*, 157 Mass. 86; *Philadelphia Co. v. Freeport*, 167 Pa. 279.

³ *Scheffbauer v. Kearney*, 57 N. J. L. 588. See *ante*, chap. i, also *post*, chap. xxvi, on "Public Utilities."

⁴ *Gurnsey v. Northern Cal. Power Co.*, 7 Cal. App. 534; *Baltimore County Water Co. v. Dubreuil*, 105 Md. 424; *Carpenter v. Capital Elect. Co.*, 178 Ill. 29; *Cheney v. Barker*, 198 Mass. 356; *Gulf Coast Ice & Mfg. Co. v. Bowers*, 80 Miss. 570, 581; *Hazlehurst v. Mayes*, 84 Miss. 7; *Loeber v. Butte Gen. El. Co.*, 16 Mont. 1; *Meyers*

v. Hudson County Electric Co., 63 N. J. L. 573; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; *Van Brunt v. Flatbush*, 128 N. Y. 50, 56; *Palmer v. Larchmont El. Co.*, 158 N. Y. 231, *rev'g* 6 N. Y. App. Div. 12; *Hequembourg v. Dunkirk*, 49 Hun (N. Y.), 550; *Johnson v. Thomson-Houston El. Co.*, 54 Hun (N. Y.), 469; *Consumers' Gas & El. L. Co. v. Congress Spring Co.*, 61 Hun (N. Y.), 133; *Electric Const. Co. v. Heffernan*, 12 N. Y. Supp. 336; *Ellison v. Allen*, 30 N. Y. Supp. 441; *Tuttle v. Brush El. Ill. Co.*, 50 N. Y. Super. Ct. 464; *McDevitt v. People's Nat. Gas Co.*, 160 Pa. 367. The fact that electric poles and wires are to be used for *private purposes* as well as for the illumination of the public highways does not create an additional burden on the fee. *Gurnsey v. Northern Cal. Power Co.*, 7 Cal. App. 534. The sidewalk is simply a part of the street, and the abutter has no greater right to compensation for gas mains

authorities recognize a *distinction between urban streets and rural ways*, arising out of the necessary requirements of the public in the uses made of them respectively; and it has been held, in some cases, that, in respect of rural ways, *gas pipes* impose an additional servitude on the fee for which compensation must be made to the owner thereof.¹ But while light may not be necessary in all ordinary country

laid down therein than he has for gas mains laid in the carriageway. *McDevitt v. People's Nat. Gas Co.*, 160 Pa. 367. See also *Allegheny County L. Co. v. Booth*, 216 Pa. 564. But the municipality cannot construct its lighting works and plant within the lines of a public street; such use is not a proper public use of the street. *McIlhinny v. Trenton*, 148 Mich. 380.

In *Palmer v. Larchmont El. Co.*, 158 N. Y. 231, 235, *Haight, J.*, said, with reference to the *use of highways for sewers, water pipes, and lighting appliances*: "The primary object of highways is for the public travel by persons and animals, and by carriages or vehicles used for the transportation of persons and goods, other than by railroads. *Sewers* drain the surface water from the highways, and thus relieve them from impairment and destruction. In this respect sewers are for a street purpose. In addition, they may drain also the abutting property and houses and thus tend to promote the public health. In this respect they are for a municipal purpose. *Water* supplied by mains through the highways may be used for cleansing and sprinkling the streets. In this respect it is for a street purpose. It may be used by the abutting owners for cleansing and for domestic purposes, and is also used for the extinguishment of fires. In this respect it is for a municipal purpose. *Light* is, as we have seen, an aid to the public in the nighttime in travelling upon the highway. It is, therefore, used for a street purpose. All of the street purposes which we have referred to are clearly incident to the highway and are deemed within the grant of lands for highway purposes whenever the necessity for these uses arises. Not so with *telegraph and telephone* wires. They in no way preserve or improve the streets or aid the public in travelling over them." As an incident to the right to use the streets for lighting purposes, municipality may cut shade trees where they interfere with the electric wires with-

out incurring any liability to the abutting owner. *Hazlehurst v. Mayes*, 84 Miss. 7. But see *contra*, *Brown v. Ashville El. L. Co.*, 138 N. Car. 533. Index, *Trees*.

In *Illinois*, the Supreme Court seems to place *electric light poles and wires* upon the same basis as telegraph and telephone poles and wires, and it has been held that a municipality which is vested with the fee of the city streets may lawfully authorize private corporations or individuals to erect electric light poles therein in order to provide lights for its own use and that of its citizens, provided that in so doing they do not materially obstruct the ordinary use of the streets and public travel. When the fee is in the municipality, the abutter can only recover if he can show special damages differing in character from those sustained by the public generally. But if the fee of a street or highway is in the abutting owner, the erection of poles for electric light wires is an additional easement or servitude entitling the abutter to compensation. *McWethy v. Aurora El. L. & P. Co.*, 202 Ill. 218, aff'g 104 Ill. App. 479. Index, *Abutter*; *Public Utilities*. The erection of poles and wires in a *private alley*, the fee of which is in the abutting owner, for the purpose of supplying light to a private party who has an easement of travel over the alley, constitutes an additional servitude, which the owner of the fee is not required to bear without compensation. *Carpenter v. Capital Electric Co.*, 178 Ill. 29.

¹ *Kincaid v. Indianapolis Nat. Gas Co.*, 124 Ind. 577; *Consumer's Gas Trust Co. v. Huntsinger*, 14 Ind. App. 156; *Ward v. Triple State Nat. Gas & Oil Co.*, 115 Ky. 723; *Sterling's Appeal*, 111 Pa. 35. But we venture to suggest whether the true criterion is not the reasonable public requirements and convenience in the particular locality rather than whether the public way is within or without the limits of a chartered municipality. But when the fee of a rural highway is vested in the public and not in the abutter, the

highways, yet there may be country roads on which the travel is so great as to make light a necessity in order to avoid collision or injury in the night time. Consequently, it has been held that the question whether the public use requires the lighting of a country highway is primarily within the determination of the municipal authorities of the town exercising such powers as may be conferred upon it to light highways.¹ And under those conditions, also, the court held that the abutting owner, who was also the owner of the fee of a highway in a New York town, was not entitled to compensation for the ground in the highway in front of his premises occupied by the poles of an electric lighting company on which were suspended wires and lamps for lighting the highway, where the town authorities had determined the necessity for lighting and had contracted with the company owning the poles to furnish them.² But it has also been held that the placing of electric light poles and the stringing of wires in a street for the purpose of supplying light to private persons constitutes an additional burden on the fee, and is a taking of the property of the abutter as the owner of the fee which entitles him to compensation.³

abutter has no ground to claim compensation for the laying of gas mains therein. *Ward v. Triple State Nat. Gas & Oil Co.*, 115 Ky. 723; *Index, Abutter; Streets*.

¹ *Palmer v. Larchmont El. Co.*, 158 N. Y. 231, rev'g 6 N. Y. App. Div. 12.

² *Palmer v. Larchmont El. L. Co.*, 158 N. Y. 231, rev'g 6 N. Y. App. Div. 12. The earlier case of *Bloomfield & R. Nat. G. L. Co. v. Calkins*, 62 N. Y. 386, was a proceeding under the power of eminent domain, to determine the compensation to be awarded to an abutter who owned the fee of a country highway upon a taking of his property in the highway by laying gas mains therein. The court held that the property of the owner of the fee was taken, and that he was entitled to a substantial award. In *Palmer v. Larchmont El. Co.*, 158 N. Y. 231, *supra*, this decision was referred to by the New York Court of Appeals as holding that a gas light company could not lay its pipes in a country highway without compensation to the owner of the abutting land where its pipes were not used for the lighting of the highway through which the company sought to lay them. In *Cheney v. Barker*, 198 Mass. 356, it was held that the gas pipes of a corporation which was authorized by statute to lay them in a highway were not an additional servitude, although

neither the abutters on the highway, nor the municipality within which the highway was situated, were served by the corporation. In *Hardman v. Cabot*, 60 W. Va. 664, it was held that a pipe line constructed in a rural highway to supply the public with natural gas for heating and illuminating purposes is not an additional burden on the fee. But see *contra*, *Paine v. Calor Oil & Gas Co.* (Ky.), 103 S. W. Rep. 309.

³ *Andreas v. Bergen County Gas & Elect. Co.*, 61 N. J. Eq. 69; *Callen v. Columbus Edison Elect. L. Co.*, 66 Ohio St. 166; *Schaaf v. Cleveland, M. & S. R. Co.*, 66 Ohio St. 215. See also *Tiffany v. United States Illuminating Co.*, 51 N. Y. Super. Ct. 280, aff'g 67 How. Pr. (N. Y.) 73. In *Callen v. Columbus Edison Elect. L. Co.*, 66 Ohio St. 166, 179, *Spear, J.*, who delivered the opinion of the court, explained the grounds of the decision as follows: "The electric lighting by defendant is not of the streets and for the city. It is wholly for private use; hence it is a private purpose in any aspect of it. Its use of the streets is not such as was contemplated by the original dedication. On the contrary, the maintenance of its structures devolves new burdens upon the land, burdens calculated to materially impair the rights of the owner in the

§ 1214 (691). **Gas Pipes and Electric Lighting Appliances in Public Streets.**—Lighting cities is so necessary for the safety and convenience of the inhabitants that the municipal authorities are usually given by the legislature powers more or less extensive in respect to it.¹ The legislature may authorize the condemnation of property for such a purpose.² In Great Britain express legislative sanction is necessary to warrant the laying down of *gas pipes* in the public highways;³ and so in this country it is also considered that the right to the use of the public streets of a city by a gas or electric company, for the purpose of laying down its pipes or erecting and maintaining its poles and wires, is a *franchise* which can be *granted only by the legislature*, or some local or municipal authority empowered to confer it.⁴ Although the power to use the city streets for

street." In *Andreas v. Bergen County Gas & Elect. Co.*, 61 N. J. Eq. 69, *supra*, the electric light poles were to be used for both public and private lighting, but were larger than necessary for merely public lighting. By statute, poles for private lighting could only be erected with the consent of the abutter, and this statutory consent appears to have been a controlling feature with the court in holding that so far as the private lighting was concerned, the erection of the poles was a *taking* of property.

¹ *Ante*, chap. i.

² *Heyward v. New York*, 8 Barb. (N. Y.) 486; *supra*, § 1213; Index, *Eminent Domain; Streets*.

³ *Regina v. Sheffield Gas Co.*, 22 Eng. Law and Eq. 518; *Ellis v. Sheffield Gas Co.*, 23 L. J. Q. B. 42; *Galbreath v. Armour*, 4 Bell App. Cas. 374; *Queen v. Longton Gas Co.*, 2 El. & El. 651; *Queen v. Charlesworth*, 16 Queen's B. 1012; *Regina v. Train*, 9 Cox Cr. Cas. 180; *Boston v. Richardson*, 13 Allen (Mass.), 152, 160, by Gray, J.; *Thompson v. Sunderland Gas Co.*, L. R. 2 Ex. Div. 429.

⁴ *Newport v. Newport Light Co.*, 84 Ky. 167, 176, citing text; *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667, quoting text; *Purnell v. McLane*, 98 Md. 589; *Attorney-General v. Walworth L. & P. Co.*, 157 Mass. 86; *Richards v. Dover*, 61 N. J. L. 400; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262.

In *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242, it was said that the right to manufacture and sell gas is a commercial enterprise, open to all, but the

right to use the streets to distribute and sell light is a *franchise* dependent upon legislative grant. See also *Purnell v. McLane*, 98 Md. 589, where a similar declaration was made as to electricity. While the right to the use of the public streets of a city by a gas company or a water company for the purpose of laying down its pipes is generally considered to rest upon a grant from the sovereign authority, it is well settled that the legislature of a State may confer the power to grant such franchises upon municipal corporations, though, when so granted, they are, nevertheless, to be regarded as derived from the State. *Andrews v. National Foundry and Pipe Works*, 18 U. S. App. 458.

A grant of authority to use the city streets for gas mains must be enjoyed, if at all, in the manner and subject to the precedent conditions prescribed by statute in relation to the exercise of the right. When required by statute, the *consent of the municipal authorities* is essential to the right to use the streets. *Philadelphia Co. v. Freeport*, 167 Pa. 279. See also *Richards v. Dover*, 61 N. J. L. 400. The act of the municipal authorities in consenting to the use of streets for gas mains is *legislative in its nature*, and, in the absence of any statute otherwise providing such consent, must be given by the city council or legislative body. *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, rev'g 34 N. Y. App. Div. 551. A grant pursuant to statute, by the local authorities of a town to a gas light company of the power to lay its pipes through the public streets and highways of the town, without any expressed limita-

laying or erecting lighting appliances is frequently, if not usually, delegated to the municipality, yet in the absence of any constitutional restriction it is within the power of the legislature to confer it *without the consent* or over the objection of the municipality.¹ Where the grantee of such a franchise has performed the public service imposed as a condition of the grant, the franchise is a *contract* which falls within the provision of the Constitution of the United States forbidding the States to pass laws impairing the obligation of contracts.² But in making an *exclusive grant* of the right to supply gas to a city and its inhabitants, the legislature does not part with its police power and duty regarding public health, morals, and safety, as they may be affected by the exercise of the franchise.³

tion, was not deemed restricted to *existing streets* and highways, but was construed as extending to streets and highways as subsequently enlarged, changed, or opened. If a portion of the town is thereafter incorporated into a village, the change from town to village government does not change the rights of the gas light company, and the village authorities cannot refuse to permit the company to lay its conductors in a street within the village limits opened subsequently to the grant. *People v. Deehan*, 153 N. Y. 528, rev'g 11 N. Y. App. Div. 175.

Authority was conferred by statute upon a corporation to sell gas and lay its mains "in the streets," &c., "of Morristown and its vicinity," Morristown being at the time an unincorporated community. It was held that this grant did not authorize the laying of gas pipes in the streets of other places constituting independent municipal governments beyond and outside of the municipal corporation of which the unincorporated village of Morristown was a part at the time of the legislative grant. *Madison v. Morristown Gas-light Co.*, 65 N. J. Eq. 356, rev'g 63 N. J. Eq. 120. See also *Millville Gas Light Co. v. Vineland L. & P. Co.*, 72 N. J. Eq. 305; 65 Atl. Rep. 504. City held to have power to grant right to use its streets for gas mains to a corporation having charter authority only to erect works beyond the municipal limits. *Sharp v. South Omaha*, 53 Neb. 700.

As to power of municipalities to grant permission to lay down *gas pipes* in the streets, see also *Milbau v. Sharp*, 15 Barb. (N. Y.) 193, 210, *per Edwards*

P. J.; *Norwich Gasl. Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Smith v. Metrop. Gasl. Co.*, 12 How. (N. Y.) Pr. 187; *People v. Benson*, 30 Barb. (N. Y.) 24. Power to *light streets* construed. *Nelson v. La Porte*, 33 Ind. 258; *Richmond County Gasl. Co. v. Middletown*, 59 N. Y. 228; *New Orleans v. Clark*, 95 U. S. 654. In *California* the right of laying gas and water pipes in streets is controlled by the Constitution adopted in 1879. See *People v. Stephens*, 62 Cal. 209; *post*, Chap. xxvi on "Public Utilities."

¹ *Coverdale v. Edwards*, 155 Ind. 374; *La Harpe v. Elm Township Gas Co.*, 69 Kan. 97; *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510; *Index, Legislature*. The right may be conferred *without compensation to the municipality*. *La Harpe v. Elm Township Gas Co.*, 69 Kan. 97. See also *Matter of Milbridge & C. El. R. Co.*, 96 Me. 110; *Canton v. Canton Cotton Warehouse Co.*, 84 Miss. 268; *State Line Tel. Co. v. Ellison*, 121 N. Y. App. Div. 499.

² *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650. To same effect, *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *People v. Deehan*, 153 N. Y. 528, rev'g 11 N. Y. App. Div. 175; *supra*, § 1210. See also *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, to same effect as applied to water-works.

³ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, *supra*. Same ruling as to water companies. *Stein v. Bienville Water Supply Co.*, 34 Fed. Rep. 145 and note; *National Water Works Co. v. Kansas City*, 28 Fed. Rep. 921.

§ 1215 (692). **A City cannot, without Express Legislative Authority, grant Exclusive Rights.** — A *general grant*, while it carries with it, by implication, all such powers as are clearly necessary for the reasonable and convenient exercise of the authority expressly conferred, such as using the streets for the mains and for placing lamp-posts, and making contracts or adopting ordinances proper to the execution of the power, does not authorize the city council to grant to any person or corporation an *exclusive right to use the streets* of the city for the purpose of laying down gas pipes for a term of years, and thereafter, until the works shall be purchased from the grantee by the city. The court admitted that the power to light the city would authorize the council to contract for gas, and to grant the contracting party the use of the streets, but denied its authority under such a *general* legislative grant to make such use exclusive for a determinate future period.¹

¹ Grand Rapids Elect. L. & P. Co. v. Grand Rapids Edison El. L. & F. G. Co., 33 Fed. Rep. 659, approving text; Indianapolis v. Indianapolis Gasl. & C. Co., 66 Ind. 396, citing and approving text; State v. Cincinnati Gasl. & C. Co., 18 Ohio St. 262; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435; Clarksburg Elect. Lt. Co. v. Clarksburg, 47 W. Va. 739, citing text. See also New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650. See further as to grants of the exclusive right to light a municipality, *post*, chap. xxvi, on "Public Utilities."

But in Newport v. Newport Light Co., 84 Ky. 167, it was held that when a city has the power to erect and maintain gas works, to light the streets, and to furnish the inhabitants with gas light, it has by implication the power to contract therefor, and it may, as an incident to such contract, grant to a corporation the exclusive right to use its streets for that purpose for a term of years. This decision was founded upon the contractual obligation of the gas light company to furnish a supply of light. That obligation was regarded as furnishing a sufficient consideration for the exclusive right, and the court declared that the rule might be otherwise if it were attempted to grant an exclusive franchise without any contractual obligation on the company to furnish light. But a contract between a city and a light company granting an exclusive use of the streets for a term of years to supply gas to the city does not authorize the company to use the

streets for *electric lighting*, although the contract contains a proviso that the company may adopt any other mode equal to gas to supply light to the city, provided that it can be done at no greater cost to the city than gas light. The court regarded electric light as a new use of the streets requiring a new contract or consent by the city. Newport v. Newport Light Co., 89 Ky. 454. If a franchise is granted to use the streets for lighting purposes, and it is made exclusive in its nature without authority therefor, the franchise is valid except as to the exclusive feature. Clarksburg El. L. Co. v. Clarksburg, 47 W. Va. 739. It is not within the power of the municipal authorities in New York to insert a clause in a lighting contract to the effect that they will not, during the term of the contract, give their statutory consent to any other gas or electric company to lay pipes in the streets. Parfitt v. Furguson, 159 N. Y. 111, aff'g 3 N. Y. App. Div. 176.

In Richmond County Gasl. Co. v. Middletown, 59 N. Y. 228, the board of the town corporation was authorized to cause the streets to be lighted with gas whenever they deemed it necessary, and the act required the board, whenever they deemed it necessary to have the streets so lighted, to contract with the plaintiff company to furnish and lay down gas pipes, and to furnish lamp-posts and lamps, and to supply the same with gas. This was held by a majority of the Court of Appeals not to confer the power on the board to make a con-

§ 1216 (693). **Municipal Grant of Exclusive Rights to lay down Gas Pipes; Connecticut Decision.** — In the *Norwich Gaslight Company v. The Norwich City Gas Company* the plaintiff *claimed to have the exclusive right* to the use of the streets and public places of the city of Norwich for the purpose of *laying down gas pipes* and distributing gas therein, and sought an injunction to restrain the defendant, a rival company, from using the streets for a similar purpose. Plaintiff's claim to an exclusive right to the use of the streets was based upon *an act of the city council*, in terms giving such exclusive privilege. It appeared that the city did not own the soil or fee of the streets, but that this was in the adjoining proprietor, as in case of ordinary highways, subject to the public right of way, and to the right of the city to regulate their use, by making by-laws "relative to the streets and highways of the city, . . . relative to public lights and lamps," &c. The court decided that while the act of the city council was a license which would protect the plaintiffs from a prosecution for a public nuisance for digging up the streets in order to lay down their pipes, it was inoperative (from want of power in the city) to confer upon them an *exclusive* right to the use of the streets for this purpose.¹

tract which should be absolutely binding on the town for a *fixed term of years*. It was also held that the contract was terminated by a repeal of the act under which the contract was made. *Grover, J.*, says: "The power conferred [on the town] was like the other powers conferred upon the officers of this and the other towns of the State, subject to modification or repeal by subsequent legislation; and the board of town auditors could not, by any contract, prevent or at all control the action of the legislature in this respect. . . . The contract became void, for want of authority, when the power to light the streets was taken away by the repeal of the acts. . . . If the town could deprive the legislature of this power for five years by entering into a contract with the plaintiff for that time, it might for one hundred years, by contracting for that period. . . . The act shows that it was intended to vest a discretion at all times in the board, whether any and which of the streets should be lighted with gas. The board could, therefore, contract for a supply only during its pleasure." The conclusion of the court that the *repeal* of the act terminated

the contract must, as we think, rest upon the soundness of the previous determination that the enabling act, properly construed, only authorized a contract during the pleasure of the town authorities, and not for any fixed period. Index, *Ordinances; Repeal; infra*, § 1218.

¹ *Norwich Gasl. Co. v. Norwich City Gas Co.*, 25 Conn. 19. This case is distinguished, and the power of the legislature to grant an *exclusive* right to a company to manufacture and sell gas is affirmed, in *State v. Milwaukee Gasl. Co.*, 29 Wis. 454; *supra*, § 1214, note. See and compare *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, noticed *infra*. As to the test propounded by the Supreme Court of *Alabama* in respect of conferring franchises on particular individuals, see *Horst v. Moses*, 48 Ala. 129; *Indianapolis v. Indianapolis Gas & C. Co.*, 66 Ind. 396, citing and approving text. A municipal corporation has no power, under the statutes of *Indiana*, to grant *exclusive* privileges to a *natural gas* company in using the streets. *Citizens' Gas & M. Co. v. Elwood*, 114 Ind. 332.

§ 1217 (694). **Same Subject.** — The plaintiffs' claim to an exclusive use of the streets was further based upon *an act of the legislature*, which gave them a right (but did not oblige them to exercise it) to use the streets of the city of Norwich to lay down gas pipes, &c., which right was declared to be exclusive "against any and all persons or corporations," &c., with an exception not material to be noticed. When this act was passed, the defendants' works were far advanced. The court was of opinion that the act gave the plaintiffs *no interest in the streets*, and that they could only sustain their bill for an injunction upon the idea that they have an interest in the street that is being interfered with, or threatened to be, by the defendants. The court was further of the opinion, and so held, that the act giving the plaintiffs the exclusive use of the streets was a restriction upon the free manufacture and sale of gas, was a monopoly, and unconstitutional and void. The court distinguished this from the grants of ferry and bridge franchises, which are founded upon an adequate consideration, in the obligation to accommodate the public, keep in repair, &c. But, remarks the court, "The grant to the plaintiffs appears to have been made without any consideration whatever for it. The plaintiffs are under no obligation to make gas, or suffer the gas they make to be used.¹ As there was no consideration, public or private, reserved for the grant, and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade, in respect to which the government has no exclusive prerogative, we think that, so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by the means of pipes can be fairly viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole

¹ A gas company chartered by the legislature, with authority to manufacture and sell gas to private consumers and for lighting the public streets on such terms as may be agreed upon, although of a public character, is not necessarily a public corporation, at least in such a sense as to exempt it from the exercise, in respect of land held by it not then in use, of the power of eminent domain conferred in general terms upon a railway company. *New York Central & H. R. R. Co. v. Metrop. Gasl. Co.*, 63 N. Y. 326; *Rochester Water Com'rs, In re*, 66 N. Y. 413. Under general power to construct its

railway between specified termini, a railway company cannot locate its road through land acquired by a city for a reservoir. *State v. Montclair Ry. Co.*, 35 N. J. L. 328; compare with *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659, and *Rochester Water Com'rs, In re*, 66 N. Y. 413; *Lewis, Em. Dom.* § 273; *ante*, § 1019.

A gas company, empowered to lay its pipes in the streets of a city, takes the risk of their location, and may be required to make such changes as public convenience or security requires, at its own expense. *Matter of Deering*, 93 N. Y. 361.

theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void."¹

§ 1218 (695). **Same Subject; Connecticut Decision commented on and criticised.**— With reference to this decision, it may be remarked that in order to induce the investment of capital in such enterprises, it is quite usual for the legislature, or city council by legislative authority, to grant exclusive privileges for a limited time.² Whether the principles of this decision would be extended to such cases, or to cases where a consideration was received for the grant, or whether, without regard to these circumstances, the restriction on the power of the legislature therein declared will be followed elsewhere, may be doubted. Since all persons cannot have a grant of the right to use streets for such a purpose, and since the grant of such a right to one on proper conditions may be for the public good, and since the essence of the franchise is not the exclusive right to manufacture and supply gas or light, but only the right to lay down pipes in the street (which in the nature of the case all persons cannot have), the Supreme Court of the United States have sustained the validity of such an *exclusive legislative grant* when not in conflict with some special provision of the Constitution of the State. And similar legislation has been elsewhere upheld, though it has been sometimes denied or doubted.³ How-

¹ Compare with *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, and cases cited *infra*. For construction of constitutional prohibition against "granting any exclusive privilege, immunity, or franchise whatever," see case of *Union Ferry Co.*, 98 N. Y. 139, which confines the prohibition within narrower limits than had been generally supposed, and it may be open to further consideration whether the views expressed in the opinion give full effect to the purpose intended by the constitutional amendment. See *supra*, § 1214 and note, as to power of legislature to grant exclusive rights. *Ante*, § 771. See Index, title *Monopolies*.

² In *Citizens' Street Ry. Co. v. Jones*, 34 Fed. Rep. 579, the city charter authorized it to grant to street railways "for the time which may be agreed upon, the exclusive privilege of using the streets and alleys," and

it was held that such a grant must be strictly construed, and that the exclusive right began only when the actual use of the streets began.

³ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, rev'g s. c. 81 Ky. 263; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Peoples' Electric L. & P. Co. & Capital Gas & Electric L. Co.*, 116 Ky. 76 (exclusive right to light streets by gas); *State v. Columbus G. L. & Coke Co.*, 34 Ohio St. 572; *State v. Milwaukee Gasl. Co.*, 29 Wis. 454; *Newport v. Newport Light Co.*, 84 Ky. 167; *Atlantic City Water Works v. Atlantic City*, 39 N. J. Eq. 367; *ante*, § 771; *supra*, § 1214, and note. See and compare with *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, cited *infra*, and see Index, title *Monopolies*; 2 Hare Am.

ever it may be as respects the *power of the legislature*, in a particular State, to make the grant *exclusive*, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words, or by necessary, or at least reasonable, implication.¹

Const. Law, 781, 782; *State v. Cincinnati Gaslight & C. Co.*, 18 Ohio St. 262; *Indianapolis v. Indianapolis Gasl. & C. Co.*, 66 Ind. 396; *post*, chap. xxvi, on Public Utilities.

¹ *People v. Benson*, 30 Barb. (N. Y.) 24; *ante*, § 668; *State v. Cinc. Gaslight & C. Co.*, 18 Ohio St. 262; *ante*, § 771; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Smith v. Westerly*, 19 R. I. 437, citing text; *Newport v. Newport Light Co.*, 84 Ky. 167, 176, quoting text; *Stein v. Bienville Water-Supply Co.*, 34 Fed. Rep. 145, and note; *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667. The legislature in granting an exclusive franchise to a water company does not relinquish its police power, or duty as to the public health. *Stein v. Bienville Water-Supply Co.*, 34 Fed. Rep. 145. Power in a city "to cause the streets to be lighted," and to make "reasonable regulations" therefor, does not authorize a grant of an exclusive right to furnish gas for fifty years. *Saginaw Gasl. Co. v. Saginaw*, 28 Fed. Rep. 529.

A provision in a municipal charter giving the council power to make "ordinances, rules, regulations, and by-laws for lighting the streets and public buildings of the city, and to supply the city with water," does not authorize the city to grant an *exclusive privilege* to lay pipes and mains in the streets of the city in order to supply it and its inhabitants with water. In a case where the charter of a water company did not expressly grant an exclusive franchise, and there was no provision in the city's charter authorizing it to grant exclusive franchises or rights to lay pipes and mains in the streets, the court held that such an exclusive right could not, consistently with the rules for the construction of such grants and contracts, be held to exist. The court strongly expressed the opinion that public policy does not permit the inference of authority in a municipality to make contracts inconsistent with the continuous duty to adopt such by-laws and regulations as the public interest and welfare require. It was also held that a reserva-

tion of the right of the city after twenty years to purchase the property and franchises of the company, or to take them sooner if it failed to supply water, did not impose on the city any legal duty which disabled it from using other means of water supply. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167. An ordinance granting to a water company the exclusive right to furnish water to the inhabitants, held to be void as creating a monopoly. *Brenham v. Brenham Water Co.*, 67 Tex. 542; *supra*, § 1215, note.

As to the power of the *State legislatures*, under the amendments to the Federal Constitution, to grant monopolies, see the "Slaughter House Cases," 16 Wall. (U. S.) 36. Judge *Hare's* review of the cases and discussion of the subject is instructive. 2 Am. Const. Law, 778-782.

The grant of a franchise by the legislature may constitute an *irrevocable contract*, the obligation of which cannot be destroyed or impaired by subsequent legislation. *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, and cases cited by appellant. In this case a grant by a city to a water company of the exclusive right to lay pipes, &c., so long as a full supply of pure water should be furnished, which was ratified by the legislature, was sustained, and a later act granting a similar right to another company was held to be beyond the power of the legislature. See also *Newport v. Newport Light Co.*, 84 Ky. 167, where it was held that if a city has power to maintain gas-works it may grant exclusive use of its streets for a term of years. A grant of an *exclusive right* to supply gas to a city and its inhabitants, upon condition of the performance of the service by the grantee, is not an infringement of the clause in the Bill of Rights of *Kentucky* declaring that "no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, *rev'g* *Citizens' Gas Light Co.*

§ 1219 (696). **Same Subject.** — That a city acting under its general authority has given to a gas company the exclusive right to lay pipes through its streets and light the same for a specified compensation, does not deprive it of the right to grant to another company, before the first franchise shall have expired, similar rights and privileges. The fact that a contract was created by the first ordinance does not destroy its legislative character.¹

§ 1220 (698). **Telegraph and Telephone Poles in Streets and Highways.** — *Legislative sanction* directly given by the legislature, or mediately conferred through proper municipal action, is necessary to authorize the use of streets for the posts and wires of a telegraph or telephone company. If such posts be erected within the limits of a street or highway without such sanction, they are nuisances; but if the erection be thus authorized, they are not.² The legislature may authorize the erection of telegraph or telephone

v. Louisville Gas Co., 81 Ky. 263; *supra*, § 1215. In a case where a city, having only a general power to light streets, adopted an ordinance granting to an *electric light company* the exclusive right to use the streets for fifteen years, the ordinance was declared *ultra vires*. The court in an opinion of marked force and ability says: "We have endeavored to show, upon principle and adjudged cases, that the authority of a municipality to grant *exclusive* privileges in its streets involves the exercise of the whole sovereign power over such highways; that nothing short of *exclusive* power and control will sustain the grant of exclusive rights. . . . If the power rests in the city council to grant an exclusive privilege for fifteen years, I cannot understand why the grant may not, under the same authority, be conferred for any longer period that may be determined on. The power requisite to confer an exclusive *sovereign franchise* for fifteen years involves the exercise and operation of the same sovereign power which could make the grant for one hundred or one thousand years, or in perpetuity. If the authority does not exist to make the grant for the longer period, it does not exist to confer it for the shorter; for it requires the possession of the whole *exclusive* power and control to grant either the one or the other." *Jackson, J., Grand Rapids Electric L. & P. Co. v. Grands Rapids Edison*

E. L. & F. G. Co., 33 Fed. Rep. 659, distinguishing *Atlantic City Water Works Co. v. Atlantic City*, 39 N. J. Eq. 367, which see noted *infra*; *State v. Newark*, 44 N. J. L. 344 (denying power of city council). See to the same effect as to grant of exclusive use of streets for gas pipes for thirty years. *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, where it was also held that the grant of an exclusive privilege of lighting a city with gas does not affect the right of the city to make a contract with an electric light company for lighting it with electric lights.

¹ *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505.

² *Hewett v. Western Un. Tel. Co.*, 4 Mackey (D. C.) 424; *Morristown v. East Tennessee Tel. Co.*, 115 Fed. Rep. 304; *Southern Bell Tel. & Tel. Co. v. Mobile*, 162 Fed. Rep. 523; *Wichita v. Missouri & K. Tel. Co.*, 70 Kan. 441; *Irwin v. Great So. Tel. Co.*, 37 La. An. 63, citing text; *Young v. Yarmouth*, 9 Gray (Mass.), 386; *Commonwealth v. Boston*, 97 Mass. 555; *Julia Building Assoc. v. Bell Tel. Co.*, 88 Mo. 258, citing text; *State v. Red Lodge*, 30 Mont. 338; *Domestic Tel. & T. Co. v. Newark*, 49 N. J. L. 344; *Roake v. American Tel. & Tel. Co.*, 41 N. J. Eq. 35, 37, citing text; *Regina v. United Kingdom El. Tel. Co.*, 9 Cox Cr. Cas., 174, cited in *Redfield on Carriers*, § 574, and note, where leading opinion of *Crompton, J.*, is given.

lines in streets and highways without the consent of the municipal or local authorities.¹ Whatever power the municipality has on the subject must be granted to it by the legislature.² Although the *telegraph is an instrument of commerce*, and as such for some purposes comes within the interstate commerce clause and postal clauses of the Federal Constitution, whatever right a telegraph company may have to erect its lines on streets and highways in the respective States is dependent upon *legislative authority from the States themselves*, in the absence of a valid grant of authority from

¹ *State v. Red Lodge*, 30 Mont. 338; *State Line Tel. Co. v. Ellison*, 121 N. Y. App. Div. 499. Where a telephone company was authorized by statute to construct its lines "over or under any of the public roads, streets, and highways," it was held that it was entitled to erect its poles on highways acquired by New York City outside of the city limits in connection with its water supply without compensation to the city. It was also held that the city under such circumstances could not claim compensation as the owner of abutting lands, as by the statute the right to compensation was only given to abutting owners when rights in the highway must be condemned. *State Line Tel. Co. v. Ellison*, 121 N. Y. App. Div. 499. Moving a house held not to be an ordinary use of a street, but an extraordinary use, which cannot be exercised without compensation to a telephone company, whose electrical conductors are lawfully in the street and are interfered with. *Kibbie Tel. Co. v. Landphere*, 151 Mich. 309. See further as to use of streets for removing buildings, *ante*, § 715.

² *State v. Sheboygan*, 111 Wis. 23. The authority of the municipality to grant the right to erect telegraph or telephone poles, &c., in the public streets, can only be derived from the legislature by express grant or by necessary implication from powers expressly granted. *Domestic Tel. & T. Co. v. Newark*, 49 N. J. L. 344. The *general power* of a municipality to *open, regulate, and control* the streets does not authorize it to grant to a telephone company the right to erect its poles and wires in the streets. *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1; *State v. Milwaukee Indep. Tel. Co.*, 133 Wis. 588; *contra*, *Plattsmouth v. Nebraska Tel. Co.*, 80 Neb. 460. Where a statute authorizes a telephone company to con-

struct its line along the margins of highways, a city may, by virtue of its general power to regulate and control the streets, grant the right to use the city streets. *Southern Bell Tel. & Tel. Co. v. Mobile*, 162 Fed. Rep. 523.

Authority to a city "to grant the right of way" for telegraph, telephone, and other poles, authorizes the city to *designate what streets* may be used. *Wichita v. Missouri & K. Tel. Co.*, 70 Kan. 441. By virtue of its power to pass ordinances for the good government of the city, for the preservation of peace and order, for the benefit of trade and commerce, and to regulate the erecting of telephone, telegraph, and electric light poles in the streets, the city may by ordinance provide that the franchise or right to construct and maintain telephone lines shall be *sold at public auction* and in consideration of the payment of a percentage of the gross earnings to the city. *Plattsburg v. Peoples' Tel. Co.*, 88 Mo. App. 306. Where an ordinance required the poles of telephone and telegraph companies to "be located and erected under the supervision and approval of the city engineer," a mere *verbal approval* by the city engineer of a general plan showing the places where the poles are to be erected is not sufficient without his actual supervision and approval. *New Castle v. Central Dist. & Ptg. Tel. Co.*, 207 Pa. 371. An ordinance granting the right to a telegraph or telephone company to use the city streets is, when acted upon by the company, a *contract* which can only be affected or impaired by reasonable and necessary regulations under the police power. *London Mills v. White*, 208 Ill. 289, aff'g 105 Ill. App. 146; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140; *Duluth v. Duluth Tel. Co.*, 84 Minn. 486; *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303.

the Federal government. The provisions of the act of Congress¹ that any telegraph company, organized or to be organized under the laws of any State of the Union "shall have the *right* to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the *military or post roads* of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States," and of the further Federal statutes² declaring all letter carrier routes established in any city or town for the collection and delivery of mail matter and all public roads and highways to be post roads, do confer upon telegraph companies which accept the Act of July 24, 1866, the right to occupy the streets of a city, or post roads under the said acts of Congress, for the purpose of maintaining and operating their lines of telegraph, not interfering with the ordinary use of the streets, yet this right so conferred bears with it no exemption from the ordinary burdens which may be cast by State legislation upon those who would appropriate to their exclusive use any portion of the public highways; and the municipality, under State legislative authority, may demand reasonable compensation for the space in the streets exclusively appropriated. Such compensation must be reasonable, and whether any given compensation is reasonable, is a question which cannot be conclusively determined by the municipality, but is a question of fact for judicial determination upon all the facts and circumstances in the particular case.³

¹ Act of Congress of July 24, 1866, Ch. 230, 14 St. 221. The title of the Act is: "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military, and other Purposes."

² U. S. Rev. St. § 3964. Also Act of March 1, 1884, 23 Rev. St. (U. S.) 3; Act of Congress, June 8, 1872, 17 U. S. Statutes at Large 308, declaring the public highways of a State to be post and military roads.

³ *St. Louis v. Western Union Tel. Co.*, 143 U. S. 92; explained in *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465; *Atlantic & P. Tel. Co. v. Philadelphia*, 190 U. S. 160; *West. Union Tel. Co. v. New Hope*, 187 U. S. 419; *Postal Tel. & C. Co. v. Baltimore*, 156 U. S. 210; *Richmond v. Southern Bell Tel. Co.*, 174 U. S. 761; *Toledo v. Western Union Tel. Co.*, 107 Fed. Rep. 10; *Cumberland Tel. & Tel. Co. v. Evansville*, 127 Fed. Rep. 187,

aff'd 143 Fed. Rep. 238; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641; *Postal Tel. Cable Co. v. Oregon S. L. R. Co.* 114 Fed. Rep. 787; *Western Un. Tel. Co. v. Texas*, 105 U. S. 460; *Western Un. Tel. Co. v. New York City*, 38 Fed. Rep. 552; *United States v. Union Pac. Ry.*, 160 U. S. 1; *Postal Tel. Cable Co. v. Oregon S. L. R. Co.*, 23 Utah, 474; *Hewett v. Western Un. Tel. Co.*, 4 Mackey (D. C.), 424; *Northwestern Tel. Exch. Co. v. St. Charles*, 154 Fed. Rep. 386; *Ganz v. Ohio Postal Tel. Cable Co.*, 140 Fed. Rep. 692; *San Francisco v. Western Un. Tel. Co.*, 96 Cal. 140; *Western Un. Tel. Co. v. Visalia*, 149 Cal. 744. In *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 100, Mr. Justice *Brewer*, who delivered the opinion of the court, said: "It is a misconception to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public

It seems to be a fair deduction from the decisions of the Supreme and Circuit Courts of the United States under the act of Congress

property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communications, would authorize it to enter upon the private property of an individual and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State."

Referring to the said act of Congress of July 24, 1866, Mr. Justice Brewer quotes the following from the opinion of Mr. Justice Miller in *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530: "While the State could not interfere by any

specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

After quoting this language, Mr. Justice Brewer says respecting the act of Congress of July 24, 1866: "It may also be affirmed that it carries with it no exemption from the ordinary burdens which may be cast upon those who would appropriate to their exclusive use any portion of the public highways." 148 U. S. 102. "Indeed it may be observed, in the line of the thoughts heretofore expressed, that this charge, [\$5.00 per annum by the city of St. Louis for the privilege of using the streets, alleys, and public places for each telegraph pole erected or used in the streets] is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated." 148 U. S. 104, 105. That the act of Congress of July 24, 1866, protects companies which have accepted its provisions against any *unreasonable* interference on the part of the State or its municipalities, see *Pensacola Tel. Co. v. Western Un. Tel. Co.*, 96 U. S. 1; *Western Un. Tel. Co. v. Texas*, 105 U. S. 460; *Western Un. Tel. Co. v. Massachusetts*, 125 U. S. 530; *Ratterman v. Western Un. Tel. Co.*, 127 U. S. 411; *Le Loup v. Port of Mobile*, 127 U. S. 640; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 696; *West-*

of July 24, 1866, and the legislation of Congress as to post and military roads, that these acts of Congress give to a telegraph company which has accepted their provisions the right, so far as the State or its municipalities are concerned, to occupy for its telegraph lines the public roads, streets, and post routes, urban or rural, provided such lines be so constructed and maintained as not to interfere with the ordinary travel on such military or post roads. Yet such right is subject to reasonable police regulation and supervision by the State or municipal authorities, and also subject to the State's power of taxation, as limited by the Federal Constitution, and subject also it would seem to any private property right of the abutter in the highway or street to compensation, if the abutter has any such property right as against the constitutional power of Congress to regulate interstate commerce and to establish post roads and military roads. The powers of Congress under the Constitution in this respect remain yet to be fully developed and determined. The act of Congress of July 24, 1866, does not grant the right to enter upon private property without the consent of the owner, nor does it confer upon the telegraph company the right of eminent domain.¹

ern Un. Tel. Co. v. American Un. Tel. Co., 9 Biss. C. C. 72; Western Un. Tel. Co. v. New York City, 38 Fed. Rep. 552; St. Louis v. Western Un. Tel. Co., 63 Fed. Rep. 68; Southern Bell Tel. Co. v. Richmond, 78 Fed. Rep. 858; Hewett v. Western Un. Tel. Co., 4 Mackey (D. C.), 424; Moore v. Eufaula, 97 Ala. 670; Postal Tel. Cable Co. v. Morgan's L. & T. S. S. Co., 49 La. An. 58; Pierce v. Drew, 136 Mass. 75; Hodges v. Western Un. Tel. Co., 72 Miss. 910; Western Un. Tel. Co. v. Fremont, 39 Neb. 692; Western Un. Tel. Co. v. Atlantic & P. Tel. Co., 5 Nev. 102; Matter of Pennsylvania Tel. Co., 48 N. J. Eq. 91; Daily v. State, 51 Ohio St. 348; Charleston v. Postal Tel. Cable Co., 3 Am. Elect. Cas., 52, 62.

"Notwithstanding telegraph lines may be an instrument of commerce, a municipal corporation has the right to determine how, in what manner and upon what conditions, a telegraph company shall enter and pass through it for the purpose of allowing the citizens of the country to communicate by telegraph, one with another." *Per Drummond, J.*, Mut. Union Tel. Co. v. Chicago, 16 Fed. Rep. 309. A telegraph company in constructing its lines in a city street under the provisions of the United States post roads act, must comply with the au-

thorized and reasonable regulations of the city as to the erection and maintenance of its lines, including a requirement that a permit therefor be procured. Toledo v. Western Union Tel. Co., 107 Fed. Rep. 10, aff'g 103 Fed. Rep. 746. The Telegraph Act of Congress of July 24, 1866 (U. S. Rev. Stats., § 5263 *et seq.*), is valid as a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to execute the powers of Congress over the postal service; and it is not limited in its operation to such military and post roads as are upon the public domain. A foreign telegraph company which has accepted and complied with the terms of that act, and which has secured a right of way, cannot be prevented from constructing and operating a telegraph line by a State. Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1.

¹ Pensacola Tel. Co. v. Western Union Tel. Co., 95 U. S. 1, 11; Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 242; Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540; Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 594; Sunset Tel. & Tel. Co. v. Pomona, 164 Fed. Rep. 561, 570.

It has been held by the Supreme Court of the United States, that a *telephone company is not a telegraph company* within the meaning of the acts of Congress above referred to, giving to telegraph companies the right to use post roads.¹ But the similarity in construction, in general method of transmission, and in the use and purpose of telegraph and telephone lines, has been deemed by the courts of some States to be sufficient ground for holding that telephone companies may be incorporated under acts authorizing the incorporation of companies to operate telegraph lines, and may be vested with and exercise the powers thereby conferred upon telegraph companies, although telephone companies are not specifically mentioned in the statutes.² It has also been held that a grant of authority to construct telephones and telegraph lines over and along "*highways*" or "*public roads*" confers authority to erect and maintain telegraph and telephone lines in the *streets* of a city.³

¹ *Richmond v. Southern Bell Tel. Co.*, 174 U. S. 761, modifying 85 Fed. Rep. 19; 42 U. S. App. 686; *Sunset Tel. & Tel. Co. v. Pomona*, 164 Fed. Rep. 561. A company which does both a telegraph and telephone business cannot claim the benefit of the act of Congress relative to post roads so far as concerns lines used in the telephone business, and the fact that the telephone lines may be used for local delivery of interstate telegraphic messages does not make the telephone line an integral part of the telegraph lines so as to bring them within the purview of the Act of Congress. *Sunset Tel. & Tel. Co. v. Pomona*, 164 Fed. Rep. 561. See also *Toledo v. Western Union Tel. Co.*, 107 Fed. Rep. 10.

² *Cumberland Tel. Co. v. United El. R. Co.*, 42 Fed. Rep. 273; *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399; *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. R. Co.*, 76 Minn. 334; *Duke v. Central New Jersey Tel. Co.*, 53 N. J. L. 341; *Hudson Riv. Tel. Co. v. Watervliet T. & R. Co.*, 135 N. Y. 393; *Cincinnati Inclined Plane R. Co. v. Suburban Tel. Assoc.*, 48 Ohio St. 390; *People's Tel. & Tel. Co. v. Berks & D. T. R. Co.*, 199 Pa. 411; *York Tel. Co. v. Keesey*, 5 Pa. Dist. Ct. 366; *San Antonio & A. P. R. Co. v. Southwestern T. & T. Co.*, 93 Tex. 313; *Texarkana v. Southwestern T. & T. Co.*, 48 Tex. Civ. App. 16; 106 S. W. Rep. 915; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32; *Roberts v. Wisconsin Tel. Co.*, 77 Wis.

589. See also *Iowa Union Tel. Co. v. Board of Equalization*, 67 Iowa, 250; *Attorney-General v. Edison Tel. Co.*, L. R. 6 Q. B. Div. 244; *National Tel. Co. v. Baker*, L. R., 2 Ch. Div. 186. *Contra*, *Home Tel. Co. v. Nashville*, 118 Tenn. 1. In *Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 312, it was held that a telephone was within the term "telegraph" as used in the provision of the *California Penal Code*, making the removal or obstruction of any line of telegraph, or the severing of any wire thereof, an offence and punishable.

³ *Abbott v. Duluth*, 104 Fed. Rep. 833, 836; *Southern Bell Tel. & Tel. Co. v. Mobile*, 162 Fed. Rep. 523; *Sunset Tel. & Tel. Co. v. Pomona*, 164 Fed. Rep. 561, 573; *Chamberlain v. Iowa Tel. Co.*, 119 Iowa, 619; *New Orleans v. Great Southern T. & T. Co.*, 4 La. An. 41; *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 154; *Hodges v. Western Un. Tel. Co.*, 72 Miss. 910; *State v. Red Lodge*, 30 Mont. 338; *Summit v. New York & N. J. Tel. Co.*, 57 N. J. Eq. 123; *Carthage v. Central N. Y. T. & T. Co.*, 185 N. Y. 448, rev'g 110 N. Y. App. Div. 625; *Barbite v. Home Tel. Co.*, 50 N. Y. App. Div. 25; *State v. Sheboygan*, 111 Wis. 23, 33. But in *Nebraska*, it is held that the term "public roads" in a statute giving a right of way to telegraph and telephone companies does not include the streets of a city. *Nebraska Tel. Co. v. Western Ind. L. D. Tel. Co.*, 68 Neb. 772.

§ 1221 (698 a). **Telegraphs and Telephones; Right of Abutter to Compensation; Additional Servitude.**—Whether the legislature can authorize the placing of poles and lines of wires on highways or streets by telegraph or telephone companies without compensation to the abutting owner has been variously decided. That such a use is a public use authorizing the exercise of the right of eminent domain is not questioned;¹ but the point of controversy is whether such use under legislative sanction is an additional servitude upon the street or highway. Diametrically opposite views have been adopted on this subject in different jurisdictions. Many courts hold the view that the erection of poles and lines of telegraph and telephone companies in streets and highways, even if under legislative authority, is the *imposition of a new burden or servitude* upon the street or highway, and the abutting owner is entitled to compensation by reason thereof. This view of the law is founded upon the principle that streets and highways are intended for locomotion; that the poles and wires of telegraph and telephone companies have no reference to this primary purpose of the highway; that they were not contemplated in the original dedication or appropriation of the land to street uses, and that therefore they must be regarded, not as a legitimate street use, but as a new use and as imposing an additional burden upon the street or highway.² But many courts

¹ *Trenton & N. B. Turnp. Co. v. Am. & E. News Co.*, 43 N. J. L. 381; *Mills, Em. Dom.* § 21; *Pierce v. Drew* 136 Mass. 75, and see cases cited, *infra*.

² *Telegraph lines are additional burdens or servitudes.* *Pacific Postal Tel. Cable Co. v. Irwin*, 49 Fed. Rep. 113; *Kester v. Western Un. Tel. Co.*, 108 Fed. Rep. 926; *Ganz v. Ohio Postal Tel. Co.*, 140 Fed. Rep. 692; *Western Un. Tel. Co. v. Polhemus*, 167 Fed. Rep. 231; *Appeal of New York, N. H. & H. R. Co.*, 80 Conn. 623; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513; *American T. & T. Co. v. Jones*, 78 Ill. App. 372; *Union Elect. T. & T. Co. v. Applequist*, 104 Ill. App. 517; *Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559; *Broome v. New York & N. J. Tel. Co.*, 42 N. J. Eq. 141; *Dusenbury v. Mutual Tel. Co.*, 11 Abb. N. C. (N. Y.) 440; *Osborne v. Auburn Tel. Co.*, 189 N. Y. 393; *Metropolitan T. & T. Co. v. Colwell Lead Co.*, 67 How. Pr. (N. Y.) 365; *Eels v. American T. & T. Co.*, 143 N. Y. 133, aff'g 65 Hun (N. Y.), 516; *Cosgriff v. Tri-State T.*

& T. Co., 15 N. Dak. 210; *Daily v. State*, 51 Ohio St. 348; *Smith v. Central Dist. P. & T. Co.*, 2 Ohio Cir. Ct. 259; *Western Union Tel. Co. v. Williams*, 86 Va. 696; *Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96.

Telephone lines are additional burdens or servitudes. *Appeal of New York, N. H. & H. R. Co.*, 80 Conn. 623; *Burrall v. American Tel. & Tel. Co.*, 224 Ill. 266; *De Kalb County Tel. Co. v. Dutton*, 228 Ill. 178; *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 48; *Bronson v. Albion Tel. Co.*, 67 Neb. 111; *Nicoll v. New York & N. J. Tel. Co.*, 62 N. J. L. 733, aff'g 62 N. J. L. 156; *Broome v. New York & N. J. Tel. Co.*, 42 N. J. Eq. 141; *Eels v. American T. & T. Co.*, 143 N. Y. 133, aff'g 65 Hun (N. Y.), 516; *Osborne v. Auburn Tel. Co.*, 189 N. Y. 393, 396, rev'g 111 N. Y. App. Div. 702 (overruling *Johnson v. New York & P. T. & T. Co.*, 76 N. Y. App. Div. 564, and *Weeks v. New York & N. J. Tel. Co.*, 86 N. Y. App. Div. 257); *Myers v. Bell Tel. Co.*, 83 N. Y. App. Div. 623; *Gray v. York State Tel. Co.*, 92 N. Y. App. Div. 89; *Powers v. State*

take the opposite view and hold that when a street or highway is laid out it is contemplated that it should be subjected not only to

Line Tel. Co., 116 N. Y. App. Div. 737; *Donovan v. Allert*, 11 N. Dak. 289; *Cosgriff v. Tri-State T. & T. Co.*, 15 N. Dak. 210; *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667, 670; *Cumberland Tel. Co. v. Avritt* (Ky.), 85 S. W. Rep. 204; *Spokane v. Colby*, 16 Wash. 610; *Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96. See also *Roake v. American Tel. Co.*, 41 N. J. Eq. 35; *Blashfield v. Empire State Tel. Co.*, 147 N. Y. 520. Although the decisions have been classified above according to the particular facts involved, yet it may be said that, almost without an exception, they make no distinction between telegraph and telephone poles and wires.

Speaking generally we find the District of Columbia and the States of Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, South Dakota, Tennessee, Vermont, and West Virginia holding that telegraph, telephone, trolley, or electric lighting lines on streets and highways do not constitute an additional servitude; and Illinois, Kentucky, Maryland, Mississippi, Nebraska, New York, North Carolina, North Dakota, Ohio, Texas, Virginia, Washington, and Wisconsin holding that these or some of these electrical lines do constitute an additional servitude, entitling the abutting owner to compensation.

New York. In *Eels v. American Tel. & Tel. Co.*, 143 N. Y. 133, the court held that the erection of telegraph or telephone poles in a rural highway is an additional burden upon the fee for which the owner of the soil is entitled to compensation. The reasoning of the court was to the effect that the erection of the poles constituted a permanent appropriation and exclusive possession of a portion of the highway, and therefore they were not incident to the ordinary use to which a highway was devoted. *Peckham, J.*, said: "We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly discovered method of exercising the old public easement, for the very reason that this so-called new method is a permanent, continuous, and exclusive use and possession of some part of the public highway itself, and

therefore cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method, or means of locomotion. All these might be varied, increased as to number, capacity, or form, altered as to means or rapidity of locomotion, or transformed in their nature and character, and still the use of the highway might be substantially the same, a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway. The following are some of the many authorities which hold that the easement is one of passage only. *Goodtitle v. Alker*, 1 Burr. 133; *Prest. Soc. of Waterloo v. Railroad Co.*, 3 Hill, 567, and cases cited; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, 55." In this case the court expressly stated that it did not decide whether the erection of telegraph or telephone poles in the streets of a city would be an additional burden, but it so held in the later case of *Osborne v. Auburn Tel. Co.*, 189 N. Y. 393 (cited *infra*), rev'g 111 N. Y. App. Div. 702 (overruling *Johnson v. New York & P. T. & T. Co.*, 76 N. Y. App. Div. 564, and *Weeks v. New York & N. J. Tel. Co.*, 86 N. Y. App. Div. 257). See also to the same effect, *Powers v. State Line Tel. Co.*, 116 N. Y. App. Div. 737.

In *Osborne v. Auburn Tel. Co.*, *supra*, *Haight, J.*, who delivered the opinion of the court, said: "When the streets have been appropriated for the construction of sewers, the laying of water mains or gas pipes for street purposes, such sewers, mains, and pipes may also be used by the public for municipal purposes. But the use of the street for municipal purposes or individual purposes, independent of its use for street purposes, is an additional burden upon the fee not included in the grant of the lands for highway purposes. . . . The learned Appellate Division ap-

use by means of travel known at the time when it is opened, but also to any improvements thereon which invention or science may develop. In this view of the law, telegraphs and telephones are regarded as means of transmitting intelligence, and as substitutes for messengers travelling upon the streets and highways, and as being, under legislative sanction, fairly within the public purposes for which the street or highway was laid out and opened. In jurisdictions where this view prevails, the poles and wires of a telegraph or telephone line *do not constitute an additional burden or servitude* upon the street or highway, and the abutter is not entitled to compensation, unless he is specially and peculiarly injured.¹ Some of

pears to have entertained the view that there was a distinction between rural and urban property. It is undoubtedly true that the use of highways is many times greater in cities than it is in country towns. We had occasion to consider this question to some extent in the case of *Palmer v. Larchmont El. Co.*, 158 N. Y. 231, and in addition to what we then said, we only wish to remark that the fee to lands in the city is as sacred to the owner as it is in the country, and that in either place he is protected by the constitutional provision to the effect that property shall not be taken for public purposes without compensation." In *Castle v. Bell Tel. Co.*, 49 N. Y. App. Div. 437, it was held that where overhead wires were placed in an underground conduit, such act was not the imposition of an additional burden or servitude on the fee. This decision was rendered prior to the decision of the Court of Appeals in the case of *Osborne v. Auburn Tel. Co. supra*. But when the fee is vested in the municipality and not in the abutter, no property right of the abutter is invaded by the erection of telephone poles and wires in front of his premises. *Halleran v. Bell Tel. Co.*, 64 N. Y. App. Div. 41, aff'd 177 N. Y. 533.

¹ *Telegraph lines are not additional servitudes.* *Hewett v. Western Un. Tel. Co.*, 4 Mackey (D. C.), 424; *Pierce v. Drew*, 136 Mass. 75; *People v. Eaton*, 100 Mich. 208; *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 485.

Telephone lines are not additional servitudes. *Hobbs v. Long Dist. Tel. Co.*, 147 Ala. 393; *Magee v. Overshiner*, 150 Ind. 127; *Coburn v. New Tel. Co.*, 156 Ind. 90; *McCann v. Johnson County Tel. Co.*, 69 Kan. 210; *Cumberland Tel. & Tel. Co. v. Avritt*,

120 Ky. 34; *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397; *Wyant v. Central Tel. Co.*, 123 Mich. 51; *Cater v. Northwestern Tel. Exch. Co.*, 60 Minn. 539; *Julia Building Assoc. v. Bell Tel. Co.*, 88 Mo. 258; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623; *Plattsburg v. Peoples' Tel. Co.*, 88 Mo. App. 306, 311; *Lancaster v. Briggs*, 118 Mo. App. 570; *Hershfield v. Rocky Mt. B. T. Co.*, 12 Mont. 102; *York Tel. Co. v. Keesey*, 5 Pa. Dist. R. 366; *Shinzel v. Bell Tel. Co.*, 31 Pa. Super. Ct., 221; *Kirby v. Citizens' Tel. Co.*, 17 S. Dak. 362; *Frazier v. East Tennessee Tel. Co.*, 115 Tenn. 416; *Rugg v. Commercial Un. Tel. Co.*, 66 Vt. 208; *Lowther v. Bridgeman*, 57 W. Va. 306; *Maxwell v. Central Dist. & Ptg. Tel. Co.*, 51 W. Va. 121.

A case which appears to make a distinction between telegraphs and telephones is *Magee v. Overshiner*, 150 Ind. 127. In that case the court held that the use of a city street for telephone purposes was not the imposition of an additional burden on the fee entitling the abutter to compensation. The court considered that the use of poles and wires for telephone purposes was similar to the right to maintain poles and wires for electric railroad purposes. It further distinguished the use for telephone purposes from use for telegraph purposes, saying: "The telegraph has never been employed as a means of inter-urban communication. It requires skilled persons to receive the messages, and then they are to be carried to the persons for whom they are intended by just such means and use of the streets as would other written communications. The telephone is particularly useful in communications between the people within a city,

the cases have made this question depend upon whether the fee in the street is in the public in trust for street uses, or in the abutter. It may be doubted, for reasons elsewhere stated, how far, if at all, this distinction is sound.¹ The author considers the true doctrine to be, where the question is not controlled or influenced by legislation,

and it can be used for that purpose directly without special skill. It is more nearly a substitute for the old method of communication or messages between persons within the city than the telegraph."

In *Minnesota*, the court was equally divided on the question whether the maintenance of telegraph poles and wires on a highway, the fee of which was in the abutter, was the imposition of an additional servitude upon the highway. *Willis v. Erie Tel. & Tel. Co.*, 37 Minn. 347. This decision should, however, now be considered in the light of the subsequent decision of the same court holding that telephone poles and wires are not the imposition of an additional servitude. See *Cater v. Northwestern Tel. Exch. Co.*, 60 Minn. 539. In *Coburn v. New Tel. Co.*, 156 Ind. 90, it was held that the use of a street for the construction of conduits for telephone wires was not the imposition of an additional servitude. See also *Erwin v. Central Union Tel. Co.*, 148 Ind. 365.

¹ *Ante*, §§ 1123, 1124; *post*, §§ 1259, 1261; also note at end of chapter.

In *Illinois*, the right to recovery appears to turn upon the question whether the fee of a street or highway is in the abutter. The erection of telegraph or telephone poles, &c., is the imposition of a new servitude upon the fee if the fee be in the abutter, and the abutter in that event is entitled to compensation. But there is no taking of his property if the fee be in the city. *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513. In *Louisiana*, when the fee is not in the abutter he can only recover damages upon proving that the erection and maintenance of the poles and wires constitutes a material obstruction or the invasion of some vested right. *Irwin v. Great Southern Tel. Co.*, 37 La. An. 63. In *Maryland*, a recovery is sustained whether the fee be in the abutter or in the municipality. A telephone or

telegraph pole is an additional burden on the fee, when the fee is in the abutter. When the fee is not in the abutter, it is an interference with his property entitling him to redress, if it materially affects his access, &c. *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36.

In *New York*, the liability for compensation to an abutter is limited to cases where the fee is in the abutter. All the cases cited *supra* from this State to the effect that a telegraph or telephone line is an additional servitude or burden were cases in which the fee of the street or highway was in the abutting owner. When the fee is in the city and not in the abutter, there is no liability to the abutting owner for compensation. His property is not taken. *Halleran v. Bell Tel. Co.*, 64 N. Y. App. Div. 41, *aff'd* 177 N. Y. 533. The erection of a telephone pole in the street by authority of the State and the city is not a nuisance, and the cause of action of the abutting owner is not for damages for a nuisance, but for an injury resulting to him from the construction of the telephone pole by the company in the exercise of right secured to it by its charter. *Brown v. Southwestern T. & T. Co.*, 17 Tex. Civ. App. 433.

Cutting shade trees. On the question whether a telegraph or telephone company is entitled to cut shade trees for the purpose of constructing and maintaining its lines, there is an apparent diversity of opinion. Some cases hold that the company may do so without liability. *Wyant v. Central Tel. Co.*, 123 Mich. 51. Other cases deny any such right. *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224; *Cartwright v. Liberty Tel. Co.*, 205 Mo. 126; *McAntire v. Joplin Tel. Co.*, 75 Mo. App. 535; *State v. Graeme*, 130 Mo. App. 138; *Daily v. State*, 51 Ohio St. 348. The question largely depends upon whether the telegraph or telephone line is an additional servitude on the street or highway. See further as to shade trees, § 721, *ante*.

that the rights of the abutter, as between him and the public, are substantially the same whether the fee is in him subject to the public use, or is in the city in trust for street uses proper. The conservative view is that such a use of the street other than by the city itself, for its own purposes and that of its inhabitants, attended as it may be, especially in cities, with serious damage and inconvenience to the abutting owner, is not a street use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof *by individuals or private companies*. But much may be said in favor of the proposition that such a use of the street is a legitimate street use when expressly sanctioned by the legislature.¹

§ 1222 (701). **Scope of Legislative Power.** — Reference is elsewhere made to the plenary power of the legislatures of the States in this country over all public ways, including not only common highways, but streets within the limits of municipalities.² It has often been decided, and is settled, that the legislature has, unless specially restricted by the Constitution, the power to authorize the building of a railroad, or the construction of a telegraph or telephone line, electric lighting line, or other public utility on a street or highway, without the consent of the municipal authorities,³ and

¹ *Donovan v. Allert*, 11 N. Dak. 289, quoting text; *Theobald v. Louisville, N. O. & T. R. Co.*, 66 Miss. 279; Index, *Abutter*. *Infra*, §§ 1245 *et seq.* See also chapter on Streets, *ante*, and chapters on Public Utilities and Taxation, *post*.

² *Ante*, §§ 1122 *et seq.*, 1160, 1161, 1163.

³ *State v. Jacksonville St. R. Co.*, 29 Fla. 590; *Chicago v. Illinois Steel Co.*, 66 Ill. App. 561, 567, quoting text; *New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18, 23, citing text; *Coverdale v. Edwards*, 155 Ind. 374; *Hine v. Keokuk & D. M. R. Co.*, 42 Iowa, 636; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *Floyd County v. Rome St. R. Co.*, 77 Ga. 614; *Meridian v. Western Union Tel. Co.*, 72 Miss. 910, citing text; *Canton v. Canton Cotton Warehouse Co.*, 84 Miss. 268; *Dubach v. Hannibal & St. J. R. Co.*, 89 Mo. 483; *People v. Kerr*, 27 N. Y. 188; *Worster v. Forty-second St. & G. St. F. R. Co.*, 50 N. Y. 205; *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 512; *Potter v. Collis*, 19 N. Y. App. Div. 392, 397; *Milwaukee v. Milwaukee & B. R. Co.*, 7 Wis. 85.

When the legislature authorizes a new method of use of the public easement in a highway, *e. g.* by authorizing the construction of a street railway therein, the *municipality* has no such property interest in the highway as entitles it to *pecuniary compensation*, nor has an injury been done to it of which it can complain. *Milbridge & C. Elect. R. Co., In re*, 96 Me. 110. The legislature can authorize a *natural gas company* to use the streets for its gas mains *without compensating* the municipality. *La Harpe v. Elm Township Gas Co.*, 69 Kan. 97.

In *Donnager v. State*, 16 Miss. 649, the court decided that where the statute under which a city was laid out vested the title of the streets in the city, such streets cannot be subjected to the use of a railroad without the consent of the city, unless the damages to the city are assessed and paid. In other words, the legislature can only interfere with the use of the streets of the city by its exercise of the right of eminent domain; and if it exercise this right it must compensate the city. But this conclusion seems to have been adopted without sufficient reflection,

may directly exercise this power or devolve it upon the local or municipal authorities.¹

§ 1223 (701 a). **Special Constitutional Limitation on Legislative Power over Streets and their Uses.** — In the State of New York the plenary power of the legislature over highways and streets (doubtless a sound general principle) had been exercised so often with such manifest injustice to the municipalities and to the owners of adjoining property, that its Constitution was amended, January 1, 1875, as follows: "The Legislature shall not pass a *private* or *local bill* in any of the following cases: —

"Granting to *any* corporation, association, or individual the right to lay down railroad tracks.

"Granting to any private corporation, association, or individual any *exclusive privilege*, immunity, or franchise whatever.

"The Legislature shall pass *general laws* providing for the cases enumerated in this section, and for all other cases which, in its judgment, may be provided for by general laws. But no law shall authorize the construction or operation of a *street railroad* except upon the condition that the *consent of the owners* of one-half in value of the property bounded on, and the *consent also of the local authorities* having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained," &c.²

The prohibition to be found in the above constitutional provision of *special legislation* granting franchises to lay down railroad tracks or granting exclusive privileges, immunities, or franchises to cor-

and is undoubtedly erroneous. Approving of the author's comments on this case, the court in *Meridian v. Western Union Tel. Co.*, 72 Miss. 910, criticized and overruled the case so far as the principle on which it was decided was concerned.

¹ *Barney v. Keokuk*, 94 U. S. 324; s. c. 4 Dillon, 593; *Geiger v. Filor*, 8 Fla. 325; *Moses v. Pittsburgh*, Ft. W. & C. R. Co., 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; *Atchison St. R. Co. v. Missouri Pac. R. Co.*, 31 Kan. 661; *Cosby v. Owensboro*, & R. R. Co., 10 Bush (Ky.), 288; *New Orleans & C. R. Co. v. Municipality*, 1 La. An. 128; 9 La. An. 284; *Harrison v. New Orleans Pac. R. Co.*, 34 La. An. 462; *Tilton v. New Orleans City R. Co.*, 35 La. An. 1062; *Springfield v. Connecti-*

cut Riv. R. Co., 4 Cush. (Mass.) 63; *State v. Hoboken*, 35 N. J. L. 205; *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 352, 357; *Paterson & P. H. R. Co. v. Paterson*, 24 N. J. Eq. 158; *Philadelphia & R. R. Co. v. Philadelphia & T. R. Co.*, 6 Whart. (Pa.) 25, aff'd in *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339, 354; *Henry v. Pittsburgh & A. Br. Co.*, 8 Watts & S. 85; *Green v. Reading*, 9 Watts, 382; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Mercer v. Pittsburgh & Ft. W. & C. R. Co.*, 36 Pa. St. 99; *Black v. Philadelphia & R. R. Co.*, 58 Pa. St. 249; *Tennessee & A. R. Co. v. Adams*, 3 Head (Tenn.) 596; *ante*, §§ 1122 *et seq.*

² *New York Const.*, 1848, art. iii, § 18, as amended in 1875; *New York Const.*, 1895, art. iii, § 18; *infra*, § 1232.

porations has been carried into the constitutional provisions of many other States,¹ and at the present time grants of franchises are usually made by or under general laws, and not by special legislation. Other States than New York have also embodied in their Constitutions provisions requiring the consent of the local authorities to the use of streets and highways, not only for railroad purposes, but in some instances for any form of public utility.² It would seem that

¹ Colorado Const., 1876, art. v, § 25; Illinois Const., 1870, art. iv, § 22; Kentucky Const., 1899, § 59, par. 19; Louisiana Const., 1898, art. 48; Minnesota Const., 1857, art. iv, § 33, as amended in 1892; Mississippi Const., 1890, § 90; Missouri Const., 1875, art. iv, § 53; Montana Const., 1889, art. v, § 26; Nebraska Const., 1875, art. iii, § 15; New Jersey Const., 1875, art. iv, § 7, sub-div. 11; North Dakota Const., 1889, § 69; Pennsylvania Const., 1874, art. iii, § 7; Wyoming Const., 1889, art. iii, § 27.

Rhode Island. "Hereafter the general assembly may provide by general law for the creation and control of corporations: provided, however, that no corporation shall be created with the power to exercise the right of eminent domain or to acquire franchises in the streets or highways of towns and cities, except by special act of the general assembly upon a petition for the same, the pendency whereof shall be notified as may be required by law." Const., 1842, art. iv, § 17, as amended.

² *Alabama.* "No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village." Const., 1901, § 220. "Any person, firm, association, or corporation who may construct or operate any public utility along or across the public streets of any city, town, or village, under any privilege or franchise permitting such construction or operation, shall be liable to abutting proprietors for the actual damages done to the abutting property on account of such construction or operation." Const., 1901, § 227. "No city or town having a population of more than six thousand shall have authority to grant to any person, firm, corporation, or association the right to use its streets, avenues, alleys, or public

places for the construction or operation of water works, gas works, telephone or telegraph lines, electric light or power plants, steam or other heating plants, street railroads, or any other public utility, except railroads other than street railroads, for a longer period than thirty years." Const., 1901, § 228. The Constitution of Alabama of 1875 contained the following provision: "No street railway shall be constructed within the limits of any city or town without the consent of its local authorities." Const., 1875, art. xiv, § 24.

Colorado. "No street railroad shall be constructed within any city, town, or incorporated village without the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad." Const., 1876, art. xv, § 11. The provisions of the Constitution of this State for a freeholder's charter for the city of Denver contain the following provision: "No franchise relating to any street, alley, or public place of the said city and county shall be granted, except upon the vote of the qualified tax-paying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise." Const., 1876, art. xx, § 4, added by amendment of 1902.

Georgia. "The General Assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city without the consent of the corporate authorities." Const., 1877, art. iii, § 7, par. 20.

Idaho. "No street or other railroad shall be constructed within any city, town, or incorporated village without the consent of the local authorities having the control over the street or highway proposed to be occupied by such street or other railroad." Const., 1889, art. xi, § 11.

Illinois. "No law shall be passed

none of the other States has adopted the provision of the New York Constitution requiring the consent of a majority of the abutting

by the General Assembly granting the right to construct and operate a street railroad within any city, town, or incorporated village without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad." Const., 1870, art. xi, § 4.

Kentucky. "No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts, or other apparatus, along, over, under, or across the streets, alleys, or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply." Const., 1899, § 163. "No county, city, town, taxing district, or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway." Const., 1899, § 164.

Michigan. The Constitution of this State, approved by a vote of the people in November, 1908, contains the following provisions relating to franchises to use the streets and highways: "Nor shall any city or village acquire any public utility or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city or village voting thereon at a regular or special municipal election; and upon such proposition women taxpayers having the qualifications of male electors shall be entitled to vote." Const., 1908, art. viii, § 25. "No person, partnership, association, or corpora-

tion operating a public utility shall have the right to the use of the highways, streets, alleys, or other public places of any city, village, or township for wires, poles, pipes, tracks, or conduits, without the consent of the duly constituted authorities of such city, village, or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village, or township. The right of all cities, villages, and townships to the reasonable control of their streets, alleys, and public places is hereby reserved to such cities, villages, and townships." Const., 1908, art. viii, § 28. "No franchise or license shall be granted by any municipality for a longer period than thirty years." Const., 1908, art. viii, § 29.

Montana. "No street or other railroad shall be constructed within any city or town without the consent of the local authorities having control of the street or highway proposed to be occupied by such street or other railroad." Const., 1889, art. xv, § 12.

Nebraska. "No general law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town, or incorporated village, without first requiring the consent of the majority of the electors thereof." Const., 1875, art. xiii, § 2.

North Dakota. "No law shall be passed by the legislative assembly granting the right to construct and operate a street railroad, telegraph, telephone, or electric light plant within any city, town, or incorporated village without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied for such purposes." Const., 1899, § 139.

Pennsylvania. "No street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of its local authorities." Const., 1874, art. xvii, § 9.

South Carolina. "No law shall be passed by the General Assembly granting the right to construct and operate a street or other railway, telegraph, telephone, or electric plant, or to erect water or gas works for public uses, or to lay mains for any purpose, without

property owners, but in a few States a provision requiring the consent of the electors is to be found in the Constitution.¹ These salu-

first obtaining the consent of the local authorities in control of the streets or public places proposed to be occupied for any such or like purposes." Const., 1895, art. viii, § 4.

South Dakota. "No street passenger railway or telegraph or telephone line shall be constructed within the limits of any village, town, or city without the consent of its local authorities." Const., 1889, art. x, § 3.

Texas. "No law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town, or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad." Const., 1876, art. x, § 7.

Utah. "No law shall be passed granting the right to construct and operate a street railroad, telegraph, telephone, or electric light plant within any city or incorporated town, without the consent of the local authorities who have control of the street or highway proposed to be occupied for such purposes." Const., 1895, art. xii, § 8.

Virginia. "No street railway, gas, water, steam, or electric heating, electric light or power, cold storage, compressed air, viaduct, conduit, telephone, or bridge company, nor any corporation, association, person or partnership engaged in these or like enterprises, shall be permitted to use the streets, alleys, or public grounds of a city or town without the previous consent of the corporate authorities of such city or town." Const., 1902, § 124. "No franchise, lease, or right of any kind to use any such public property or any other public property or places of any description, in a manner not permitted to the general public, shall be granted for a longer period than thirty years. Before granting any such franchise or privilege for a term of years, except for a trunk railway, the municipality shall first, after due advertisement, receive bids therefor publicly, in such manner as may be provided by law, and shall then act as may be required by law. Such grant, and any contract in pursuance thereof, may provide that upon the

termination of the grant the plant as well as the property, if any, of the grantee in the streets, avenues, and other public places shall thereupon, without compensation to the grantee, or upon the payment of a fair valuation therefor, be and become the property of the said city or town; but the grantee shall be entitled to no payment by reason of the value of the franchise; and any such plant or property acquired by a city or town may be sold or leased, or, if authorized by law, maintained, controlled, and operated by such city or town. Every such grant shall specify the mode of determination of any valuation therein provided for, and shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates, and the maintenance of the property in good order throughout the term of the grant. Nothing herein contained shall be construed as preventing the General Assembly from prescribing additional restrictions on the powers of cities and towns in granting franchises or in selling or leasing any of their property, or as repealing any additional restriction now required in relation thereto in any existing municipal charter." Const., 1902, § 125.

West Virginia. "No law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town, or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad." Const., 1872, art. xi, § 5.

Wyoming. "No street passenger railway, telegraph, telephone, or electric light line shall be constructed within the limits of any municipal organization without the consent of its local authorities." Const., 1889, art. xiii, § 4.

¹ In *Nebraska*, no street railroad can be constructed in a city without the consent of a majority of the electors thereof. Const. Neb., 1875, art. xiii, § 2, quoted *supra*. A similar constitutional provision is applicable to the city of Denver. See Const. Colo., 1876, art. xx, § 4, as added by amendment of 1902.

tary organic provisions, whose necessity originated in constantly growing private and public injuries and injustice arising from the free exercise of unrestrained legislative power, are founded upon a true conception of the nature of streets in cities so far as concerns the rights of the public therein, and of the special and peculiar rights of the abutting lot-owners (subject, of course, to reasonable municipal regulation) in and to the use of the streets for light, air, access, and all other objects which do not interfere with the legitimate public uses of the street for street purposes.¹ Hence, the above-mentioned constitutional limitations in New York on legislative power are, in effect, that no local or special law shall be passed authorizing the laying down of railroad tracks anywhere; and that no general law shall be passed authorizing the construction or operation of street railroads, *without the consent, in the manner provided, of the two parties directly affected, viz., of the municipal authorities as representing the local public interests involved, and of the abutting owners, whose rights are by such a use of the streets necessarily and specially affected.* These constitutional changes mark a distinct stage in the progressive development of our jurisprudence which we may well pausefully stop to consider.

§ 1224 (701 b). **Same Subject.** — This New York constitutional provision ordains, in the most comprehensive language, that hereafter the legislature shall not, either by a local or a private act, grant to any corporation, whether new or old, or to any association or individual, the right to lay down railroad tracks anywhere, either in cities or out of them. The legislature, it is ordained, shall pass general laws; but no law shall authorize the construction or operation of a street railway except upon the consent of the city and of the owners of abutting property. The language is imperative: "by no local or private Act shall you legislate on this subject; you cannot touch it by any such act; you shall only legislate thereon by a *general law*," but no general law, even, shall be passed on this subject, unless it is of such a character that it can secure the assent of the municipality, and of one-half in value of the abutting property owners or of the substituted judicial tribunal. This constitutional provision not only operates as a limitation upon legislative power, but it is also an additional guarantee protecting the rights of every person in the State who owns property upon any public street. Before the Constitutional Amendment of 1875, it would have been competent for the legislature, by a local or a private or a general law, as it

¹ See *ante*, §§ 1123, 1124, *post*, §§ 1259, 1261.

might see fit, to authorize any company or person to construct and operate a railway in any city or town in the State, on the single condition that it was willing to make compensation to the lot-owner for the damage. The Amendment is a limitation upon the power of eminent domain. No person who owns a lot can have the street in front of him touched by virtue of the provisions of any local or private act whatever, or by virtue of the provisions of any general act, unless it is such a one as shall be consented to by the municipality, and by one-half in value of the abutting property owners, or in lieu thereof by the prescribed judicial tribunal. This constitutional provision not only prohibits the legislature in any case from passing a local or private law granting the right to lay down railroad tracks, but it is a further limitation upon the legislative power, to the effect that not only the right of eminent domain, but no other legislative power where the subject is the operation or construction of street railways, shall be exercised unless the law is a general law, and makes provision for obtaining the prescribed consent of the municipality and of the lot-owners. This, it is obvious, is a substantial limitation on the legislative power. Where the subject-matter of legislation is the authorization of either the construction or the operation of a street railway, the power of eminent domain cannot be exercised, though the party in whose favor the power is attempted to be granted is willing to pay for the property taken a hundred-fold, unless provision is made that the railway company shall obtain the required consent of the municipality and of the abutting owners. The Amendment protects the city and the abutting owner by requiring the legislative power to be exercised by *general* (instead of local or private) laws, and by requiring the consent both of the municipality and of a majority in value of the abutting property owners. Both these parties are interested, and hence the consent of both must be obtained in the manner specified in the Amendment,¹ which *applies equally to surface, elevated, and underground railways.*²

¹ Unrestrained power in the central legislative authority to bestow valuable franchises affecting cities and property therein, without the consent of the municipal authorities and of the property owners who are injuriously affected, practically makes the city and such owners the victims of inconsiderate grants. Administered on business principles, a city ought to

derive large revenues from the use of wharves, from railways occupying streets with their tracks, from gas, water, and other companies to which are given the right to lay mains in the streets, &c. Effective organic limitations on the power both of the legislature and of the local authorities to make grants of this character ought to be devised, and the rights of adjoin-

² *Elevated Railway cases*: In the and 90 N. Y. 122) the court had to Elevated Railway cases (70 N. Y. 327, deal with the questions as to the use

§ 1225 (701 c). **Same Subject; New York Arcade Railway Cases.** — The value and efficiency of the provisions of the amendment to the

ing property owners protected. It was in this spirit and for this purpose that the amendment of the Constitution of New York, of January 1, 1875, was adopted. Provisions still more specific to secure to cities the pecuniary value of grants made by them for the use of their streets ought also to be adopted. The legitimate sources of revenue thus opened to cities is well illustrated by the case of the city of Berlin. In that city, it is stated on good authority that the street railway companies not only pave a portion of all the streets they occupy, but pay a percentage of their receipts to the city, whose revenue from this source twenty years ago was about \$250,000 a year;

and that in A. D. 1911, the street railways, with all of their equipment, will become the property of the city. Municipal gas works yielded at that time about 18 per cent of the entire annual expenditure of the city as profit; the water works also yielded an annual profit of about \$220,000; and even the great sewerage system produces a net revenue of considerable amount through the annual rates imposed upon householders for the use of sewers. See on this subject more fully, *post*, chap. xxvi, on Public Utilities; also Lord Avebury, on Municipal Trading, *passim*, a valuable and instructive work.

of the streets *above* the surface. Construing the constitutional amendment quoted in the text (§ 1223), the Court of Appeals in the N. Y. Elevated Railway cases (70 N. Y. 309, 338, 349), *per Earl, J.*, said: "These constitutional provisions do not prohibit a private or local bill to amend the charter of a private corporation by regulating powers, rights, privileges, and franchises which it previously possessed. Such a bill may not be passed to give to an existing corporation any new right to lay down railroad tracks, or any new exclusive privileges or franchises, but it may be passed to regulate and control the right to lay down tracks previously existing, or to give new privileges or franchises, provided they be not exclusive. A bill may be passed waiving a forfeiture of corporate rights. Such a bill would confer no new rights upon the corporation, but would simply be a surrender or waiver by the sovereign of its right to claim a forfeiture. A bill may be passed to extend the time within which corporate rights may be exercised. Such a bill would give no new substantial rights, but would simply extend the time within which rights previously granted could be exercised. So a bill may be passed giving a private railroad corporation the right to use a new or different motive power, provided the right be not exclusive. . . . It must be conceded that a distinct provision in the general law, granting to a specified corporation the right to

lay down railroad tracks, might be as much in conflict with the Constitution as if the grant were in a separate bill. As to such provision the bill would be a private bill (*People v. Chautauqua County*, 43 N. Y. 10). The Constitution (§ 1, art. viii) provides that all general and special laws for the formation of corporations may be altered or repealed; but where a special act was passed prior to 1875, creating a private corporation, an act to amend its charter would be a private one, and it could not therefore, since January 1, 1875, grant the right to lay down railroad tracks. Nothing can be done by the legislature under the power to alter acts of incorporation which it could not constitutionally do by an original bill. The Constitution does not forbid the legislature to grant the right to lay down railroad tracks. It simply forbids that such grant shall be made by private or local bill, and permits it to be made under general laws."

In *Gilbert Elevated R. Co., Inc. v. City of New York*, 70 N. Y. 361, *Church, C. J.*, discussing the question whether a given local act, amending a charter which was older than the constitutional amendment, granted the right to lay down railroad tracks contrary to the Constitution, said: "The changes required were *restrictive* in character. By the charter the whole street was to be covered by the structure; by the conditions imposed only a portion of some streets could be occupied. We cannot determine as a matter of law

Constitution of New York, referred to in the two preceding sections, in protecting the rights of the abutters and of the public, were

whether this change will be a benefit or a burden upon the company, nor whether the street itself will be less or more convenient for the public and abutting owners, than with the original structure. The reduction of fares and the requirement for extra trains at half fare were clearly restrictive of existing rights. I cannot accede to the proposition that any change in the structure and in the manner of occupying the street, however restrictive upon the company or beneficial to the public in the use of the streets, constitute a fresh grant of the right to lay down railroad tracks. It is a misnomer to call such restrictions grants of any right whatever. As well might the cutting down of a fee to a life estate be termed a grant of land. The purpose of the corporation and its substantial powers were the same after as before the passage of the act, and if in imposing conditions some benefits accrued, such as an extension of time, and the like, these would not change the character of the act. True, the act declares that the corporation, upon complying with the conditions imposed, shall have 'like power' with corporations authorized to be created. It possessed like power before, and this clause must be construed as confirmatory of such power, as applied to the changes and restrictions required and imposed. The constitutional clause was designed, I think, to prohibit an original and independent grant of the right to lay down railroad tracks, including the powers incident thereto. I agree with the objectors that the legislature cannot grant this right under the guise of an amendment to an existing charter any more than by an original grant. It would be incompetent to grant this right to a corporation organized for a different purpose; but, in my judgment, an act restricting and regulating an existing right to lay down railroad tracks is not a grant of that right within the meaning of this clause. It is not within the letter of the clause, nor within the evil at which the provision was aimed."

In *Astor v. N. Y. Arcade Ry. Co.*, 113 N. Y. 93, *infra*, § 1225, *Gray, J.*, quoting the language of *Church, C. J.*, *supra*, added: "I think the meaning of the decision is clear. If the legis-

tive act operates upon a charter in the direction of a regulation, an adjustment, or a restriction of powers possessed, it could not be objectionable. Within its reserved powers the legislature may at all times amend or alter the charter; but the constitutional amendment will not permit it by a private bill to make any new grant of rights comprehended within those specified by the amendment. I do not think that it can be said in the present case, that every substantial right given by the act of 1886 existed previously. For the reasons I have briefly given I think the act of 1886 practically gave to this corporation a right to lay down railroad tracks, which it could not have exercised under the act of 1873, and also gave what are practically exclusive privileges. I think it contravened the Constitution, in the letter and in the spirit, and is therefore void."

Underground street railways: In *N. Y. District R. Co., Re*, 107 N. Y. 42, the court held that the constitutional amendment applied to underground railways. *Finch, J.*, delivering the judgment of the court on this point, said: "Where the railway runs under the streets, the adjoining owners are as much, and as dangerously, affected as when it is on the surface, or above them. Whether the new surface is safe and sufficient, or weak and perilous, and invites or frightens away passage; whether the openings obstruct or hinder access to the abutter, or pour through the ventilators smoke and steam upon his premises; whether his vaults and foundations will remain safe and secure, or be undermined, or weakened, by vibration; whether his gas and water supply will continue ample and convenient, and the new sewerage work him no injury,—all these are to him questions of vital importance, affecting his comfort and convenience, the success of his business, and the value of his property. The same reason which dictated a constitutional protection against roads on or above the surface of the streets apply to those which are built beneath, in the manner here contemplated, and those would as justly be deemed 'street railroads' within the meaning of the phrase as used in the Constitution."

The effect of the constitutional amend-

notably exemplified in the great cases of *Astor and Bailey against the New York Arcade Railway Company*. The suits were brought by the plaintiffs as abutting owners of property on Broadway and Madison Avenue in the city of New York, to restrain the defendant company from creating a public nuisance by the construction of an *underground railway* in those streets without authority of law. The company claimed legal authority to build such railway by virtue of certain local and private acts (some passed before and some after the constitutional amendment took effect), which attempted to engraft railway powers upon an old pneumatic tube charter. It was unanimously held by the Court of Appeals, that the act of 1873 to this effect was in conflict with the provision of the Constitution of New York, which ordains that "no private or local bill shall be passed which shall embrace more than one subject, and that shall be expressed in the title." It was also held that the local and private acts passed in 1881 and 1886, after the above mentioned constitutional amendment took effect, which by their terms conferred railway powers, were in conflict therewith, and therefore void. These local and private acts did not require the consent of the municipal authorities or of the lot-owners. The court, recognizing that the constitutional amendment originated in a public necessity, and that it was founded upon a wise policy designed to protect interesting public and private rights, upheld with vigor, firmness, and ability its great remedial purposes. Municipal interests of incalculable value, and private property estimated at three hundred millions of dollars, were seriously affected by this legislation, which, if valid, left its owners, as well as the municipality, voiceless in respect of the question whether this railway ought to be built. Not only the vast interests that were at stake in these cases, but the rights of every municipality and of every owner of property abutting on streets in the State of New York, are by this authoritative exposition of the constitutional amendment rendered for the future secure against like unauthorized, covert, and oblique evasions of its protective provisions.¹

ment of January 1, 1875, in limiting the power of the legislature over old charters is brought into plain view by the decisions of the Court of Appeals in the several cases relating to the Brooklyn, W. & N. R. Co., reported in 72 N. Y. 245; 75 N. Y. 335, and 81 N. Y. 69.

¹ *Astor v. New York Arcade Ry. Co.*, 113 N. Y. 93; *Bailey v. Same, Ib.* 615. *Earl, J.*, delivering the opinion of the

court, concludes: "While by the acts of 1874, of 1881, and of 1886, the charter of the corporation was amended and its powers greatly enlarged, pneumatic tubes, propulsion by atmospheric pressure, and pneumatic railways are nowhere mentioned, and all that is left as a result of all the legislation is a grand scheme for underground railways operated by any motive power except such as shall emit 'smoke, gas, or cinders,

§ 1226. **Municipal Consent; Essential to Exercise of Franchise Rights.** — Although the franchise or right to use the streets of a city is derived from the State acting through the legislature,¹ the *consent of the municipality* when required by Constitution or by statute must be obtained before the right to exercise the franchise is complete. Without that consent, the corporation seeking to use the streets has no right to enter upon them and construct its railroad or other utility thereon.² This provision of the New York Constitution

which, if carried into effect, would doubtless be one of the marvels of the world. But if it is as desirable and safe as it is marvellous, it should be placed upon a constitutional basis, and make an undisguised appeal upon its merits for the public sanction. Our conclusion, therefore, is that the act of 1873, for the insufficiency of its title, is unconstitutional and void, and hence all subsequent legislation based upon that act must fall with it. When the act of 1886 was passed, under which the defendant proposes to lay down its tracks and to construct its underground railways, it had no power to construct an underground railway for the transportation of passengers and general freight through tunnels; and therefore, that act is in conflict with § 17 of article 3 of the Constitution, which forbids the legislature to pass a private or local bill granting to any corporation the right to lay down railroad tracks or to construct a street railroad, except upon conditions mentioned in that section." See also *N. Y. Dist. Ry. Co., In re*, 107 N. Y. 42.

Prior to the adoption of the constitutional provision referred to, a railroad had been constructed on a street under a statutory provision which prohibited the use of steam as motive power. After the constitutional provision was adopted, a special statute was passed removing the prohibition. It was held that the later statute was only a restoration of suspended charter powers, or rather the removal of a restriction from their full and complete exercise, and that it was not a grant of a franchise or right to use the streets by special legislation within the meaning of the constitutional prohibition. *People v. Brooklyn, F. & C. I. R. Co.*, 89 N. Y. 75, 92. The provision of the *New York Constitution* against private or local bills granting the right to lay down railroad tracks is not violated by a statute authorizing the *consolidation*

of a railroad company with any street surface railroad within a specified territory notwithstanding that the consolidation under the act operates to confer upon the consolidated corporation the rights of the constituent corporations to lay tracks. *Bohmer v. Haffen*, 161 N. Y. 390, aff'g 35 N. Y. App. Div. 381.

¹ See *post*, § 1228.

² *Underground R. Co. v. New York City*, 193 U. S. 416, 429; *Knoxville v. Africa*, 77 Fed. Rep. 501, 508; *Logansport R. Co. v. Logansport*, 114 Fed. Rep. 688; *Harvey v. Aurora & G. R. Co.*, 186 Ill. 283; *East Tennessee Tel. Co. v. Anderson County Tel. Co.*, 115 Ky. 488; *Rural Home Tel. Co. v. Kentucky & I. Tel. Co.*, 128 Ky. 209; 107 S. W. Rep. 787; *State v. Wabash R. Co.*, 206 Mo. 251; *Swinhart v. St. Louis & S. R. Co.*, 207 Mo. 423; *People's Traction Co. v. Atlantic City*, 71 N. J. L. 134; *Franklin v. Nutley Water Co.*, 53 N. J. Eq. 601; *Matter of Saratoga Elect. R. Co.*, 58 Hun (N. Y.), 287; *Matter of Rochester Elect. R. Co.*, 123 N. Y. 351; *Colonial City Traction Co. v. Kingston R. Co.*, 153 N. Y. 540, aff'g 15 N. Y. App. Div. 195; *Citizens' St. R. Co. v. Africa*, 100 Tenn. 26, 43. The consent of the municipality given to the construction and operation of a railroad which has already been constructed in the street without such consent *legalizes* the construction and operation of the railroad therein. *State v. Wabash R. Co.*, 206 Mo. 251.

In *Pennsylvania*, the franchise of a street railway passing through several localities is an entirety, and the necessary local or *municipal consent for the whole route* must be obtained before the company has the right to build any part of the railroad. *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 167 Pa. 62; *Lehigh Coal & Nav. Co. v. Inter-County St. R. Co.*, 167 Pa. 75; *Rahn v. Tamaqua & St. R. Co.*, 167 Pa. 84; *Pennsylvania R. Co. v. Greens-*

applies to the operation of a street railroad as well as to the construction. Hence the legislature cannot authorize one railroad

burg, J. & P. St. R. Co., 176 Pa. 559, 576.

In *New York* it has been said that a charter must be accepted or rejected *in toto*. If accepted it must be taken as offered, and the company has no right to accept in part and reject in part. *Per Martin, J.*, in *Paige v. Schenectady R. Co.*, 178 N. Y. 102, 114, citing *People v. Albany & V. R. Co.*, 24 N. Y. 261, 269; *Matter of Metropolitan Transit Co.*, 111 N. Y. 588; *Goelet v. Metropolitan Transit Co.*, 48 Hun (N. Y.), 520. Accordingly, it was held that where the local authorities consented to the construction of a railway on streets and highways over a distance of five miles, the company must construct the railroad in substantial conformity therewith. It could not construct the railroad for a short distance in a street or highway, and the rest of the way through private land. *Collins v. Amsterdam St. R. Co.*, 76 N. Y. App. Div. 249.

Where a street railway company had under its charter, which antedated the constitutional provision of *Pennsylvania*, constructed only a part of its lines at the time of the adoption of that constitutional provision, it was held that the consent of the local authorities was not required to the construction of the remainder of its lines after the adoption of the constitutional provision. *Williamsport Pass. R. Co. v. Williamsport*, 120 Pa. 1. See also *Dunmore v. Scranton R. Co.*, 34 Pa. Super. Ct. 294. But a consent given to the construction of a railroad does not authorize material alterations therein after construction without obtaining a further consent to the changes. *Chester v. Baltimore & O. R. Co.*, 217 Pa. 402. The provision of the *New York Constitution* requiring the consent of the municipal authorities to the construction of a street railway is *purely prospective* in its operation, and does not apply to or affect previously existing laws. *People v. Brooklyn, F. & C. I. R. Co.*, 89 N. Y. 75. But an amendatory statute giving to an existing railroad company the right to locate its tracks in new and additional streets is within the constitutional requirement of the consent of the municipality and of owners of the property abutting thereon. *Matter of Metropolitan Tran-*

sit Co., 111 N. Y. 588, 603. Under the *New York Constitution*, the consent of the municipality is not required to a change of the motive power of a street railroad. Such change may be authorized by the legislature without the consent of the municipality. *Matter of Third Ave. R. Co.*, 121 N. Y. 536, 539; *Matter of Rochester & L. O. R. Co.*, 51 N. Y. App. Div. 65, 68.

Where the statute requires the consent of the municipality, the *municipality* may maintain a suit to enjoin construction without its consent. *Franklin v. Nutley Water Co.*, 53 N. J. Eq. 601. Similarly such a suit may be maintained by the *attorney-general* on behalf of the State and by the abutting owners. *Stockton v. Atlantic Highlands, R. B. & L. B. Elect. R. Co.*, 53 N. J. Eq. 418. But an abutting owner is not entitled to enjoin the giving of consent by the municipality. His property rights are not damaged or affected until construction; and until the company threatens to proceed with construction no ground for equitable relief exists. *Seccomb v. Wurster*, 83 Fed. Rep. 856. In *Missouri*, it is held that the consent of the municipal authorities is in the nature of a license to perform an act, and the burden is on the company to establish that the necessary consent has been given. *Swinhart v. St. Louis & S. R. Co.*, 207 Mo. 423, 433.

Remedy by injunction by adjoining owners. *Zabriskie v. Jersey City & B. R. Co.*, 13 N. J. Eq. 314; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Ford v. Chicago & N. W. Co. R. Co.*, 14 Wis. 609; *Milburn v. Cedar Rapids*, 12 Iowa, 246; *infra*, § 1244; *post*, chap. xxxi.; *Lewis, Em. Dom.* § 635, and cases; *Lahr v. Metrop. Elev. Ry. Co.*, 104 N. Y. 268; *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122; *Indianapolis & St. L. R. Co. v. Calvert*, 110 Ind. 555.

Remedy by injunction by and against city corporation. *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524, 531; *N. Y. Cable Co. v. New York*, 104 N. Y. 1, 38, 43; *Clinton v. Cedar Rap. & M. R. R. Co.*, 24 Iowa, 455; *s. c. Ib.* 482, note; *Northern Central R. Co. v. Baltimore*, 21 Md. 93; *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 352; *Milwaukee v. Milw. & Beloit R. Co.*, 7 Wis.

company to use against the will of the owner a portion of the tracks of another railroad company for its purposes, without the consent of the municipality;¹ and in Pennsylvania the same view has been adopted where a street railway company seeks to use the existing tracks of another company by agreement with the owner thereof.² But in New York, where by statute enacted prior to the adoption of the constitutional requirement, a street railroad company was authorized to lease the railroad tracks of another, the court held that the constitutional provision did not operate to qualify the authority to lease; and hence that a street railway company might lease its railroad to another company and the lessee company might enter upon the same and operate its cars thereon without the necessity of obtaining the consent of the municipality, or of the abutting owners thereto.³

85; *Jamestown v. Chicago, B. & N. R. Co.*, 69 Wis. 648; *ante*, §§ 1133, note, 1225, and note; *post*, § 1244.

¹ *Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540, 549, aff'g 15 N. Y. App. Div. 195.

² In *Erie v. Erie Traction Co.*, 222 Pa. 43; 70 Atl. Rep. 904, a street railway company had obtained the consent of the municipality to the use of the streets, but it failed to comply with the conditions of the consent, and had thereby lost the rights granted to it. It asserted the right to use the tracks of another railroad by contract, and claimed that this contract right was complete without the consent of the municipality. The court, however, held that the consent of the municipality was necessary, and that the street railway company could not use the existing tracks solely by virtue of the contract. The court declared that although the provision of the *Pennsylvania Constitution* that no passenger railway should be constructed within the limits of any city, &c., without the consent of its local authorities, did not in terms apply to the operation of such railroads, yet municipalities had, independently thereof, under the statutes and jurisprudence of that State, power to impose reasonable regulations on the operation as well as to exact conditions with reference to the construction, and that, by reason thereof, a street railway company could not run its cars over the tracks of another railroad company by agreement without the

consent of the municipality. *Elkin, J.*, said: "A grant to a street railway company to operate its own lines on certain streets and subject to certain conditions does not carry with it the right of the company obtaining such franchise to permit other companies to come into the city and use its tracks without municipal consent and against municipal protest. We agree that as between the companies themselves, so far as the private rights of the corporations may be involved, there is no reason why a contractual relation should not exist for the use, enjoyment, and occupation of the property of either corporation by the other. A very different question arises when the rights of the municipalities are involved. No matter what contracts may be made by corporations as between themselves, and as only private corporate rights may be concerned, no such contract is binding upon a municipality without its consent. The respondent company needs one thing more to entitle it to the use of the streets in the city of Erie, and that is municipal consent. It had municipal consent once, lost it by failure to perform the conditions imposed, and it cannot now secure by indirection what it lost by nonperformance of precedent and subsequent conditions."

³ *People v. Brooklyn, F. & C. I. R. Co.*, 89 N. Y. 75; *Ingersoll v. Nassau Elect. R. Co.*, 157 N. Y. 453, aff'g 89 Hun (N. Y.), 213.

§ 1227. **Municipal Consent; By what Body given.** — Under a constitutional provision such as that of the State of New York, requiring the consent of "*the local authorities having the control of*" the street or highway upon which the railroad is to be constructed, the *local authorities* whose consent is required are, in the absence of a specific statutory designation, those officers to whom the control, supervision, and maintenance of highways are entrusted.¹ The scheme of municipal government, however, usually includes a legislative body, such as the common council or board of aldermen, which is entrusted with the general management and control of the affairs of the municipality, including the streets and public places, as well as executive officers upon whom administrative duties in the supervision and maintenance of streets and public places is devolved. The consent of the local authorities of the municipality is to be regarded as a legislative and governmental act, rather than as administrative in its nature, and, in the absence of any controlling language in the statute or Constitution, it is to be given by the legislative body, and not by the executive or administrative officers.²

¹ Matter of Rochester Electric R. Co., 123 N. Y. 351.

Under the *New York Constitution*, the *highway commissioners* are the local authorities of a *town* whose consent is required by the Constitution. Matter of Rochester Elect. R. Co., 123 N. Y. 351; Geneva & W. R. Co. v. New York Cent. & H. R. R. Co., 163 N. Y. 228, rev'g 24 N. Y. App. Div. 335, 631. Although the use and control of a highway in a town has been transferred by statute to a *turnpike company*, the highway commissioners of the town still have general control over it as a highway, and the consent of the highway commissioners is required for the construction of a railroad thereon. The consent of the turnpike company alone is not sufficient. Matter of Rochester Elect. R. Co., 123 N. Y. 351. Where a bridge was constructed partly in one village and partly in another and each village was in a different town, it was held that as the village trustees had no authority over the construction and maintenance of the bridge, the highway commissioners of the two towns were the local authorities whose consent was required to the construction and operation of a railroad on the bridge. Wheatfield v. Tonawanda St. R. Co., 92 Hun (N. Y.), 460; Lysander v. Syracuse, L. & B. R. Co., 31 N. Y. Misc. 330, aff'd 51 N. Y.

App. Div. 617. Where the railroad of a street railroad company ran through two villages and a town, it was held that the consent of the highway commissioners of the town was sufficient to authorize construction within the town limits, and that a failure to obtain the consents of the local authorities of the villages was immaterial so far as concerned construction within the town. Geneva & W. R. Co. v. New York C. & H. R. R. Co., 163 N. Y. 228, rev'g 24 N. Y. App. Div. 335, 631.

When the consent of the municipality is required by statute and the statute also requires notice of the time and place of a hearing to be given, such notice is essential to the validity of the consent. Harvey v. Aurora & G. R. Co., 186 Ill. 283. Where a statute required the consent of the *people* of the city, it was held that the council was without authority to give the consent, and that a *vote of the electors* was required. Kavanagh v. Mobile & G. R. Co., 78 Ga. 271. Consents by township authorities held to be invalid because procured by *bribery or other corrupt practices*. Lehigh Coal & Nav. Co. v. Inter-County St. R. Co., 167 Pa. 75; Tamaqua & L. St. R. Co. v. Inter-County St. R. Co., 167 Pa. 91; Thomas v. Inter-County St. R. Co., 167 Pa. 120.

² Ghee v. Northern Union Gas Co., 158 N. Y. 510; People v. Consolidated

But a constitutional provision such as that to be found in the Constitution of the State of New York does not deprive the legislature of its general power and control over the administration of municipal affairs, and does not preclude a designation by statutory enactment of a body or officials other than the council or other local legislative body as the source of the prescribed consent. Notwithstanding the constitutional provision, *the legislature may*, from time to time, *designate the local authorities* to whom the control of streets and highways shall be entrusted, and may specify the particular body or board that shall be deemed to have such control within the meaning of the requirement of the Constitution.¹ The power to

Tel. & Elect. Subway Co., 187 N. Y. 58, aff'g 110 N. Y. App. Div. 171; *People v. Coler*, 190 N. Y. 268, rev'g 121 N. Y. App. Div. 898. In granting a consent to the construction of a street railroad, the city acts in a *governmental*, and not in a *private capacity*. *Potter v. Calumet Elect. St. R. Co.*, 158 Fed. Rep. 521. A proceeding under the New Jersey statute to "locate" the tracks of an electric street railway is a *legislative* and not a *judicial act*, and in the absence of a statutory requirement to that effect notice thereof need not be given. *Moore v. Haddonfield*, 62 N. J. L. 386, aff'g 61 N. J. L. 470. See also *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, 238.

Although the general supervision, maintenance, care, and control of parks and public places are vested in a department or commissioner, such authority does not confer upon the commissioner the power to give consent to the use of the park lands or ways for the purpose of laying down the wires or conduits of an electric lighting company. The use of a parkway for appliances designed for supplying electricity to private consumers is not connected with that ordinary and primary enjoyment of it which ought to be subjected to the control of the park department. It constitutes a privilege to use the parkway as a means of carrying on a general business, and as such it should be left subject to the jurisdiction of the municipal authorities ordinarily entrusted with the control of such matters. *People v. Coler*, 190 N. Y. 268, rev'g 121 N. Y. App. Div. 898. In *Bohmer v. Haffen*, 161 N. Y. 390, aff'g 35 N. Y. App. Div. 381, it was held that the commissioner of street improvements for the twenty-

third and twenty-fourth wards of New York City who had supervision of the laying out, construction, and maintenance of streets and highways in these wards, did not have such exclusive control of the streets as to require his consent in addition to that of the common council.

A *taxpayer's action* to have the consent of the local authorities to the construction of a street surface railroad declared void, will not lie under the *New York statute* as an action to prevent waste or injury to the property of the city, or as an action to restrain the consent on the ground that it was based upon and procured by fraud on the part of the municipal authorities, or as an action to restrain an illegal act, because the courts have not the power to inquire into the motives inducing legislative action, whether such action be taken by the legislature of the State, or the common council of a city. *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377. As to suits by *taxpayers*, see *post*, chapter on Remedies. Where a statute incorporated a street railroad company, but required that the consent of the city council shall be obtained to the construction of the railway, the Supreme Court of Pennsylvania held that an ordinance refusing the consent of the city as contrary to the public interests *exhausted the power* conferred upon the company and the council, and a subsequent ordinance giving a consent qualified by conditions was *ultra vires*. *Musser v. Fairmont & A. St. R. Co.*, 7 Am. L. Reg. (o. s.) 284.

¹ In *Wilcox v. McClellan*, 185 N. Y. 9, aff'g 110 N. Y. App. Div. 378, the legislature had passed certain statutes *transferring to the board of estimate and*

consent to the construction of the railroad, whether conferred by constitution or by statute, is *incapable of delegation*, and must be fairly and intelligibly exercised by the local authorities to whom the duty is entrusted. Hence, when the consent of the municipality is required, the city cannot make a general grant or give a general consent to a railroad company to construct its railroad whenever the company may desire, through such streets as the company may from time to time elect to use. This is a surrender to the railroad company of the right of the municipality to designate or consent to the construction in particular streets.¹ No particular mode of manifesting the municipal consent to the construction of a railroad or other public utility in the city streets is prescribed by the usual constitutional provision, and in such case it has been said that so far as the Constitution is concerned, such consent may be either express or implied.² And it has also been held that the consent of the municipality required by statute *may be presumed* where the streets of the municipality have been used for a long period of years by the company under such circumstances as to amount to a claim of the right to use them.³

apportionment of the city of New York the power to grant franchises to use the city streets. It was objected to this legislation that, at the time of its enactment, the board of aldermen constituted the sole authority having control of the streets and the power to give consent to their use for railroad purposes within the meaning of the Constitution. The court held that even if this were true, which however was not the case, the legislature might take such authority away from one body of local authorities and transfer it to some other board or department, and that the statute in question did not violate the constitutional provision referred to. See also *Pettit v. McClellan*, 185 N. Y. 529, aff'g 110 N. Y. App. Div. 390.

¹ *Logansport R. Co. v. Logansport*, 114 Fed. Rep. 688. In this case power was conferred by statute upon the municipality to consent to "the location, survey, and construction of any street railroad through or along the public streets of any city."

But where a steam railroad company was organized for the purpose of constructing a railroad between certain designated points, and the company was by statute and by its charter authorized to designate its own route, it was held that the city had no authority to designate the route even

within the municipal limits, and that the consent of the municipality which was required to enable the company to use the streets at places where the railroad crossed them, was not void because it omitted to designate the points at which the railroad might be constructed across the respective streets. *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110.

² *Per Haney, J.*, in *Missouri Riv. Tel. Co. v. Mitchell*, 22 S. Dak. 191; 116 N. W. Rep. 69. In this case, an ordinance granting the consent of the municipality to the construction of a telephone line was adopted at a special meeting of the city council. Thereafter the company proceeded to erect its poles and wires and expended large sums of money. The city authorities took part in such erection to the extent of designating the places where the poles should be erected and supervising the work. It was held that inasmuch as no particular mode of giving the constitutional consent was prescribed, the consent of the municipality was sufficiently manifested, and that it was estopped to object to the validity of the consent given and the regularity of the special meeting at which it was given.

³ *Chicago v. Union Stockyard Co.*, 164 Ill. 224; *New Castle v. Lake Erie*

§ 1228. **Constitutional Requirement of Municipal Consent; Power of Legislature.** — Although the legislature may be prohibited by constitutional provisions from authorizing the construction of a street railroad, or telegraph or telephone line, or other structures in the streets for the public service, without the consent of the municipality, the franchise or right to use the streets therefor *flows from the State, and not from the municipality.*¹ A constitutional requirement

& W. R. Co., 155 Ind. 18; Raynolds v. Cleveland, 28 Ohio Cir. Ct. 463, aff'd 76 Ohio St. 619; Seattle v. Columbia & P. S. R. Co., 6 Wash. 379; Spokane St. R. Co. v. Spokane Falls, 6 Wash. 521; State v. Spokane St. R. Co., 19 Wash. 518, 531. Consent of municipality implied from acquiescence in construction and operation of railroad. North Jersey St. R. Co. v. Newark Street Com'rs, 73 N. J. Eq. 106; 67 Atl. Rep. 691. In *Nebraska*, where a street railway had been constructed and was in operation, it was held that even the State was estopped to attack the regularity or validity of the proceedings by which the vote of the electors of the municipality was given. State v. Lincoln St. R. Co., 80 Neb. 333; State v. Citizens St. R. Co., 80 Neb. 357.

If a city deals with a corporation exercising a street franchise as validly incorporated, such city cannot question its right to exercise the franchise on the ground that it is in fact not validly incorporated. The right to question the incorporation belongs to the State alone. Wyandotte Elect. L. Co. v. Wyandotte, 124 Mich. 43; Kalamazoo v. Kalamazoo H. L. & P. Co., 124 Mich. 74. But there can be no estoppel of the municipality where the municipality had no power to consent to construction, or to grant the right or privilege. State v. Monroe, 40 Wash. 545.

¹ Dakota Central Tel. Co. v. Huron, 165 Fed. Rep. 226; Mobile v. Louisville & N. R. Co., 84 Ala. 115; State v. Red Lodge, 30 Mont. 338; Asbury Park & S. G. R. Co. v. Neptune, 73 N. J. Eq. 323; 67 Atl. Rep. 790; Missouri River Tel. Co. v. Mitchell, 22 S. Dak. 191; 116 N. W. Rep. 67.

In *Beekman v. Third Avenue R. Co.*, 153 N. Y. 144, aff'g 13 N. Y. App. Div. 279, a case which involved the validity of a right granted through power delegated to a municipal corporation after the adoption of the constitutional

provision referred to in a preceding section, *O'Brien, J.*, said: "The authority to make use of the public streets of a city for railroad purposes primarily resides in the State, and is a part of the sovereign power, and the right or privilege of constructing and operating railroads in the streets, which for convenience is called a franchise, must always proceed from that source, whatever may be the agencies through which it is conferred. The use or occupation of the streets for such purposes, without the grant or permission of the State through the legislature, constitutes a nuisance, which may be restrained by individuals injuriously affected thereby (*Fanning v. Osborne*, 102 N. Y. 441). The city authorities have no power to grant the right, except in so far as they may be authorized by the legislature, and then only in the manner and upon the conditions prescribed by the statute (*Davis v. New York City*, 14 N. Y. 506; *Milhau v. Sharpe*, 27 N. Y. 611; *People v. Kerr*, 27 N. Y. 188)."

In *Citizens' Street R. Co. v. City R. Co.*, 64 Fed. Rep. 647, 649, aff'd 166 U. S. 557, *Woods, C. J.*, who delivered the opinion of the Circuit Court of Appeals, in speaking of a franchise granted under a statute which required the consent of the common council, said: "The consent of the common council being required, it is in a sense true that the franchise is granted by the city, since the ultimate right is acquired or becomes effective only upon the giving of that consent. But the power to construct tracks, switches, side tracks, or turnouts upon the streets, and, by implication, the right to run cars thereon, is conferred by the statute, or, in other words, is derived directly from the State, so that strictly speaking, the city does not grant the franchise, but simply consents to its exercise." In *Homestead St. R. Co. v. Pittsburgh & H. St. R. Co.*, 166 Pa. 162, the court said, referring to the

that no street railroad, telegraph or telephone line, or other public utility, shall be constructed within the limits of any city without the consent of the local authorities, is *not a grant* of authority to the municipality to create and grant *franchises* in streets. It is a *restriction on the legislature* only, and the municipality still requires legislative authority to enable it to make an effective grant or to give its consent.¹ Such a constitutional requirement does not otherwise restrict or limit the powers of the legislature. Thus, the legislature may impose additional requirements upon the grantee of the franchise or right, such as that the consent of a railroad corporation owning and operating a street railroad in the street be obtained.² And so long as the legislature leaves the municipality free to give or withhold its consent, the municipality itself is subject to control and regulation by the legislature in its action thereon. Thus, it has been held that the legislature, by virtue of its general power over municipalities, may regulate the mode or manner in which the consent shall be given by the authorities having the control of the street,

function of the municipality in giving its consent pursuant to constitutional requirement: "The municipal consent of itself can confer no right. The municipality has no power to confer the franchise. But it is the franchise, and that alone, which gives the legal right to build the railway. When the franchise is granted, authority is conferred to lay the track, and it can then truly be said that the laying of a track is authorized. Municipal consent is only essential to the execution of the authority, not at all to its creation."

We have referred elsewhere to the application of the principle of self-government, which is so fully recognized by the courts of *Michigan* (see *ante*, §§ 99, 119, 120). In *Detroit Citizens' St. R. Co. v. Detroit*, 64 Fed. Rep. 628, 642, *Lurton*, C. J., said with reference to this principle and the power of the legislature to confer rights upon street railway companies: "It is evident that the legislature could grant to any street railway the right to construct and operate its road upon any particular street. It may provide for the incorporation of such companies, and endow them with the franchises necessary. But for the necessary street rights they must be referred to the only authority which can grant such privileges, — the local government of the municipality in which it is proposed to operate such

road. It may confer power upon such municipalities to grant or withhold such easements. The right to make such grants may be conferred, subject only to such terms and conditions as the municipality may impose, or it may surround the power with such limitations as it shall deem wise. It cannot [in *Michigan*] require that the municipality shall exercise the powers conferred. That must be left to the discretion of the municipal authorities."

Under the provision of the Constitution of *Nebraska* requiring the *consent of the majority of the electors of a city* to the construction and operation of a street railroad therein (see § 1223 *ante*), the franchise is not derived from the municipality through the enactment of the ordinance submitting the question to vote, and the vote of the electors thereon, but is derived from the State acting through the legislature. *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109.

¹ *Missouri River Tel. Co. v. Mitchell*, 22 S. Dak. 191; 116 N. W. Rep. 67. To the effect that the municipal consent can only be given to a corporation having a valid charter to construct the railway, see *Philadelphia v. River Front R. Co.*, 173 Pa. 334.

² *Matter of Thirty-fourth St. R. Co.*, 102 N. Y. 343. See also *Jersey City v. North Jersey St. R. Co.*, 74 N. J. L. 774, 780, *aff'g* 73 N. J. L. 175.

and may prescribe the conditions upon which it may be given.¹ There is grave doubt, if no contract obligation is violated, whether any right which is beyond legislative power vests in the municipality by reason of a condition attached to its consent, even where the consent has been given pursuant to a constitutional pro-

¹ *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, 152, aff'g 13 N. Y. App. Div. 279. See also *Missouri River Tel. Co. v. Mitchell*, 22 S. Dak. 191; 116 N. W. Rep. 67. It would seem to be clear that, by reason of the plenary power of the legislature over the creation and powers of municipal corporations, a constitutional provision which simply prohibits the granting of a franchise or right to use the streets for the purposes of a public service corporation without the consent of the municipality would not preclude the legislature from imposing conditions and restrictions upon the charter powers of the company or even upon the power of the municipality to grant the consent, provided always that the substantial right to give or withhold the consent upon the prescribed conditions be not denied to the municipality. But in *Pennsylvania* the Supreme Court appears in the case next cited to have expressed or intimated the contrary view. Thus, in *Allegheny v. Millville, E. & S. St. R. Co.*, 159 Pa. 411, *Mitchell, J.*, a very able and learned judge, said: "It is conceded that the local authorities may impose some conditions, such as those relating to the police power, but where is the grant to any other body to supervise and limit the conditions, or say what they shall be? The legislature clearly cannot do it. The very purpose of the provision was to put an end to the legislature's interference. Nor can the court trespass upon the discretion given absolutely by the Constitution to the local bodies. We do not undertake to say no condition could possibly be attached to the consent, which would not be an abuse of or transcend the discretion given. A condition, conceivable for the purpose of illustration, that the members of council voting for the consent should have perpetual free passes, or other gratuities, might be declared void as against the fundamental principle of the purity of the administration of public affairs for the public benefit. But even then the question would remain whether the con-

sent was not void as well as the condition on which it was given. But it would require a very clear case of the contravention of some controlling and paramount principle of public policy to justify an interference by the courts to put a limit on the unlimited constitutional grant." In *Plymouth v. Chestnut Hill & N. R. Co.*, 168 Pa. 181, 187, the legislature had enacted that a street railroad constructed pursuant to statute should be completed within two years after obtaining its franchise unless the time should be extended by the proper local authorities, and the Supreme Court held that the local authorities might require completion of the railroad within a shorter time. The court below had held that the consent of the municipality was void, because it did not comply with the terms of the statute. The Supreme Court, however, held that the limit prescribed by the statute was placed upon the charter powers of the company, and that as a limitation upon the charter powers of the company the provision of the statute was a valid exercise of the legislative power. *Mitchell, J.*, said with reference to a conflict between the Constitution and the statute: "If there were the conflict between the conditions of a consent and the statute that the learned judge [below] supposed, the statute not the Constitution would have to give way." It is to be noted, however, that in a more recent case language was used by the Supreme Court which seems to imply that the power of the municipality to attach conditions is not unlimited. Thus, in *Minersville v. Schuylkill Elect. R. Co.*, 205 Pa. 394, 401, *Fell, J.*, said: "The power of the borough to give or refuse consent to the occupation of its streets was unqualified, and the power to impose reasonable conditions necessarily implied." The remarks of the court in these cases were made with reference to the provisions of the *Pennsylvania Constitution* quoted, *supra*, § 1223.

vision. The city is the creature of the State, and the legislature has supreme control of the affairs of the city, except in so far as it may be restricted by the provisions of the Constitution. It would seem, therefore, that any stipulation or advantage which the *municipality* may obtain by reason of a condition attached to a consent is within the legislative control to the same extent as any other corporate matter. Whether such a condition or advantage obtained by the municipality by reason of a condition attached to a consent given pursuant to the Constitution be within the control of the legislature or not, it has been held by the Supreme Judicial Court of Massachusetts, and by the Supreme Court of the United States, that such a benefit or advantage, enuring to the municipality by reason of a condition to a consent or grant of a location given or made pursuant to statute, is not exempt from legislative control, and the legislature has the right as respects the municipality to modify or abrogate the conditions on which the locations in the street and public ways have been granted, although such conditions may have been originally imposed by the city.¹

¹ In *Springfield v. Springfield St. R. Co.*, 182 Mass. 41, it was held that the city acted in behalf of the public in regard to certain extensions of location of a street railway, and that the legislature had the right to modify or abrogate the conditions upon which the locations in the streets and public ways had been granted, after such conditions had been originally imposed by the city. In another case which was decided by the Supreme Judicial Court of *Massachusetts* at the same time, extensions of location of a street railway were applied for and granted upon the condition or restriction that the street should be paved between the rails and outside thereof to the street curb, and these conditions were accepted and the acceptance duly filed in the city clerk's office. Subsequently the legislature passed a statute which relieved the street railway company from this obligation. It was held by the Supreme Court of the United States, affirming the decision of the Supreme Judicial Court of *Massachusetts*, that this statute was not void as violating the impairment of obligation clause of the Federal Constitution, because it relieved the company from the obligation to pave and repair the streets imposed upon it by the conditions exacted by the municipality. *Worcester v. Worcester Consol. St. R.*

Co., 196 U. S. 539, aff'g 182 Mass. 49. Mr. Justice *Peckham*, who delivered the opinion of the United States Supreme Court, said: "It seems plain to us that the asserted right to demand the continuance of the obligation to pave and repair the streets, as contained in the orders or decrees of the board of aldermen granting to the defendant the right to extend the locations of its tracks on the conditions named, does not amount to property held by the corporation which the legislature is unable to touch, either by way of limitation or extinguishment. If these restrictions or conditions are to be regarded as a contract, we think the legislature would have the same right to terminate it, with the consent of the railroad company, that the city itself would have. These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole, of the expenses of paving or repaving the streets in which the tracks were laid, and that method of collection would not become an absolute property right in favor of the city, as against the right of the legislature to alter or abolish it, or substitute some other method with the consent of the company, even though as to the company itself, there might be a contract not alterable except with its consent.

§ 1229 (706). **Consent of Municipality; Power to attach Conditions.**

— So far as concerns the *power of the municipality to attach conditions and restrictions* to a grant or consent, no fundamental distinction appears in the decisions between a general delegation of authority to a municipality to grant consents or rights to use the streets for railroad, telegraph, telephone, and other public purposes, and a simple requirement, whether constitutional or statutory, that no streets shall be used for these purposes without the consent of the municipality. The power possessed by the State to attach as a condition to the grant of a franchise to a *quasi*-public corporation the performance of duties beneficial to the public may be exercised by the municipality under a delegated power to grant to such a corporation the use of its streets;¹ and when, under the Constitution or the statutes of a State, a railroad company or other public service corporation is forbidden to construct its railroad, telegraph, or telephone line, or other structures in or upon the streets of a city “without the consent of” the city or of specified local authorities, the municipal authorities are not limited to a simple granting or denial of the right of way, but may prescribe conditions on which the consent is given, and valid conditions or restrictions accepted by the railroad or other public service corporation are binding upon the parties.² But it is apparent

If this contention of the city were held valid, it would very largely diminish the right of the legislature to deal with its creature in public matters, in a manner which the legislature might regard as for the public welfare.”

In *New York* it has been held that a condition attached to the consent of a city to the construction of street railroad that the company keep the pavement within its tracks and three feet on each side thereof in repair with certain stone and under the direction of the authorities to be designated by the common council did not constitute a private contract between the railroad company and the municipality, but is rather in the nature of charter legislation, which may be at any time amended as the legislature deems necessary in view of the changed conditions and the interests of the general public, since the powers of the municipality in respect to the control and regulation of its streets are held in trust for the public benefit, and it cannot release control thereof for all future time. The city may, therefore, under subsequent legislative authority, adopt and enforce a resolution to repave a street through which the railroad runs

with a different material and assess one-fourth of the cost thereof on the railroad company. *Binner v. New York*, 177 N. Y. 199, modifying 80 N. Y. App. Div. 438. See also *Mechanicville v. Stillwater & M. R. Co.*, 35 N. Y. Misc. 513, *aff'd* 67 N. Y. App. Div. 628, and 174 N. Y. 507; *Rochester v. Rochester R. Co.*, 182 N. Y. 99, *rev'g* 98 N. Y. App. Div. 521.

¹ *People v. Suburban R. Co.*, 178 Ill. 594.

² *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521; *Pacific R. Co. v. Leavenworth*, 1 Dill. C. C. R. 393; *Pittsburg, C. & St. L. R. Co. v. Hood*, 94 Fed. Rep. 618; *Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co.*, 101 Fed. Rep. 347; *Southern Bell T. & T. Co. v. Richmond*, 103 Fed. Rep. 31, *aff'g* 98 Fed. Rep. 671; *Bellville v. Citizens' Horse R. Co.*, 152 Ill. 171; *Indianapolis & C. R. Co. v. Lawrenceburg*, 34 Ind. 304; *City R. Co. v. Citizens' St. R. Co. (Ind.)*, 52 N. E. Rep. 157; *Mordhurst v. Ft. Wayne & S. W. Traction Co.*, 163 Ind. 268; *Postal Tel. & Cable Co. v. Newport (Ky.)*, 76 S. W. Rep. 159; *Northern Cent. R. Co. v. Baltimore*, 21 Md. 93; *Rapid R. Co. v. Mt. Clemens*, 118 Mich.

that there is a limit to, or qualification of the character of, the conditions which may be imposed by the municipality. Although the statute or constitutional provision may simply require the consent of the municipality, it is usual to give that consent in the form of an ordinance containing stipulations and conditions; and such ordinance with its stipulations and conditions becomes a part of the contract under which the right to use the streets arises. These conditions and stipulations may be of such a nature as to operate as a restriction or qualification of the powers of the municipality as well as a qualification or restriction of the right granted. So viewed, such conditions or restrictions must not infringe certain fundamental principles of municipal law. Thus, it has been recognized that conditions attached by the municipality may be unlawful because they *require the performance of a forbidden act*, or because they *wholly transcend the scope of the authority conferred upon the municipality*;¹ and it has been held that the municipality has not the power, in giving its consent to the construction of a street railroad, *to contract away or limit the taxing or police powers of the legislature*.² Some courts have gone further and have limited the power of the municipality to

133; *Traverse City Gas Co. v. Traverse City*, 130 Mich. 17; *Detroit v. Detroit City R. Co.*, 76 Mich. 421; *Springfield v. Robberson Ave. R. Co.*, 69 Mo. App. 514; *Humphreys v. Bayonne*, 55 N. J. L. 241, 243; *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227; *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61, 360; *People v. Barnard*, 110 N. Y. 548; *Allegheny v. Millville, E. & S. St. R. Co.*, 159 Pa. 411; *Plymouth v. Chestnut Hill & N. R. Co.*, 168 Pa. 181; *Allegheny v. People's Nat. Gas & P. Co.*, 172 Pa. 632; *Philadelphia v. Empire Passenger R. Co.*, 177 Pa. 382; *Minerville v. Schuylkill Elect. R. Co.*, 205 Pa. 394; *McKeesport v. Pittsburg, M. & C. R. Co.*, 213 Pa. 542, 544; *Muncy Elect. L., H. & P. Co. v. People's Elect. L., H. & P. Co.*, 218 Pa. 636; *Spring City v. Montgomery & C. Elect. R. Co.*, 35 Pa. Super. Ct. 533, 538.

Where the right of way along a street was granted by a city, on condition that the company should *build a depot* in a certain part of a city, and grade, rip-rap, and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant, and not comply with the conditions on which it was made. *Pacific R. Co. v. Leavenworth*, 1 Dill. C. C. R.

393. Under the *Massachusetts* statute an application to the municipality for the "location" of a street railroad must *precede the exercise of corporate powers* by the company, and conditions attached to the "location" must also be accepted by the company. Hence these conditions, if lawful, are qualifications of the corporate right of the company, and it cannot, while it continues to exercise its franchises, complain of their enforcement. *Clinton v. Worcester Consol. St. R. Co.*, 199 Mass. 279. In *New Jersey* restrictions and conditions attached to the municipal location of the tracks of a street railroad company are *obligatory upon purchasers* of the railway and its franchises, without an express assumption thereof. *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227. See also to the same effect, *Grosse Point v. Detroit & L. St. C. R. Co.*, 130 Mich. 363; *Asbury Park & S. G. R. Co. v. Neptune*, 73 N. J. Eq. 323; 67 Atl. Rep. 790.

¹ *Clinton v. Worcester Consol. St. R. Co.*, 199 Mass. 279. See also *Keefe v. Lexington & B. St. R. Co.*, 185 Mass. 183, 185; *Worcester v. Worcester Consol. St. R. Co.*, 192 Mass. 106.

² *Rochester v. Rochester R. Co.*, 182 N. Y. 99, rev'g 98 N. Y. App. Div. 521.

attach conditions to its consent to such conditions as materially affect, or relate to the powers of government which are conferred upon the municipality by its charter, or by statute.¹ And in those jurisdictions in which a limit to the power of the municipality to attach conditions is recognized, the attempt to impose an *unlawful or invalid condition* is regarded as a mere nullity, and the validity of the consent or franchise is not affected thereby.² But in other jurisdictions the principle of *estoppel* appears to be applied, and it is held that a railroad company or other public service corporation, which has accepted the benefit of a grant or consent with a condition attached thereto, is estopped to contest the validity of the condition either as *ultra vires* the municipality, or as beyond its own powers, and is bound thereby.³

¹ The city of Galveston granted to a steam or commercial railroad company the right to construct its tracks upon certain streets of that city, by an ordinance which provided that the construction within the city should be completed within one year (which was done) and also that the privilege should be forfeited "if the said railway company fails to build and extend their road across the bay within five years from the passage of this ordinance." The company was incorporated under a general statute which allowed railroad corporations to construct their railroads in the streets of any city with the consent of the municipality. Having failed to extend its railway across the bay within the prescribed time, the city brought suit to declare a forfeiture of the privileges granted by it, and to have the railroad tracks removed from the city streets. After reviewing the decisions the court held that when the city gave its consent to construct over the streets of the city, the condition precedent prescribed by the legislature was fulfilled and the statutory right attached in favor of the railroad company; that the limited authority delegated to city councils to give or refuse consent did not empower them to legislate on everything connected with the general subjects on which they were authorized to act; that the city might annex to its consent terms or conditions requiring performance by the railroad company of those things which were within the power of the municipal corporation to regulate and enforce against a corporation or individual occupying the streets, such as the preservation of the

streets or crossings, but could prescribe no other terms; that the time within which the railroad should be constructed to any point, especially beyond the city limits, was a subject entirely beyond the jurisdiction of the city council, and that failure to comply with the condition did not justify a forfeiture of the company's rights, or the removal of its tracks from the city streets. *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398; s.c. 91 Tex. 17.

² *Keefe v. Lexington & B. St. R. Co.*, 185 Mass. 183, 185; *Worcester v. Worcester Consol. St. R. Co.*, 192 Mass. 106; *Clinton v. Worcester Consol. St. R. Co.*, 199 Mass. 279; *Rochester v. Rochester R. Co.*, 182 N. Y. 99, rev'g 98 N. Y. App. Div. 521; *Matter of Kings County Elev. R. Co.*, 105 N. Y. 97; *Galveston & W. R. Co. v. Galveston*, 91 Tex. 17. A street railroad company by complying with the terms of a condition imposed by its grant of a "location" under the *Massachusetts* statute from the aldermen of a city, does not lose the right to contest the legality of the condition. *Worcester v. Worcester Consol. St. R. Co.*, 192 Mass. 106.

³ *Potter v. Calumet Elect. St. R. Co.*, 158 Fed. Rep. 521; *Postal Tel. Cable Co. v. Newport (Ky.)*, 76 S. W. Rep. 159. In *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, it was held that when an ordinance granting the right to use the streets has been accepted and acted upon by a street railway company, it cannot resist the enforcement of conditions or restrictions thereon on the plea that the ordinance is *ultra vires* the municipality. In *People v. Suburban*

§ 1230. **Municipal Consent; Validity of Conditions.** — When the *legislature* has regulated the terms and conditions upon which the streets of the municipality may be used by a railroad or other public service corporation, the city council or other officials charged with the duty of giving municipal consent to the construction of the public utility *cannot impose other or different conditions* which are inconsistent with those prescribed by the legislature.¹ It has been said that in adjusting the terms of a municipal consent to, or of a grant of a location for, a street railroad or other public utility, the municipal officers act as public officers exercising a *quasi-judicial* authority, and not as agents of the municipality driving a bargain with the promoters of a projected railway or other utility.² But the courts have never attempted to define or specifically limit the character or

R. Co., 178 Ill. 594, where the validity of a *condition as to the rate of fare* to be charged imposed by the ordinance giving the consent of the municipality was involved, the court held that having accepted the ordinance and having enjoyed the benefits, the railroad company could not escape performance of its undertaking by setting up that it was *ultra vires* the municipality or the company. The right given to the company to use the streets of the municipality was held to be a sufficient consideration for the undertaking of the company to comply with the conditions of the ordinance as to the charge for transportation. In *Chicago General R. Co. v. Chicago*, 176 Ill. 253, an ordinance granting consent to the use of the streets for street railway purposes required the payment annually of a *license fee on each car* and an *annual tax* on each mile of railroad. It was held that even if the condition were *ultra vires* the city, the railway company was estopped to deny its validity.

¹ Appeal of Central R. & Elect. Co., 67 Conn. 197; *Bayonne v. East Jersey T. & T. Co.*, 61 N. J. L. 136; *Matter of Kings County Elev. R. Co.*, 105 N. Y. 97; *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, aff'g 13 N. Y. App. Div. 279; *Dusenberry v. New York, W. & C. Traction Co.*, 46 N. Y. App. Div. 267; *Missouri River Tel. Co. v. Mitchell*, 22 S. Dak. 191; 116 N. W. Rep. 67. See also *Dakota Cent. Tel. Co. v. Huron*, 165 Fed. Rep. 226. Where by statute a city whose consent is required by the Constitution is directed to sell the franchise or privilege to construct a street railway at auction

for a percentage of the receipts thereof, the city cannot attach a condition to the sale that a cash payment shall be made. *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, aff'g 13 N. Y. App. Div. 279.

When the statute prescribes certain conditions upon which the franchise or privilege may be exercised and authorizes the municipality to impose "*further conditions*," the further conditions which may be imposed relate to matters not fully covered by the statute itself and which are *ejusdem generis* with those specifically enumerated. *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, 153, aff'g 13 N. Y. App. Div. 279.

A statute of *New York* provided that the municipal authorities *shall sell at auction* the franchise or privilege of using the streets for street railways "to the bidder who will agree to give the largest percentage per annum of the gross receipts, with adequate security." Under the act the municipal authorities *may grant or withhold consent*, and may impose any conditions in their discretion upon which their consent will be given. But if certain conditions be specified by the authorities and inserted in the notice of sale, and the right or privilege be sold, no other and further conditions can be exacted or imposed upon the successful bidder, who may compel by *mandamus* the proper officer of the city to accept and approve of a bond containing only the proper conditions. *People v. Barnard*, 110 N. Y. 548.

² *Clinton v. Worcester Consol. St. R. Co.*, 199 Mass. 279.

nature of the conditions which a municipality may attach to its consent, or to the grant of the franchise or right when its power to do so is left without restriction. They appear to have considered each case upon its own circumstances, and have decided the question of the authority of the municipality to adopt the condition and its reasonableness or unreasonableness upon the facts of the particular case. Among the conditions which have been sustained as valid and reasonable under such circumstances are stipulations *limiting the duration* of the right or privilege granted,¹ requiring the use of alleys for gas pipes, instead of the city streets,² requiring the grantee of the franchise to permit other companies to run their cars upon a portion of the grantee's tracks,³ requiring a street railway company

¹ Blair v. Chicago, 201 U. S. 400, 458; Louisville Trust Co. v. Cincinnati, 76 Fed. Rep. 296; Knoxville v. Africa, 77 Fed. Rep. 501, 508; Indianapolis v. Consumers' Gas Trust Co., 144 Fed. Rep. 640, 644; City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. Rep. 157; Coverdale v. Edwards, 155 Ind. 374, 381. In giving its consent to the use of the city streets for gas pipes and mains, the city may stipulate that, after a specified time, it shall have the right to purchase the plant, &c., at an appraised value. Indianapolis v. Consumers' Gas Trust Co., 144 Fed. Rep. 640.

² In Traverse City Gas Co. v. Traverse City, 130 Mich. 17, a stipulation or condition that the main pipes of a gas company should be laid in alleys wherever practicable and when so ordered by the council, was sustained, and the company was required to lay its mains in the alleys, although large additional expense was thereby incurred and the alleys were not so well adapted to the purpose as the streets.

³ A condition in a municipal grant of the right or privilege to a street railway company to use the streets provided that *any other company should be allowed to run its cars* upon a portion of the road for which the privilege was granted upon the payment of such reasonable compensation as the city council should prescribe. It was held that the council could prescribe the compensation, and that, without proof that the amount of compensation so prescribed was inadequate, the grantee of the right was not entitled to an injunction restraining the other company from using its tracks. Kinsman St. R. Co. v. Broadway & N. St. R. Co.,

36 Ohio St. 239. See also Canal & C. R. Co. v. Orleans R. Co., 44 La. An. 54; Union Depot R. Co. v. Southern R. Co., 105 Mo. 562; Toledo Consol. St. R. Co. v. Toledo Elect. St. R. Co., 50 Ohio St. 603; Jersey City & H. H. R. Co. v. Jersey City & B. R. Co., 21 N. J. Eq. 550. A street railroad company by accepting the consent of the municipality containing a condition or reservation to the city of the power to condemn portions of its tracks for the joint use of other companies, when deemed necessary, upon the payment of just compensation, cannot repudiate the condition upon the ground that the city has no statutory power of eminent domain for such purpose. The city may authorize another company to condemn in the manner provided by the State law. Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 Fed. Rep. 347.

But in *Pennsylvania*, the Supreme Court has held that a statute which authorizes one street railway company, subject to the payment of compensation, *to use the tracks of another railroad company* for twenty-five hundred feet, is unconstitutional and beyond the power of the legislature, because it is simply a taking from one company of property belonging to it and transferring it to another company for precisely the same use, but for the profit of the second company. Philadelphia, M. & S. St. R. Co.'s Petition, 203 Pa. 354; Commonwealth v. Uwehlan St. R. Co., 203 Pa. 608; Commonwealth v. Bond, 214 Pa. 307. See also Harrisburg, C. & C. T. R. Co. v. Harrisburg & M. Elect. R. Co., 177 Pa. 585; Altoona St. R. Co. v. City Passenger R. Co., 209 Pa. 281. Hence it has

to pay the cost of paving the portion of the street occupied by its tracks,¹ or to pave and maintain the entire street,² or to water a street over which street railway tracks are laid between certain dates,³ for the payment to the municipality of compensation for the use of the streets,⁴ for the payment to the municipality of a percentage of the gross earnings from the exercise of the franchise or privilege,⁵ or a

been held that when the municipality has, by condition attached to its consent, reserved the right to authorize another street railway company to construct its tracks in a street, it cannot authorize that company to straddle the existing tracks. This is in effect an appropriation of these tracks to the use of the second railroad company in violation of the principles declared in the preceding decisions. *Commonwealth v. Bond*, 214 Pa. 307. *Sed quare*, as to these decisions.

¹ *Rutherford v. Hudson River Tracton Co.*, 73 N. J. L. 227; *McKeesport v. Pittsburg, M. & C. R. Co.*, 213 Pa. 542.

² *Worcester v. Worcester Consol. St. R. Co.*, 192 Mass. 106.

³ *Newcomb v. Norfolk W. St. R. Co.*, 179 Mass. 449. A requirement in the consent to the use of county bridge by a street railway that the railway company should bear the expense of strengthening the bridge, assume the cost of repairs, and pay a reasonable rental, sustained as valid. *Berks County v. Reading City Passr. R. Co.*, 167 Pa. 102.

⁴ *Chicago Gen. R. Co. v. Chicago*, 176 Ill. 253; *Columbus v. Columbus Gas Co.*, 76 Ohio St. 309; *Providence v. Union R. Co.*, 12 R. I. 473. An act of the legislature authorized a street railway company to construct its railway along such streets of the city of Covington as "it may consider beneficial to its interest, and to which the city council may consent, authority for which is hereby given to said council to make an agreement therefor."—held, to authorize an agreement between the company and the city by which, among other things, the former agreed to pay to the latter an annual *bonus*, or compensation, for the consent of the city. *Covington Street R. Co. v. Covington*, 9 Bush (Ky.), 127.

In giving its consent municipality may require the payment of an annual tax for each mile of track; *Chicago General Elect. Co. v. Chicago*, 176 Ill. 253; also an annual license fee upon

each car operated on the street railroad. *Byrne v. Chicago Gen. Elect. Co.*, 169 Ill. 75. A provision in a municipal ordinance granting street rights to a street railway company that the company shall pay to the city annually a sum "as a license fee for each and every car run and operated upon said railway" does not impose a tax upon the railway company, but exacts a consideration for the franchise. *Newport v. South Covington & C. St. R. Co.*, 89 Ky. 29. A city may exact as a condition of a grant of a location of a street railway under the *New Jersey* statute, the payment of the expenses of the hearing of the application, of publication of notice thereof, &c., and a reasonable counsel fee. *Hutchinson v. Belnar*, 61 N. J. L. 443.

⁵ *Chicago v. Chicago Tel. Co.*, 230 Ill. 157; *Lancaster v. Briggs*, 118 Mo. App. 570; *Jamestown v. Home Tel. Co.*, 125 N. Y. App. Div. 1. A stipulation or condition requiring the payment annually of a percentage of the gross receipts from the operation of a street railway "is in the nature of a covenant on the part of the street railway company that it will pay a money consideration for the grant," and an action therefor is barred by the statute applicable to ordinary contract debts, each year's payment being a separate debt or obligation. *Asbury Park & S. G. R. Co. v. Neptune*, 73 N. J. Eq. 323; 67 Atl. Rep. 790. As to method of computing the percentage of the gross receipts where a part only of a single and entire railroad is within the municipality, see *Asbury Park & S. G. R. Co. v. Neptune*, 73 N. J. Eq. 323; 67 Atl. Rep. 790. As to meaning of the phrase "percentage of net income" when used in a statute requiring the payment thereof to the city in respect of a franchise, see *New York v. Manhattan R. Co.*, 192 N. Y. 90, aff'g 119 N. Y. App. Div. 240; *New York v. Manhattan R. Co.*, 143 N. Y. 1. A condition in a consent to the construction of telephone lines in the city streets that the company will pay to the city a

percentage of the dividends of the corporation.¹ Stipulations or conditions *fixing or regulating the charge* to be made by the public service corporation to persons making use of its utility are also generally sustained as valid and reasonable. Thus, in giving its consent, a city may fix the maximum rates to be charged by a telephone company for service within the city,² and it may require a street railroad company to charge a designated rate of fare.³

§ 1231. **Time of Completion; Forfeiture and Damages for Breach of Condition.** — A condition or restriction attached to a municipal consent to the construction of a railroad or other public utility in the city streets, that the work of construction shall be completed and the utility put in operation *within a prescribed period*, is generally recognized as beneficial to the public, and reasonable and valid.⁴

percentage of its gross receipts, creates a *purely contractual right* in the city and does not impose a public duty upon the company. Hence, payment of the percentage cannot be enforced by *mandamus*. *Chicago v. Chicago Tel. Co.*, 230 Ill. 157.

¹ *Allegheny v. Millville, E. & S. St. R. Co.*, 159 Pa. 411.

² *Rochester Tel. Co. v. Ross*, 125 N. Y. App. Div. 76, *aff'd* 195 N. Y. 429; *Moberly v. Richmond Tel. Co.*, 126 Ky. 369; 103 S. W. Rep. 714. A provision of a statute relating to steam railroads that the company shall not use its railroad "for street railroad purposes or for the purpose of carrying passengers for a consideration from one point to another in the same city," does not confer upon the public the right to travel within the city free of charge, but is intended to prevent competition between steam railroads organized under the statute and local street railways within the city. *Buswell v. Southern Pacific Co.*, 114 Cal. 445.

Allegheny v. Millville, E. & S. St. R. Co., 159 Pa. 411. In granting a location under the *Massachusetts* statute, the city may require *school children* to be carried by a street railway company at *half fare*. *Clinton v. Worcester Consol. St. R. Co.*, 199 Mass. 279. See also *Interstate Cons. St. R. Co. v. Massachusetts*, 207 U. S. 79, *aff'g* 187 Mass. 436. A city may require a street railway company to carry passengers for a *single fare* to and from points beyond the *termini* of the proposed railway over other street railways owned by other companies.

People v. Barnard, 110 N. Y. 548. But compare *Chicago City R. Co. v. Chicago*, 142 Fed. Rep. 844. A village in granting a suburban street railway company the right to use its streets may prescribe as a condition that the fare between the village and points in the city shall not exceed that charged patrons from another town on the line. *People v. Suburban R. Co.*, 178 Ill. 594. The highway commissioners of a town may require one fare and transfers to connecting lines as a condition of giving a consent to a street railway. *Gaedeke v. Staten Island M. R. Co.*, 43 N. Y. App. Div. 514. A condition in a franchise requiring transfers enforced, and *mandamus* held to be the proper remedy. *Richmond R. & Elect. Co. v. Brown*, 97 Va. 26. Condition in grant of franchise requiring company to carry "pupils in any school" at reduced rates, construed to include students attending a business college; *Northrop v. Richmond*, 105 Va. 335; and also students attending *Richmond College*. *Northrop v. Richmond*, 105 Va. 341.

⁴ *Grey v. New York & P. Traction Co.*, 56 N. J. Eq. 463; *South Shore Traction Co. v. Brookhaven*, 116 N. Y. App. Div. 749; *Plymouth v. Chestnut Hill & N. R. Co.*, 168 Pa. 181; *Minersville v. Schuylkill Elect. R. Co.*, 205 Pa. 394; *Spring City v. Montgomery & C. Elect. R. Co.*, 35 Pa. Super. Ct. 533; *Keystone State T. & T. Co. v. Ridley Park*, 28 Pa. Super. Ct. 635.

A city which has the power to grant the right to use a street for street railway purposes may do so with the pro-

The effect of this condition appears to be to create a defeasance if the railroad or other public utility should not be completed and put in operation within the prescribed period, or it may be regarded as limiting the consent of the municipality in duration to the prescribed period, unless within that period the public utility should be constructed and operated.¹ The period prescribed for completion and operation has been regarded as of the essence of the contract or grant, and it has been held that upon the expiration of that period without completion, the municipality may begin proceedings to remove the railroad or other public utility from the city streets.²

viso that the tracks shall be removed on sixty days' notice, and the company accepting and acting on the grant is bound by the condition. *Rapid R. Co. v. Mt. Clemens*, 118 Mich. 133. An ordinance which granted the right to construct a single track street railway with all necessary and convenient tracks for turnouts, side tracks, curves, and switches, wherever the same might be necessary, required the railway to be constructed and put in operation within one year. It was held that the time limited did not apply to the construction of turnouts, and that additional turnouts might be constructed to accommodate increased traffic from time to time as required. *Detroit Citizens' St. R. Co. v. Detroit Board of Public Works*, 126 Mich. 459.

A city, under delegated authority, granted the right to lay street railway tracks on a street under conditions which prescribed that the cars should be drawn "by horse or other animal power" only. By reason of the grade, animal power was found to be impracticable, and there was no user of the right in compliance with the terms of the grant for a period of twenty-two years. It was held that the right or easement granted ceased when its use became impossible under the terms of the grant. *Southern R. Co. v. Memphis*, 97 Fed. Rep. 819. *Lurton, C. J.*, said: "The fact that the track has not, in twenty-two years of experiment, been used in the only way admissible under the grant, and the conceded fact that it cannot be made available in the only way allowable, operate to terminate the easement. Without regard to any question of abandonment by nonuser, the impossibility of enjoying the easement granted operates to bring it to an end through the inherent limitation of the grant itself."

¹ *Grey v. New York & P. Traction Co.*, 56 N. J. Eq. 463. See also *Keystone State T. & T. Co. v. Ridley Park*, 28 Pa. Super. Ct. 635. A consent to a street railway declared that if it was not built within a specified time, "then this franchise and all rights thereunder to be null and void and of no effect." It was held that upon a breach of condition by failure to construct within the prescribed time, no action on the part of the township was required to complete the forfeiture. *Millcreek v. Erie R. T. R. Co.*, 209 Pa. 300. Authority from a city to construct a street railway on a street at any time within six months after the authority is granted must be exercised, if at all, before the expiration of the time limited. The authority conferred is a mere license, and no act of revocation or declaration of forfeiture is required to terminate it in the event that it is not availed of in accordance with its terms. *Atchison St. R. Co. v. Nave*, 38 Kan. 744. A proviso in a grant of the right of way, that a horse railway shall be completed within a specified time, is a condition subsequent; the right of way vests at once, subject to being defeated by the city for breach of the condition. *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

² *Plymouth v. Chestnut Hill & N. R. Co.*, 168 Pa. 181; *Minersville v. Schuylkill Elect. R. Co.*, 205 Pa. 394.

In *Wisconsin*, street railway companies are incorporated by general law for the sole and express purpose of operating such railways under a grant of the right from a city. In this State it is held that a municipal ordinance granting a street railway franchise to occupy and use the streets has the force and effect of a statute of the State; that the exercise of the rights conferred thereby is necessary to the corporate

For the purpose of giving an effectual remedy for a failure to complete construction within the prescribed period, or for any other breach of the conditions attached to the consent, the municipality, in giving its consent, may expressly *reserve the right to repeal* the ordinance and revoke the consent for breach of condition; and when the ordinance contains such a provision, the consent may be revoked, or a forfeiture of the right declared by the municipality, without a judicial determination of a breach of the condition.¹ It has also been

existence; and that the *attorney-general may maintain an action in the name of the State* to vacate the charter of the company, or annul its existence for a breach of the ordinance granting the right to use the streets. *State v. Madison St. R. Co.*, 72 Wis. 612. See also *Wright v. Milwaukee Elect. R. & L. Co.*, 95 Wis. 29, 36; *State v. Portage City Water Co.*, 107 Wis. 441.

Effect of delay by city in applying for injunction when assent has been given, but conditions have not been complied with. *Northern Cent. R. Co. v. Baltimore*, 21 Md. 93; *Clinton v. Cedar Rap. & Mo. R. R. Co.*, 24 Iowa, 455. A borough is not guilty of laches by an indulgence as to time in commencing proceedings, where the delay did not lead to any change in the situation to the prejudice of the street railway company. *Minersville v. Schuylkill Elect. R. Co.*, 205 Pa. 394. In *Pacific R. Co. v. Leavenworth*, 1 Dillon C. C. R. 393, an ordinance and contract, special in their terms, were construed to *give the city a right to re-enter and take possession of the street, and remove the railroad track, on the failure of the company to comply with the conditions of the ordinance granting to it the right of way.* The case also considers the principles which will, in such cases, govern the chancellor in granting or denying a temporary injunction against the city, to restrain it from taking possession of the street, and removing the rails, and preventing the running of the trains of the company. A *private citizen* cannot take advantage of a breach of the condition of a municipal grant limiting the time for the completion of a railroad. The stipulation is a matter of contract, of a breach of which the city alone can complain. *Hovelman v. Kansas City H. R. Co.*, 79 Mo. 632.

¹ *Bellville v. Citizens' Horse R. Co.*, 152 Ill. 171; *Union Street R. Co. v. Saginaw Circuit Judge*, 113 Mich. 694.

But a reservation in an ordinance granting a street railway franchise of the right to repeal it in case of a breach of condition, does not justify a repeal without assigning a breach, or when in fact there has been none. *Missouri & K. I. R. Co. v. Olathe*, 156 Fed. Rep. 624. By virtue of such a stipulation the city cannot declare a forfeiture to its own use of the railroad or property of the grantee of the consent. *Bellville v. Citizens' Horse R. Co.*, 152 Ill. 171. But the grant or consent may be so framed as to *forfeit the property of the company in the streets to the municipality.* A city granted to a street railway company the privilege of constructing a street railway upon certain conditions. The ordinance also provided: "This franchise is granted upon condition that the company faithfully fulfill the requirements herein expressed, and should the company fail therein, or wilfully abandon such road, and neglect or refuse to operate it, then this franchise to become null and void. Said company agree that they *will forfeit said road to the city* of Tower in one year after said company cease to operate said road." The company became insolvent and suspended operation of the railroad for over a year. It was held that the condition was valid and enforceable; that the forfeiture included not only the franchise, but also the tracks, &c., in the streets; and that the city, whether it had the power to declare a forfeiture and take possession by its own act or not, could maintain legal proceedings to enforce the forfeiture. *Tower v. Tower & S. St. R. Co.*, 68 Minn. 500. In granting a franchise to a street railway company under authority delegated from the legislature, a city may reserve the right to *forfeit the street rights of the company in case of its failure to pay the cost of paving between the tracks, and the inability of the company to make such payment is not a legal excuse for*

generally held that the municipality in giving its consent *may exact* from the company *the deposit of a sum of money to be forfeited to the municipality, or a bond conditioned for the payment to the municipality of a sum of money, in the event of a breach by failure to construct within the prescribed period.*¹ Although the courts have recognized the fact that the damage suffered by a total failure to construct results to the public, and not to the municipality in its corporate character, yet they have uniformly regarded the deposit or the penalty of the bond as in the nature of liquidated damages agreed

the default. *Union Street R. Co. v. Saginaw Circuit Judge*, 113 Mich. 694.

In *New York* it has been held that although a consent to the construction of a street railroad provided that if the road was not completed by a specified date "then this franchise shall be forfeited and the rights and privileges granted by it shall cease and determine without any action or proceeding in law or otherwise," was broad enough in its terms to work a forfeiture without legal proceedings, it would not be given that force and effect; and that the company might, in an action to establish a forfeiture, show facts excusing non-performance on its part, or a waiver of the condition, or estoppel of the municipality. *Dusenberry v. New York, W. & C. Traction Co.*, 46 N. Y. App. Div. 267. For construction of *California* statute providing for the forfeiture of street franchises for failure to comply with the conditions of a municipal grant, see *Los Angeles R. Co. v. Los Angeles*, 152 Cal. 242. Right to forfeit privileges for breach of condition of a municipal grant *held to be waived* by acts of the city recognizing the franchise for several years after the right to declare a forfeiture had accrued. *Commercial Elect. L. & P. Co. v. Tacoma*, 17 Wash. 661. A failure to complete a street railroad within the prescribed time *is excused when legal cause for the delay is shown, e. g., that construction was prevented by injunction.* *Newport News & O. P. R. & E. Co. v. Hampton Roads R. & E. Co.*, 102 Va. 795.

In *Illinois* it is held that when a condition is attached to a grant of the right to use the streets for telephone purposes, that the poles and wires shall be so erected as to avoid danger to the public, a breach of the condition is a vital matter justifying the termination of the rights of the telephone company; and when the

ordinance does not provide that the breach shall be a ground for repeal or revocation of the consent, *quo warranto* is a proper remedy to determine whether the breach is of such a vital character as to require the termination of the contract, and also to determine whether there has been a breach of the condition. *People v. Central Union Tel. Co.*, 232 Ill. 260. *Mandamus* by or on the relation of a municipality may be maintained to compel the performance of conditions imposed by the municipality in a grant of street railway rights under delegated authority. *Grosse Pointe v. Detroit & L. St. C. R. Co.*, 130 Mich. 363. When a condition is attached to a consent to the use of the streets for street railroad purposes limiting or regulating the rates of fares to be charged, the condition is for the benefit of the public, and any citizen of the municipality may by *mandamus* compel its performance. *People v. Suburban R. Co.*, 178 Ill. 594.

¹ *South Shore Traction Co. v. Brookhaven*, 116 N. Y. App. Div. 749. In *Phoenix v. Gannon*, 195 N. Y. 471, rev'g 123 N. Y. App. Div. 93, it was held that although the statute only authorizes the construction of street railroads by a corporation, the grant of a franchise or municipal consent to an individual or his successors or assigns is not void, but may be assigned to a corporation, and a bond conditioned on the carrying into effect the franchise or right granted may be enforced. And see *Geneva & W. R. Co. v. New York Cent. & H. R. Co.*, 163 N. Y. 228, where it was held that the consents of abutting owners required by the *New York Constitution* may be given to individual promoters of a street railroad company and may be assigned to a corporation upon its organization.

upon in advance by the parties and recoverable by the municipality as such without evidence of any actual loss.¹

¹ *Brooks v. Wichita*, 114 Fed. Rep. 297; *Hattersly v. Waterville*, 26 Ohio Cir. Ct. 226; *Salem v. Anson*, 40 Oreg. 339.

In *Clark v. Barnard*, 108 U. S. 436, 460, a statute granting to a steam or commercial railroad its right of way required the deposit of \$100,000 with the State treasurer, for the purpose of securing the construction of the railroad. It was held that the deposit was in the nature of a statutory penalty to secure the performance of a statutory duty; that the penalty could not be discharged on payment of such damages as might be proved to have arisen from non-performance; and that it was not necessary for the State to show any actual damage or injury from the breach in order to be entitled to recover when the breach was proved. A contract for the construction of a street railway in a town stipulated that, for a failure to complete, the contractor should forfeit the sum of \$500, and that sum was deposited for the purpose of securing compliance with the condition. It was held that the stipulated amount was to be regarded as liquidated damages, and not as a penalty; that as no damage could be recovered by the municipality in its corporate character, the only loss being sustained by the public in general, and as the parties must have known that it was impracticable to measure the damage or injury to the public by any rule of damages, it was reasonable to suppose they intended to fix the precise damages recoverable for a breach. *Nilson v. Jonesboro*, 57 Ark. 168. See also to the same effect, *Eureka Light & I. Co. v. Eureka*, 5 Kan. App. 669.

An ordinance required the deposit of a check for \$2,000 by the grantee of an electric railway franchise, the same to be returned if the railroad should be completed within the stipulated time, and, if not completed, then the check should be collected and the proceeds placed in the village treasury. The work of construction was never begun. It was held that the amount of the check should be regarded as stipulated damages and not as a penalty, and that it could not be recovered from the village. *Whiting v. New Baltimore*, 127 Mich. 66, 71. *Long, J.*,

said: "It may be conceded that the village in its corporate capacity suffered no damages by failure to build the road; but the contract was made by the corporate officers for and in the interests of the inhabitants, and for such damages they could and did agree with Mr. Dyar" (the grantee of the franchise). See also to the same effect *Detroit v. People's Tel. Co.*, 135, Mich. 696; *Springwells v. Detroit*, P. & N. R. Co., 140 Mich. 277. An ordinance granting the municipal consent to the construction of a street railway required the deposit of \$10,000 to secure completion within one year. In the ordinance this deposit was described as liquidated damages and not as penalty. It was held that the deposit should be treated as liquidated damages and not as penalty, and that it could not be recovered from the municipality. *Peekskill, S. C. & M. R. Co. v. Peekskill*, 21 N. Y. App. Div. 94, aff'd 165 N. Y. 628. An application by a street railway company to a city for a right of way was refused, but was afterwards granted by the city on the agreement of the railroad company to extend its railroad for a certain distance beyond the municipal limits. A bond for \$50,000 was given conditioned for the performance of the grant. In an action which alleged the breach of the condition by reason of the failure of the company to extend its railroad beyond the municipal limits, a recovery on the bond was sustained, and the court held that the bond was not *ultra vires* the railroad company; that the city had power to make the contract and exact the bond; and that the amount named was stipulated damages and not a penalty. *Indianola v. Gulf, W. T. & P. R. Co.*, 56 Tex. 594. But see *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398; s. c. 91 Tex. 17, where this decision is explained and limited. In connection with a grant of the right to use the streets for street railway purposes, a deposit was made with the municipality to guarantee performance. This deposit was to be repaid to the railway company on performance of certain specified conditions. It was held that the railway company could only recover the money by showing performance of the conditions, or a

§ 1232. **Railroads in Streets; Consents of Abutters.** — We have referred above¹ to the provision of the New York Constitution, which declares that no law shall authorize the construction or operation of a street railroad "except upon the condition that the consent of the owners of one-half in value of the property bounded on" that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained. Although no other State appears to have adopted such a constitutional provision as to abutters, statutory enactments are to be found in some States which require the concurrence of a majority of the property owners, usually computed by frontage, before a franchise for a street railway becomes effective. While many points of similarity between the constitutional provision of New York and these statutory enactments are to be found, important differences also exist. Thus, the provision of the New York Constitution has never been construed to imply that the consents of abutters shall be a prerequisite to municipal action, while the statutory enactments frequently provide that the right of way shall not be granted by, or the consent of, the municipality given, until the consent in writing of the owners of the greater part of the frontage on the street on which the railway is to be constructed be obtained. This distinction between the two provisions should be kept in view, as it may be the explanation of divergences which have arisen in the course of judicial decision. Whether the *consent of a majority of the abutters* be required under the constitutional provision of New York, or under a statutory enactment such as we have referred to, a *compliance* with the requirement *is essential* to the validity of the franchise or right to use the streets.² In some jurisdictions where

legal excuse for non-performance thereof. *St. Joseph County v. South Bend & M. St. R. Co.*, 118 Ind. 68.

¹ *Ante*, § 1223.

² *Beeson v. Chicago*, 75 Fed. Rep. 880; *McCartney v. Chicago & E. R. Co.*, 112 Ill. 611; *Chicago Dock Co. v. Garrity*, 115 Ill. 155; *Hunt v. Chicago, H. & D. R. Co.*, 121 Ill. 638; *Doane v. Chicago City R. Co.*, 160 Ill. 22; *Chester v. Wabash, C. & W. R. Co.*, 182 Ill. 382; *McGann v. People*, 194 Ill. 526; *People v. Decatur, S. & St. L. R. Co.*, 120 Ill. App. 229; *Currie v. Atlantic City*, 66 N. J. L. 671, rev'g 66 N. J. L. 140; *Mercer County Traction Co. v. United New Jersey R. & C. Co.*, 64 N. J. Eq. 588; *Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540, aff'g 15 N. Y. App. Div. 195; *Roberts v. Easton*, 19 Ohio St. 78.

Compliance with the requirement of the *Nebraska* Constitution that a street railroad be sanctioned by a vote of the electors is mandatory; but where a vote has been had and the railroad has been constructed and operated, even the State will be estopped to attack the validity of the proceedings pursuant to which the vote was given. *State v. Lincoln St. R. Co.*, 80 Neb. 333; *State v. Citizens' St. R. Co.*, 80 Neb. 357. When the franchise of an existing street railway has expired, a new company which seeks to construct and operate upon the same route must obtain the consent of the municipality to the use of the streets. *Isom v. Low Fare R. Co.*, 29 Ohio Cir. Ct. 583. Under a general act declaring that cities have no power to grant the use of streets to railways except upon the petition of

the consent of the abutters is required as a prerequisite to municipal action, it has been held that the right to give or withhold the consent is conferred upon the abutting property owners for a public or *quasi*-public purpose; that the power is to be exercised for the common benefit of the neighborhood, or at least of the property affected by the construction of the railroad; and that individual considerations should not be permitted to influence the giving or withholding of the statutory consent. Hence, it has been held that it is against public policy to induce or procure the consent by a pecuniary or valuable consideration enuring to the exclusive benefit of an individual property owner.¹ But in New York, under the

the owners of one-half of the frontage upon the street, it is held that the power lies dormant until the petition is made. *Hunt v. Chicago Horse & D. R. Co.*, 121 Ill. 638. Statutory requirements as to the *form and manner* in which the consents of abutters shall be executed *must be substantially complied with*. *Mercer County Traction Co. v. United New Jersey R. & C. Co.*, 64 N. J. Eq. 588.

Under the provision of the *New Jersey* statute that permission to construct a street railway shall not be granted by the city council without the consent in writing of the owners of at least one-half of the frontage of the property abutting on the street on which the railway is to be constructed, the fact that an ordinance has been passed granting the consent of the municipality is *prima facie* evidence that the requisite consent of the abutters has been given. The city council may resort to any evidence it pleases to establish the fact that the consent has been given, and it is presumed to have ascertained the existence of the fact as a prerequisite to its action. *Mercer County Traction Co. v. United New Jersey R. & C. Co.*, 64 N. J. Eq. 588. In *Roberts v. Easton*, 19 Ohio St. 78, it was held that the action of the city council in giving permission under such a statute did not conclude the property owner on the question whether the requisite majority had assented. In some cases, it is held that a statute which forbids the city council to consent to the use of streets for street railways without the consent of property owners thereon, recognizes in the *abutters such interest* as entitles them to an *injunction* against the construction of the road

where the council granted permission without the requisite consent of the abutters being obtained. *Beeson v. Chicago*, 75 Fed. Rep. 880; *Roberts v. Easton*, 19 Ohio St. 78. In *New York*, the right to question the validity of consents given for the purpose of complying with the constitutional requirement is *limited to the State and to the property owners* affected. Another railroad company cannot attack the validity of the consents for the purpose of defeating an application to cross its tracks. *Geneva & W. R. Co. v. New York Cent. & H. R. R. Co.*, 163 N. Y. 228, 236, rev'g 24 N. Y. App. Div. 335, and citing *Jones v. Tonawanda*, 158 N. Y. 438. Where the statute required the consent of the owners of two-thirds of the property abutting on the street, it was held that valid consents for two-thirds of the property were not affected by the fact that *other consents were obtained by fraud*. *Ecorse v. Jackson*, A. A. & D. R. Co., 153 Mich. 393.

¹ Under the *Illinois* statute which prohibits the city council from granting the use of streets for railroad tracks "except upon a petition of the owners of the land representing more than one-half of the frontage of the street," the consent of the property owner *cannot be purchased for money*, or for a consideration accruing to the exclusive benefit of the property owner. *Doane v. Chicago City R. Co.*, 160 Ill. 22. See also *Farson v. Fogg*, 205 Ill. 326; *Brieske v. North Chicago St. R. Co.*, 82 Ill. App. 256. The reasoning of the court in reaching this conclusion is that the streets are vested in the city for the public use and benefit; that the council should only grant the right to use them for the public benefit, and

provision of the Constitution of that State, and the statutes enacted in conformity thereto, the courts do not appear to give any *quasi-*

should withhold it if the public will be damaged; that the consent or petition of the abutters is evidence that the construction of the railroad will be for the public benefit; that such consent or petition is intended to influence municipal action, and the abutters are therefore charged with a duty to the public which cannot be influenced by pecuniary considerations. In *Doane v. Chicago City R. Co.*, 160 Ill. 22, cited *supra*, it was held that an agreement by a street railway company not to lay a second track in the street without the consent of the particular abutter was invalid as an attempt by the company to bind itself not to perform a duty which the public interests might require of it in the future. In *Farson v. Fogg*, 205 Ill. 326, it was held that a contract by a railway company with an abutter that it would pave the street according to certain specifications attached to the contract, could not be specifically enforced at the instance of the abutter in the absence of municipal action directing the paving in conformity to such specifications or consenting thereto. It was also held that neither the abutter nor the railroad company had any right to interfere with the paving of the street without municipal authority.

In *New Jersey* it has been held that the consent of the abutters under the statute of that State is not a property right, but only a special statutory limitation on the authority of the municipality. *Paterson & S. L. R. Co. v. Wostbrock* (N. J.), 56 Atl. Rep. 698. Hence, in an action which was brought upon a note given by a street railway company as the consideration for the consent of an abutter, it was held that the note was invalid as being given for a consideration *contrary to public policy*. The court declared that the right to consent is *quasi-governmental* in its character, to be exercised for the benefit of all concerned, and is not an ordinary property right which the abutting owner can dispose of or sell as he chooses and with regard only to his own interests. *Montclair Military Academy v. North Jersey St. R. Co.*, 70 N. J. L. 229, rev'g 65 N. J. L. 328. In this case, after referring to the fact that the construction of a street railway does not confer the right to com-

pensation upon an abutter, *Dixon, J.*, said: "Consequently, when the legislature required the consent of a certain portion of the abutting owners to be obtained before such a railway could be built in front of their property, a gratuitous privilege or power was delegated to them. The reason for such delegation is not obscure. Abutting owners have a certain relation to the public streets in front of their property, which, while it is subordinate to the public easement, yet places them on a footing unlike that of the rest of the community. Because of this relation, special advantages and disadvantages accrue to them from street railways, and the legislative design clearly was that unless it should be rendered probable that these advantages would exceed the disadvantages with regard to any proposed street, the railway should not be there laid. This probability was to be indicated by the consent of the owners of at least one-half of the abutting land. For the decision of the matter thus contemplated, the legislature treated these owners as a class, every member of which had similar interests to subserve, interests that in some degree were common to all. Properly to meet the confidence thus reposed, it was incumbent on each member to bear in mind and be influenced by these common interests only, so that his judgment would be as fair toward his neighbors as it was toward himself. To permit any one of the class to barter for private and exclusive gain this power over the concerns of his fellows would be subversive of the benign purpose of the legislature in delegating it." See also *St. Columba's Church v. North Jersey St. R. Co.* (N. J. Eq.), 70 Atl. Rep. 692.

But in *Ohio*, under a statute substantially similar in its tenor and effect which required the consent of the abutting owners of a majority of the frontage on the street to be obtained and produced before the ordinance granting the right should be enacted by the council, it was held that the consent of the abutting owners might be given for a valuable consideration from the street railway company to the lot-owner, and that the purchase of these rights was not against public

governmental effect to the consent of the abutter. Thus, it has been held that the consent of an abutting owner constitutes a species of property or muniment of title,¹ that these consents may be assigned by the person or corporation to whom they are given,² and that the giving of a consent operates as a release, discharge, or abandonment of the easements of the abutter, so far as they may be taken by the construction and operation of an elevated railroad,³ and when the

policy. *Hamilton, G. & C. Traction Co. v. Parish*, 67 Ohio St. 181. *Burket, C. J.*, said: "Each abutting lot-owner is free to aid in conferring such jurisdiction, and free to withhold such aid. His actions cannot be controlled in that regard by others on the street, nor by courts of justice in their behalf. Such a condition, such consent, in the nature of things cannot be appropriated under the power of eminent domain. The consent must be given or withheld at the option of the lot-owner. He cannot be forced to give it, nor forced to withhold it. Section 3439, Revised Statutes, provides for this written consent, and it imposes no conditions or restrictions, but leaves the lot-owner free to give or withhold his consent. And section 3440 provides that 'nothing herein contained shall affect the rights of property owners to give or withhold their consent.' So that our statutes, while providing for the giving or withholding of the same, impose no conditions or limitations on such power, but expressly provide that the statutes shall not affect the rights of property owners to give or withhold such consent."

¹ *Matter of Brooklyn Union Elev. R. Co.*, 112 N. Y. 61, 74.

² *Geneva & W. R. Co. v. New York Central & H. R. R. Co.*, 163 N. Y. 228. The consents of abutters to the construction of a street railroad may be made to the promoters and their legal representatives and assigns, and may be validly assigned by the promoters to the company after its incorporation. *Geneva & W. R. Co. v. New York Cent. & H. R. R. Co.*, 163 N. Y. 229.

³ *White v. Manhattan R. Co.*, 139 N. Y. 19; *Ward v. Metropolitan Elev. R. Co.*, 152 N. Y. 39; *Foot v. Metropolitan Elev. R. Co.*, 147 N. Y. 367. The city of New York being the owner of premises as well as of the fee of the street at the time when it gave its consent to the construction of an elevated railway on the street, it was held that

by its consent it parted with all claim to compensation for the taking of the easements in the street appurtenant to the property. *Herzog v. New York Elev. R. Co.*, 76 Hun (N. Y.), 486, aff'd 151 N. Y. 665. An instrument by which a property owner, in consideration of the location of a line of railroad in the street adjoining his premises, consents to its construction and operation thereon and agrees to execute a release, constitutes an agreement to release his interest in the soil of the street; but the extent of the right conferred upon the railroad company to make use of the street for railroad purposes depends upon the surrounding circumstances at the time of the execution of the instrument. *Stephens v. New York, O. & W. R. Co.*, 175 N. Y. 72, rev'g 61 N. Y. App. Div. 612.

A purchaser of the property is bound by a consent given by his grantor when the railroad has been constructed and is in operation at the time of the purchase. *Ward v. Metropolitan Elev. R. Co.*, 152 N. Y. 39. See also *Herzog v. New York Elev. R. Co.*, 76 Hun (N. Y.), 486, aff'd 151 N. Y. 665; *Bacharach v. Von Eiff*, 74 Hun (N. Y.), 533; *Webster v. Kings County Trust Co.*, 80 Hun (N. Y.), 420, aff'd 145 N. Y. 275. But the purchaser is not bound by the consent of the seller when the purchaser acquired title before the road was constructed. *Shaw v. New York Elev. R. Co.*, 187 N. Y. 186, aff'g 110 N. Y. App. Div. 892. The abutting owner who has consented to the occupation of the street by a railroad, cannot afterwards ask the court to enjoin the use of the street therefor, or award him damages. *Burkam v. Ohio & M. R. Co.*, 122 Ind. 344; *Paige v. Schenectady R. Co.*, 178 N. Y. 102; *Bellew v. New York, W. & C. Traction Co.*, 47 N. Y. App. Div. 447. Where the consent of an abutting owner to the erection of an elevated railroad expressly stipulates that it should not in any way affect the

fee of the street or highway is in the abutter, operates as a grant to the railroad company of the right to impose an additional servitude or burden thereon for the purpose of its tracks.¹ In jurisdictions where the consent of the abutters is required as a prerequisite to municipal action, it has been held that limitations, restrictions, and qualifications embodied in such consents are valid and operate as a restriction or limitation upon the city council in granting its consent or giving a franchise under delegated authority.² Difficult and intricate questions as to the validity and effect of the consents of abutters may arise, but these as a general rule are to be determined by the terms of the Constitution or statutory enactment under which the consent is required to be given. Among these are such matters as the question whether the particular railroad is embraced within a consent which has been given,³ whether the consent is to be construed with reference

abutter's claim to damages, and that the right to and extent of the compensation should not be affected and should be dealt with according to law, the equitable remedies of the abutter, as well as his remedies at law to enforce payment of compensation, are preserved. *Kingsland v. Kings County Elev. R. Co.*, 83 Hun (N. Y.), 151; *Kornder v. Kings County Elev. R. Co.*, 41 N. Y. App. Div. 357.

¹ *Paige v. Schenectady R. Co.*, 178 N. Y. 102, 112. In *Smyth v. Brooklyn Union Elev. R. Co.*, 193 N. Y. 335, modifying 121 N. Y. App. Div. 282, an agreement entered into between an abutting owner and an elevated railroad company consented to the maintenance of the elevated railroad structures in the street and was followed by a provision releasing and discharging the company from all claims and demands for damages incurred. The abutter was the owner of the fee of the street to the centre thereof. The court held that the release was not a mere license, and, if not effectual as a grant (which the court did not concede), was operative as an estoppel to any claim for compensation in condemnation, and that a subsequent purchaser of the property was not entitled to an injunction against the maintenance and operation of the railroad. Abutters who have consented to the construction of an elevated railroad will be enjoined from excavating the street in such a manner as to interfere with the columns of the railroad, whether they own the fee of the street or not. *Kings County Elev. R. Co. v. Cocks*, 22 N. Y. Supp. 1017.

² *Chester v. Wabash, C. & W. R. Co.*, 182 Ill. 382 (limitation of duration of privilege to use streets); *Specht v. Central Pass. R. Co.*, 76 N. J. L. 631; 68 Atl. Rep. 785 (requirement that railroad should be a single track only); *St. Columba's Church v. North Jersey St. R. Co.* (N. J. Eq.), 70 Atl. Rep. 692 (prohibition against construction of switches in street).

³ Where the railroad has been constructed without the consent of the abutter, although without objection by him, the company cannot, without his consent and against his objection, construct an additional switch, or remove and enlarge one previously constructed in such a manner as to increase his damages. *Taylor v. Erie City Pass. R. Co.*, 186 Pa. 120. A consent to the construction of a *surface railroad* cannot be taken advantage of for the purpose of erecting an *elevated structure or inclined plane* in the street connecting the surface railroad with an elevated railroad structure. *Eldert v. Long Island Elect. R. Co.*, 28 N. Y. App. Div. 451, aff'd 165 N. Y. 651. A *second or additional track* held to be in the nature of a new enterprise, which required an independent consent of the property owners interested, and that the assents given a year before to a single-track railroad could not be counted. *Roberts v. Easton*, 19 Ohio St. 78.

Under the *Illinois* statute the power of the municipality to grant the right to construct *switches* in the streets from the establishments of private individuals connecting with railroad

to the pendency of the particular application before the city council, or whether it may be available for other and future applications,¹

tracks is dependent upon a petition of the owners representing more than one-half of the frontage of the street. *McGann v. People*, 194 Ill. 526. The consents of abutters are necessary where a street railway company seeks to acquire by condemnation the right to use a portion of the track of another railroad company not exceeding one thousand feet in length, pursuant to a statutory provision giving it such right. *Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540, aff'g 15 N. Y. App. Div. 195. But the requirement of the consents of the abutters does not affect the statutory power of one company to lease the railroad of another and to operate the cars of the lessee over the tracks of the lessor. *Ingersoll v. Nassau Elect. R. Co.*, 157 N. Y. 453, aff'g 89 Hun (N. Y.), 213.

A paper signed prior to the construction of an elevated railroad expressing a wish and preference that the railway to be built in the street be constructed in the centre of the street, was held not to constitute a consent of the construction of the railway, but to be a mere expression of preference as to two proposed methods of construction. *Roberts v. New York Elev. R. Co.*, 155 N. Y. 31, modifying 12 N. Y. Misc. 345. A petition addressed by property owners to commissioners appointed to determine whether the railroad should be constructed, which merely asks that the road be built through the centre of the street, does not constitute a consent to the construction of the road. *Koehler v. New York Elev. R. Co.*, 159 N. Y. 218, aff'g 9 N. Y. App. Div. 449. Where an abutting owner writes underneath a consent which would otherwise be effectual as such, the words "I am in favor of an elevated road over the middle of the street but not on the walk," the instrument will not be construed to be a consent to the construction of the railroad upon the line of the sidewalk. *Shaw v. New York Elev. R. Co.*, 187 N. Y. 186, aff'g 110 N. Y. App. Div. 892. See also *Heimburg v. Manhattan R. Co.*, 19 N. Y. App. Div. 179. The consent of an abutting owner to the construction of a street railway does not bind him as to property subsequently acquired by him on the line of the same railroad. *Taylor v. Erie City Pass. R. Co.*, 186 Pa. 120.

¹ Under the provision of the *Nebraska* Constitution requiring the previous vote of the electors to the construction of a street railway, the vote must be taken on a specific application for a definitely located railroad, and not upon a blanket right to construct a railroad in the streets of the municipality generally. *State v. Lincoln St. R. Co.*, 80 Neb. 333.

In *Ohio*, when consents are required for a railroad, the franchise for which is directed to be sold to the lowest bidder, the consents of the abutters should not run to any particular company. *State v. Bell*, 34 Ohio St. 194. But it is otherwise when the consent is given to the extension of an existing railway, the franchise therefor not being susceptible of sale. *Isom v. Low Fare R. Co.*, 29 Ohio Cir. Ct. 583, 591.

Under the *New Jersey* statute, requiring the consents of the owners of the greater part of the frontage before the city council can give its consent to the construction of a street railroad, the application must be made to the council and the route filed before the consent be given. The consent must relate to the pending application, and be for the identical railroad referred to in the application; and if the application has been granted or refused, the consents so filed cannot be the basis of municipal action on further or additional applications. *Currie v. Atlantic City*, 66 N. J. L. 671, rev'g 66 N. J. L. 140; *Paterson & S. L. Traction Co. v. Wostbrock* (N. J.), 56 Atl. Rep. 698; *Mercer County Traction Co. v. United New Jersey R. & C. Co.*, 68 N. J. Eq. 715, rev'g 65 N. J. Eq. 574. In *Currie v. Atlantic City*, 66 N. J. L. 671, *Hendrickson, J.*, said: "We think, that when the consents are once filed with the petition giving the council the required jurisdiction, and, after a regular hearing, the council acts thereon by the passage of a valid ordinance or resolution, giving or refusing such consent, the council becomes thereafter *functus officio*, so far as regards the subject-matter of the application. It necessarily follows that in order to authorize the council to act upon a new application of the company, the petition must be accompanied with the filing of new consents representing the

whether a consent when given may be revoked or withdrawn, and if so under what circumstances,¹ and in what manner the required portion of the consenting property owners shall be ascertained.²

Under the New York Constitution, it is provided that in cases where the required consent of abutters cannot be obtained, the Appellate Division of the Supreme Court may appoint commissioners, and the determination of such commissioners that the rail-

required majority in interest of the abutting owners." In *Sanfleet v. Toledo*, 10 Ohio Cir. Ct. 460, it was held that if the first ordinance granting the right to the use of the streets for a street railway is invalid, the consents of the abutters used on the first application and not withdrawn may be counted on a second application.

¹ In *New York*, a consent to the construction of a railway cannot be withdrawn after the railroad has been constructed. *Paige v. Schenectady R. Co.*, 178 N. Y. 102, 112, rev'g 84 N. Y. App. Div. 91; *White v. Manhattan R. Co.*, 139 N. Y. 19; *Adee v. Nassau Elect. R. Co.*, 65 N. Y. App. Div. 529, aff'd 173 N. Y. 580. But in *Illinois*, where the frontage consents are a prerequisite to municipal action, it has been held that property owners may withdraw them at any time before they are finally acted on by the mayor. *People v. Decatur, S. & St. L. R. Co.*, 120 Ill. App. 229.

² Under the *Ohio* statute which requires the written consent of the greater part of the frontage before any franchise should be granted by the city council, it was held that the city, as the owner of lands fronting upon a street, e. g., a cemetery, may consent as an abutter, and thereby participate in conferring upon the council jurisdiction to grant the franchise. *Emerson v. Forest City R. Co.*, 28 Ohio Cir. Ct. 683. A corner lot situated opposite to and on the outside of a curve of the railroad at a point where the railroad passes from a street into an intersecting street must be included in determining whether the necessary consents have been given. *Sea Beach R. Co. v. Coney Island & G. Elect. R. Co.*, 22 N. Y. App. Div. 477. Cross streets are to be omitted in computing the frontage of the property abutting on the street. *People's Traction Co. v. Atlantic City*, 71 N. J. L. 134.

In *New York* the constitution requires the consents "of the owners of

one-half in value of property" abutting on the street. *New York Const.*, 1894, art. iii, § 18. See also *Matter of Rochester & L. O. R. Co.*, 51 N. Y. App. Div. 65. Under a statute requiring the consents of a certain proportion of property "abutting on the street or way, along which it is proposed to construct such railway or extension thereof," the consent of the necessary proportion of the owners in each street to be occupied by the railway or extension thereof is required. *Mt. Auburn Cable R. Co. v. Neare*, 54 Ohio St. 153.

Under the *Illinois* statute, a petition may be signed on behalf of a property owner by his agent, although the agent may have no authority in writing. *Tibbetts v. West & S. T. St. R. Co.*, 153 Ill. 147. The substantial purpose of a statute requiring the consent of the owners of property to the improvement of a street is satisfied by a paper signed by the land owner clearly expressing his consent to the improvement in the mode and manner provided therein, and a writing thus signed is no less binding and sufficient because in the form of a petition. *Jones v. Tonawanda*, 158 N. Y. 438. When the railroad company produces consents sufficient on their face to comply with the requirements of the Constitution and statute, and made in the usual form and acknowledged or proved and recorded, the burden is on the complaining property owner to establish the invalidity or insufficiency of the consents in fact. *Adee v. Nassau Elect. R. Co.*, 65 N. Y. App. Div. 529, aff'd 173 N. Y. 580. Where the title to the abutting premises is in the members of a copartnership as tenants in common, a consent in the firm name signed by one of the members of the firm does not bind his copartners in the absence of evidence showing authority to sign for the firm. *White v. Manhattan R. Co.*, 139 N. Y. 19.

road ought to be constructed and operated, when confirmed by the court, may be taken in lieu of the consent of the property owners. It has been held that this proceeding is a *judicial adversary proceeding* directed against the owners of property abutting upon the proposed railroad, and that the determination of the commissioners in favor of construction, when confirmed by the court, has the effect of a judgment, and is *res adjudicata* upon abutting property owners as to the incorporation of the company, and its right to construct the railroad under the franchise or privilege granted.¹

§ 1233 (707). **Authority to occupy and use Streets; How conferred and construed.** — Legislative authority to railroad companies to occupy the streets of an incorporated place, although it must exist to warrant the occupation, need not be expressly conferred, but may be given by necessary implication.² But a grant of a franchise to construct and operate a railroad or other utility in the street is to be *construed strictly*, and in cases of fair doubt in favor of the public as against those claiming under the grant.³ But a general

¹ Matter of Brooklyn Union Elev. R. Co., 112 N. Y. 61. Although a report by the commissioners appointed under this constitutional provision adverse to the construction of the proposed railroad is final if it be properly reached, yet the Appellate Division of the Supreme Court has the power in the exercise of its original jurisdiction flowing from its authority to appoint the commissioners, to set aside the report when, through misconduct, palpable error, or accident, the commissioners have failed to make such a report as the law contemplates, and either to appoint other commissioners, or remit the matter to the same commissioners with proper instructions. Matter of Nassau Elect. R. Co., 167 N. Y. 37, rev'g 6 N. Y. App. Div. 141. See also Matter of Kings County Elev. R. Co., 82 N. Y. 95. Consents duly executed and acknowledged in the nature of grants or easements in the fee of the streets owned by abutting owners are not affected by a proceeding before the Appellate Division for the determination thereof that the railroad ought to be constructed in lieu of the consent of the majority of the abutting owners. Paige v. Schenectady R. Co., 178 N. Y. 102, 116; Ade v. Nassau Elect. R. Co., 65 N. Y. App. Div. v. 529, aff'd 173 N. Y. 580.

² Post, § 1234; Commonwealth v. Erie & N. E. R. Co., 27 Pa. St. 339;

Allegheny v. Ohio & P. R. Co., 26 Pa. St. 355; State v. Hoboken, 35 N. J. L. 205; Atty.-General v. Morris & E. R. Co., 20 N. J. Eq. 530; Perry v. New Orleans, M. & C. R. Co., 55 Ala. 413; Covington Street Ry. Co. v. Covington, 9 Bush (Ky.), 127; Eichels v. Evansville Street R. Co., 78 Ind. 261; Logansport R. Co. v. Logansport, 114 Fed. Rep. 688; *infra*, § 1239.

The implication must be a necessary one, and the legislative intent must appear with great clearness, to justify a company in laying their track through the entire length of a street, with a grade requiring deep excavations and high embankments, injurious to the adjoining property. Savannah, A. & G. R. Co. v. Shields, 33 Ga. 601.

If a railroad company is authorized to occupy the street of a city, it possesses, as a necessary incident, the power to make a "turn out" within the limits of the street, to communicate with the depot on the street. New Orleans & C. R. Co. v. Municipality, 1 La. An. 128; s. p. Knight v. Carrollton R. Co., 9 La. An. 284. Power to construct *railroad* in streets, held to include right to build sidings and branches to wharves. Black v. Phila. & R. R. Co., 58 Pa. St. 249; Philadelphia v. Same, *Ib.* 253. Or to elevators. Clarke v. Blackmar, 47 N. Y. 150.

³ St. Clair County Turnpike Co. v. Illinois, 96 U. S. 63, 68; Hannibal &

grant to construct a railroad between certain *termini*, without prescribing its exact course or line, was considered to authorize the *crossing* of public highways, because this was necessary in order to execute the grant, but was not regarded as *prima facie* conferring the power to occupy highways longitudinally.¹

St. J. R. Co. v. Missouri R. Packet Co., 125 U. S. 260, 271; Stein v. Bienville Water Supply Co., 141 U. S. 67, 80; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 34; Blair v. Chicago, 201 U. S. 400, 463, 471; Augusta & S. R. Co. v. Augusta, 100 Ga. 701; Henry v. Mason City & F. D. R. Co., 140 Iowa, 201; 118 N. W. Rep. 310; Wyandotte v. Corrigan, 35 Kan. 21; New Orleans & C. R. Co. v. New Orleans, 34 La. An. 429, 447; State v. Thief River Falls, 102 Minn. 425, 433; Pennsylvania R. Co. v. Canal Commissioners, 21 Pa. 9, 22. When the language of the grant admits of doubt as to the meaning, it is to be construed in the light of the surrounding circumstances in order to determine the intention of the parties. State v. Thief River Falls, 102 Minn. 425, 433. Where the language is ambiguous, the *practical construction* given to the franchise by the parties interested may be considered and is given much weight. Henry v. Mason City & F. D. R. Co., 140 Iowa, 201; 118 N. W. Rep. 310. Under a grant to a railroad company of the right to maintain "its railroad track" in a street, a single track only was constructed and maintained for sixteen years. It was held that on the practical construction of the grant only a single track was authorized, and that the company had no right to lay a double track. Henry v. Mason City & F. D. R. Co., 140 Iowa, 201; 118 N. W. Rep. 310. But general authority to a street railway company to construct its "*line*" in a street without any language restricting the line to a single track was held to be sufficient authority for the construction of *double tracks* with the consent of the city officials. Brown v. Atlantic R. & P. Co., 113 Ga. 462. The grant to a railway company of the right to occupy a street whether by ordinance or by charter *must plainly appear*; it should not be left to implication from general language which does not clearly show an intent to give the permission. So under authority to lay such tracks "as may be necessary to the convenient use of any depot-grounds

said company may now own, or hereafter acquire, in the vicinity of or adjoining said line of road," without specific mention of streets, it was held that no authority was conferred over streets not named in a preceding part of the ordinance. Chicago, D. & U. R. Co. v. Chicago, 121 Ill. 176. See also Heath v. Des Moines & St. L. Ry. Co., 61 Iowa, 11.

¹ Clinton v. Cedar Rap. & Mo. R. R. Co., 24 Iowa, 455, 480; Thompson v. Ocean City R. Co., 60 N. J. L. 74; Burlington v. Pennsylvania R. Co., 56 N. J. Eq. 259, citing text; Springfield v. Conn. River R. Co., 4 Cush. (Mass.) 63, where the subject is fully considered by Shaw, C. J. The court held that if the road, chartered by the legislature, could not be built (in Cabotville) without using a street or highway, so much of such street or highway might be used (although there were no express words to that effect in the charter) as should be "reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made." See also Roxbury v. Boston & P. R. Co., 6 Cush. (Mass.) 424; Brainard v. Conn. River R. Co., 7 Cush. (Mass.) 424; Moses v. Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; Northeastern R. R. Co. v. Payne, 8 Rich. L. (S. Car.) 177; Commonwealth v. Erie & N. E. R. Co., 27 Pa. St. 339; Attorney-General v. Morris & E. R. Co., 19 N. J. Eq. 386; Lewis, Em. Dom. § 270; Chicago & W. I. R. R. Co. v. Dunbar, 100 Ill. 110; *ante*, § 1234, note.

The Macon and Brunswick Railroad Company, under its charter and amendments authorizing it to construct a railroad from the city of Brunswick to the city of Macon, and clothing it with the rights, privileges, and immunities of the Central Railroad, is authorized to construct its road *into* the city of Macon, and is not limited to the city line; and a private citizen cannot enjoin it from appropriating ground for the location of its track, because of its want of authority to come within the

§ 1234 (705). **Delegated Municipal Authority.** — The legislature, instead of granting, by direct act or general legislation, the power to railroad companies and other public service corporations to occupy streets for the purpose of building and operating their roads or other utilities, *may delegate to municipalities* the right to say when and upon what conditions, if at all, the public streets within their limits may be thus used.¹ The delegated authority of a municipality to grant the right to use the public streets for railroad or other purposes is dependent upon statutory enactment, either expressly or by necessary implication conferring the power.² And the power of a municipality

city limits. *Hazlehurst v. Freeman*, 52 Ga. 245. See also *Houston & Tex. C. R. Co. v. Odum*, 53 Tex. 343. And where a railroad company was authorized by its charter to construct a road from a city to another place, it was held that it could build it from any point within the city. *Appeal of Western P. R. Co.*, 99 Pa. St. 155. But where a railroad had power to run its road to the city of Augusta, and to connect with other roads, it was decided it had no authority to run *through* the city. *Augusta C. Council v. Port Royal & A. Ry. Co.*, 74 Ga. 658. Power to lay a railroad through a town held not to authorize use of streets. *St. Louis, V. & T. H. R. Co. v. Haller*, 82 Ill. 208.

¹ *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521; *Blair v. Chicago*, 201 U. S. 400, 457, citing text; *Pacific R. Co. v. Leavenworth*, 1 Dillon C. C. R. 393; *Knoxville v. Africa*, 77 Fed. Rep. 501, 507; *Perry v. New Orleans M. & C. R. Co.*, 55 Ala. 413; *Southern Pacific R. Co. v. Reed*, 41 Cal. 256; *Geiger v. Filor*, 8 Fla. 325; *Moses v. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 516; *Tate v. Ohio & M. R. Co.*, 7 Ind. 470; *Slatten v. Des Moines Val. R. Co.*, 29 Iowa, 148; *Heath v. Des Moines & St. L. R. Co.*, 61 Iowa, 11; *Merchants' Union B. Wire Co. v. Chicago, B. & Q. R. Co.*, 70 Iowa, 105; *Wolfe v. Covington & L. R. Co.*, 15 B. Mon. (Ky.) 404; *Hoyle v. New Orleans City R. Co.*, 23 La. An. 535; *Mathews v. Kelsey*, 53 Me. 56; *State v. Atlantic City*, 34 N. J. L. 99; *State v. Hoboken*, 35 N. J. L. 205; *Newark & N. Y. R. Co. v. Newark*, 23 N. J. Eq. 515, 522; *Paterson & P. H. R. Co. v. Paterson*, 24 N. J. Eq. 158; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *New York &*

H. R. Co. v. New York, 1 Hilton (N. Y.), 562; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Philadelphia v. Lombard & S. S. P. R. Co.*, 3 Grant (Pa.), 403; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Mercer v. Pittsburgh, & Ft. W. & C. R. Co.*, 36 Pa. St. 99. In granting the right to construct a street railway a city exercises a governmental power, and acts as the agent or representative of the State and not in a private capacity. *Potter v. Calumet Elect. St. R. Co.*, 158 Fed. Rep. 521. A city has no authority to grant a right of way over a proposed extension of a street not opened or extended. *Wichita & W. R. Co. v. Fechheimer*, 36 Kan. 45. In *Kansas*, although the fee of streets is in the county as the agent of the public, the power to provide for and regulate the passage of railways thereon is in the municipality. *Atchison & N. R. Co. v. Garside*, 10 Kan. 552.

Where the common council is authorized by the legislature to permit any railroad to be laid along any street, subject to the same compensation to adjoining owners allowed under the general railroad law, the council may authorize the laying of a branch track to a private elevator, and it is not requisite that the ordinance giving the authority should provide for the compensation, as that is provided for in the statute. *Clarke v. Blackmar*, 47 N. Y. 150. A railway or tramway operated for carrying grain to and from a grain elevator for the proprietors thereof, held to be only a private railway, which a city has no authority to permit to be placed and operated upon its streets. *Mikesell v. Durkee*, 36 Kan. 97.

² *Mobile v. Louisville & N. R. Co.*, 124 Ala. 132, 138; *Louisville & N. R. Co. v. Mobile, J. & K. C. R. Co.*, 124 Ala. 162, 167; *Attorney-General v.*

to grant an *exclusive right or franchise* in the streets only exists where there is an express grant of authority therefor, or language is used from which such power must necessarily or plainly be implied.¹ The municipality has no power to grant a franchise exceeding or violating express authority conferred upon it.² Thus, where authority is conferred upon a city to grant to *corporations* the franchise or right to use the streets, this power has been held to exclude any authority to confer the franchise on *individuals*, and an attempted grant of a franchise to an individual is invalid.³ We shall see hereafter that the

Walworth L. & P. Co., 157 Mass. 86; Allen v. Clausen, 114 Wis. 244; State v. Monroe, 40 Wash. 545, 548. It has been said that a delegation of power to a city to grant any privileges or rights in the streets or other public grounds is to be *strictly construed* and not enlarged by construction; and if there is a fair or reasonable doubt as to the existence of the power, it will be resolved against the municipality. St. Paul v. Chicago, M. & St. P. R. Co., 63 Minn. 330, 346. See to same effect Detroit Citizens' St. R. Co. v. Detroit R. Co., 171 U. S. 48; Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385. Statute of *New Jersey* authorizing the construction of electric light, heat, and power appliances in the streets with the proviso that "no posts or poles shall be erected in any street of any incorporated town" without a designation of the streets where the same shall be placed, construed to apply to municipal corporations incorporated as "cities" and "towns," and not to apply to "townships." East Orange v. Suburban Elect. L. & P. Co., 59 N. J. Eq. 563.

¹ Detroit Citizens' St. R. Co. v. Detroit R. Co., 171 U. S. 48; Logansport R. Co. v. Logansport, 14 Fed. Rep. 688; Henderson v. Ogden City R. Co., 7 Utah, 199. Index, *Streets; Public Utilities*. Under the constitutional provision of *Alabama* prohibiting irrevocable grants of special privileges or immunities, statutory authority cannot be conferred upon a city to grant by ordinance the *exclusive franchise in perpetuity* to maintain and operate a street railway in its streets. Birmingham & P. M. St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465. Grant construed not to be *exclusive* in the grantee. Brooklyn City & N. R. Co. v. Coney Island & B. R. Co., 35 Barb. (N. Y.) 364; Sixth

Av. R. Co. v. Kerr, 45 Barb. (N. Y.) 63; Louisville & P. St. R. Co. v. Louisville City R. Co., 2 Duvall (Ky.), 175.

² Under delegated authority to a city the power and duty of determining when and on what streets the public convenience requires street railways is devolved upon the city council, and that body cannot *delegate* this power and duty to a street railroad company by *making a general grant* of a right of way over *all* the streets, and giving the railroad company power to elect from time to time what streets it will occupy. Knoxville v. Africa, 77 Fed. Rep. 501. See also Citizens' St. R. Co. v. Jones, 34 Fed. Rep. 579; Logansport R. Co. v. Logansport, 114 Fed. Rep. 688; Kennelly v. Jersey City, 57 N. J. L. 293. But in *New Jersey* it has been held that under a statute requiring municipal authorities to designate the streets in which electric light poles and wires may be placed, a designation may be made of *all* the streets, &c. Meyers v. Hudson County Elect. Co., 63 N. J. L. 573. See also Marshall v. Bayonne, 59 N. J. L. 101.

³ Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. Rep. 628, 641; Knoxville v. Africa, 77 Fed. Rep. 501, 507; Fanning v. Osborne, 102 N. Y. 441, 447; Case v. Cayuga County, 88 Hun (N. Y.), 59, 63; Geneva & W. R. Co. v. New York Cent. & H. R. R. Co., 24 N. Y. App. Div. 335, 341; Homestead St. R. Co. v. Pittsburg & H. E. St. R. Co., 166 Pa. 162, 172; Allen v. Clausen, 114 Wis. 244, 252. But in *West Virginia*, it has been held that in the absence of a constitutional or statutory restriction the municipality may grant a franchise or right to use the streets to an individual, and it may be assigned by the individual to a corporation organized for the purpose.

use of a street for the purposes of an *ordinary street railway* is regarded as a legitimate street use, facilitating ordinary travel upon the street; and general authority to a city to open, close, and widen streets, and to control and regulate their use, is in some cases held to be sufficient to authorize a city to grant to a street railway company having the requisite franchise powers the right to occupy the city streets with its railroad tracks.¹ But as we shall also see, an *ordinary steam or commercial railway* is not usually regarded as a legitimate and proper street use; and the usual and ordinary powers of a municipal corporation to regulate and control the streets and to keep them free from obstructions are generally, although not uniformly, held not to be sufficient to empower them to authorize the use thereof for the purpose of constructing and operating thereon a steam or commercial railway between two or more cities of the State, since such powers are not to be enlarged by construction and were not conferred for this purpose.²

Watson v. Fairmount & S. R. Co., 49 W. Va. 528.

In *New York*, it has been held that in the absence of an express prohibition, an individual can purchase a franchise to construct a railroad in the city street at a public sale held pursuant to statute, but as such a railroad can only be constructed and operated by a corporation, the purchaser is bound to form a corporation to take over the franchise. *Trojan R. Co. v. Troy*, 125 N. Y. App. Div. 362. In *Kentucky*, there is a constitutional provision limiting any privilege or franchise to use the streets or highways to a term of twenty years. Compliance with this provision is mandatory. *Rural Home Tel. Co. v. Kentucky & I. Tel. Co.*, 128 Ky. 209; 107 S. W. Rep. 787. This constitutional provision must be complied with, even if the city does not bind itself to continue the franchise for more than one year. *Frankfort Tel. Co. v. Frankfort*, 125 Ky. 59; 100 S. W. Rep. 310. Where the statute providing for the grant of a franchise to use the streets for electric lighting purposes requires publication of notice of the application therefor, and prescribes the manner in which the vote should be taken, a substantial compliance with these requirements is mandatory. *Meyer v. Boonville*, 162 Ind. 165. The provision of the *Colorado* constitution, which prohibits the grant of any franchise relating to any street, &c.,

except upon a vote of the electors, does not limit the power or authority of the city council to give, without such a vote, a license or revocable permit to construct a spur track on a city street. *McPhee & M. Co. v. Union Pacific R. Co.*, 158 Fed. Rep. 5. Construction of provisions of the charter of *New York City* restricting franchises for railroad purposes to a term of twenty-five years, see *Blaschko v. Wurster*, 156 N. Y. 437, aff'g 23 N. Y. App. Div. 625.

¹ *Baltimore Trust & Guar. Co. v. Baltimore*, 64 Fed. Rep. 153; *Detroit Citizens' St. R. Co. v. Detroit*, 64 Fed. Rep. 623; *Morristown v. East Tennessee Tel. Co.*, 115 Fed. Rep. 304; *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 605. Charter authority to a city to authorize, with the abutter's consent, the laying of railroads on streets was held to refer to horse railways. *Chamberlain v. Elizabeth S. Cordage Co.*, 41 N. J. Eq. 43.

² *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413; *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 605; *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601; *Daly v. Georgia, S. & F. R. Co.*, 80 Ga. 793; *Augusta & S. R. Co. v. Augusta*, 100 Ga. 701; *Athens Terminal Co. v. Athens Foundry & Machine Works*, 129 Ga. 393, 396; *St. Paul v. Chicago, M. & St. P. R. Co.*, 63 Minn. 330, 347; *State v. Hoboken*, 35 N. J. L. 205; *Thompson v. Ocean City R. Co.*, 60 N. J. L. 74;

§ 1235 (715). **Horse Railways in Streets; Municipal Control; Davis v. New York.** — The power of municipal corporations to *authorize the establishment of horse railways* within their limits, or to authorize the use of the public streets for that purpose, has presented some interesting questions for adjudication. In a leading case — *Davis v. New York*,¹ — it appeared that the city corporation, by its charter, possessed general power to open, alter, repair, and regulate the streets. By virtue of this power and without any express authority, mediately or immediately, from the *legislature*, the corporation of the city undertook, by resolution, to confer upon an association of persons the *exclusive* right to construct and maintain for a *term of years* a railway in Broadway for the transportation of passengers for profit. It was the opinion of five of the seven judges of the Court of Appeals taking part in the decision of the

Tallon v. Hoboken, 60 N. J. L. 212, 214; *Chamberlain v. Elizabeth S. Cordage Co.*, 41 N. J. Eq. 43; *Davis v. New York*, 14 N. Y. 506; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168. The right of a steam railroad company to cross highways between its authorized terminals exists by necessary implication. *Raritan v. Port Reading R. Co.*, 49 N. J. Eq. 11. That a city has implied power to *open a street across a railway*, but no implied power to lay out a street *longitudinally* along the right of way of the railway, see *ante*, § 1020. The usual municipal power over streets does not give the municipal authorities the right to authorize a railroad company to lay its track *lengthwise* on one of the streets of the city on a grade requiring deep excavations and high embankments to the great damage of adjoining owners. *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601, 608.

In *Kentucky*, the doctrine is that the municipal authorities may consent to the use of streets by railway companies. *Lexington & O. R. Co. v. Applegate*, 8 Dana (Ky.), 289; *Wolfe v. Covington & L. R. Co.*, 15 B. Mon. (Ky.) 404; *Louisville & F. R. Co. v. Brown*, 17 B. Mon. (Ky.) 763; *Covington Street Ry. Co. v. Covington*, 9 Bush (Ky.), 127; *Cosby v. Owensboro & R. R. Co.*, 10 Bush (Ky.), 288.

In *Indiana* it is held that the general control of streets, unqualified by any other limitation, authorizes a city to grant the right to lay steam railroads therein longitudinally, provided the use of the street as a high-

way is not unreasonably impaired thereby. In so ruling the court declared that although it believed the *rule stated in the text* to be the correct rule, the question was foreclosed in *Indiana* by a long line of decisions which it would be inequitable to disturb. *New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18, citing *Tate v. Ohio & M. R. Co.*, 7 Ind. 470; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Kistner v. Indianapolis*, 100 Ind. 210; *Burkam v. Ohio & M. R. Co.*, 122 Ind. 344.

In *Illinois*, it has been held that a charter provision giving a city council *exclusive power over the streets*, authorizes the council to confer upon a steam railroad company the right to construct and operate its railroad in the streets. *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 489; *People v. Lake St. Elev. R. Co.*, 54 Ill. App. 348. When a railroad company has legislative power to lay its tracks along the streets of a city, the city authorities may consent to such use of the street although there may be no express provision in the city charter authorizing the city to grant the privilege. *Almand v. Atlanta Consolidated St. R. Co.*, 108 Ga. 417 (street railroad); *Athens Terminal Co. v. Athens Foundry & Machine Works*, 129 Ga. 393 (steam railroad).

¹ *Davis v. New York*, 14 N. Y. 506; see also *Birmingham & P. M. St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465; *Newell v. Minneapolis, L. & M. R. Co.*, 35 Minn. 112.

cause that the resolution was void. The judges delivering opinions discussed the question whether the municipal government, in the exercise of their authority over the streets, might construct, or by mere license, revocable at pleasure, authorize others to construct, such a railway, but reached different conclusions upon it.¹

§ 1236 (716). **Same Subject.** — The judgment of the court in the case just mentioned rests upon the sound principle that the powers of a corporation in respect to the control of its streets are held in trust for the public benefit, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered or delegated by contract to private parties either corporate or natural. In this case there was no such authority, and hence the resolution of the council authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation and without limit as to time, was not a license or act of legislation, but a contract; void, however, because if valid it would deprive the corporation of the control and regulation of its streets.² "Taking the whole ordinance together," says Comstock, J., in his opinion, "it is no less than an abrogation by the common council of their powers and duties over and concerning the public streets, and a surrender of a considerable portion of those powers and duties into the hands of private individuals, or a private corporation. This the corporation of New York cannot do. Time and experience may give a very unfavorable solution to the question whether this railroad, or any railroad in Broadway, can be beneficial to the public; but the hands of the city government will be tied by the contract into which it has entered, and future change and improvement may be prevented by the voluntary surrender — in effect, in perpetuity — of its own powers. On

¹ By statute in *New York* (chaps. 65 and 642, Laws of 1866) cities may sell the right to construct street railroads to the highest bidder. In doing so they may impose conditions, but such conditions must be specified in the notice of sale, or they cannot be enforced. *People v. Barnard*, 110 N. Y. 548.

² Text quoted with approval. *Des Moines Street R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 73 Iowa, 513, where an *exclusive* grant to a street railroad company to use streets for thirty years was sustained as lawful under § 464 of the Code of Iowa. See also *Des Moines St. R. Co. v. Des*

Moines B. G. St. R., 74 Iowa, 585; *Teachout v. Des Moines B. G. St. R. Co.*, 75 Iowa, 722; *Des Moines City R. Co. v. Des Moines*, 90 Iowa, 770. See Index, titles: *Contracts*, *Monopoly*, *Ordinances*. Text also quoted and approved in *Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co.*, 39 Fla. 306, holding that a municipal corporation cannot tie up its hands or those of a subsequent council by vesting, by contract, in a street railway corporation an exclusive right to construct railroad tracks on all the streets of the city as then laid out, or that might thereafter be laid out, for a period of ten years.

this ground the ordinance is void.”¹ This view was subsequently approved by the same court,² and is unquestionably sound.

§ 1237 (717). **Legislative Sanction necessary to authorize Railways in Streets and Highways.**—In Great Britain, legislative authority or sanction is necessary to enable the town or others to occupy the streets or highways for the purpose of a horse or street-railway;³ and such is doubtless the law in this country.⁴ Whether

¹ *Per Comstock, J.*, in *Davis v. New York*, 14 N. Y. 506, 532. That experience has since given a favorable solution to the question of a street railway in Broadway, does not at all impair the argument. The case of *Davis v. New York* is approved by *Clifford, J.*, *arguendo*, in *People's Pass. R. Co. v. Memphis C. R. Co.*, 10 Wall. (U. S.) 38, 52; *Citizens' Street R. Co. v. Jones*, 34 Fed. Rep. 579.

² *Milhau v. Sharp*, 27 N. Y. 611; s. c. 15 Barb. (N. Y.) 193, followed, *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201; *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.), 415, 421; *Covington Street R. Co. v. Covington*, 9 Bush (Ky.), 127. These cases are to be distinguished from *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475. See *State v. Trenton*, 36 N. J. L. 79, 83; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467; *Commonwealth v. Erie & M. F. R. Co.*, 27 Pa. St. 344; *Stanley v. Davenport*, 54 Iowa, 463; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Memphis City R. Co. v. Memphis*, 4 Coldw. (Tenn.) 406; *Richmond County Gasl. Co. v. Middletown* (contract for gas), 59 N. Y. 228; *ante*, § 245. Where a gas company, with the permission of the municipal authorities, had laid down and was maintaining its pipes in the streets of a city, and a street railway company was wrongly informed by the employees of the gas company respecting the location of the latter's pipes, so that the railway track was laid over them, it was held, that while the gas company might be, yet in this case it was not, estopped from disturbing the railway track, in order to repair its property. *Davenport Cent. R. Co. v. Davenport Gasl. Co.*, 43 Iowa, 301.

A city may determine what part of a street may be used by a horse railway. Where a grant has been made to a railway company to use the street generally, a subsequent grant to another

company to use a particular portion will be protected after the road has been constructed under it. *Fort Worth St. R. Co. v. Rosendale St. R. Co.*, 68 Tex. 169. See this case also for construction of ordinances granting use of streets conditionally.

³ *Galbreath v. Armour*, 4 Bell App. Cas. 374; *Queen v. Longton Gas Co.*, 2 Ellis & El. 651; *Queen v. Charlesworth*, 16 Q. B. 1012; *Regina v. Train*, 9 Cox Cr. Cas. 180.

⁴ *Boston v. Richardson*, 13 Allen (Mass.), 152, 160, *per Gray, J.*; *Denver & S. R. Co. v. Denver City R. Co.*, 2 Col. 673; *Memphis City R. Co. v. Memphis*, 4 Coldw. (Tenn.) 406; *State v. Hoboken*, 35 N. J. L. 205; *Newell v. Minneapolis, L. & M. R. Co.*, 35 Minn. 112; *Mills, Em. Dom.* §§ 201–203, and cases cited; *Redfield on Railways* (3d ed.), p. 317, top, where the valuable report of this learned and able jurist to the *Massachusetts* legislature, in respect to the rights and interests of *street railways*, is reprinted. After stating that it is not competent for any one to lay a passenger railway in the streets at his option, and that municipalities cannot create such companies, Judge *Redfield*, in the report above mentioned, observes that “it is now entirely well settled that such a franchise in the highways can only be created by legislative grant. It is a franchise to carry passengers and to demand tolls. This is one of the prerogatives of sovereignty, and derivable only through the action of the legislature. . . . It is not like ordinary mechanical or manufacturing business, which any one may institute at pleasure.” This report appears in 5th ed. of *Redfield* on page 328, top, vol. i, following § 76, but is omitted entirely from the 6th edition—see page 330, top, first volume.

The Rapid-Transit Act of *New York*, authorizing an extensive system of rapid transit by *elevated railroads*

powers granted to a municipality will include the authority to consent to such a use of the streets by a company that is otherwise authorized thus to use them, is a question of construction when the authority is not conferred in express terms. If not thus conferred, its existence will be denied unless upon the whole charter or legislation the implication is clear.¹

§ 1238 (718). **Special Charter Provision construed.**—The charter of New Orleans gave to the city the power “to regulate and improve streets,” and to “regulate carts, &c., and vehicles of every description thereon;” and a State law, in relation to public improvements, declared that “no railroad, plank-road, or canal should be constructed through the streets of any incorporated city or town without the consent of the municipal council thereof.” Under these circumstances, it was held competent for the city to grant the right of way in the streets to private individuals, for a specified time, for the purpose of laying down rails and running horse-cars over them, according to a tariff to be fixed by the common council.²

through cities, was sustained against various objections to its constitutional validity. *N. Y. Elevated R. Co., In re*, 70 N. Y. 327; *Gilbert Elevated R. Co., In re, Ib.* 361; *post*, §§ 1259–1261.

In the charter of a street railway company, it was authorized by the legislature to use the streets of a city upon obtaining the consent of the council, and by a supplement to the charter it was authorized to construct several tracks specified, no reference being made to any consent of the council; and it was decided that, as to such tracks, the consent of the council was unnecessary. *Jersey City v. Jersey City & B. R. Co.*, 20 N. J. Eq. 360.

¹ *Infra*, § 1239. See *Brown v. Duplessis*, 14 La. An. 842, cited in next section. *Newell v. Minneapolis, L. & M. R. Co.*, 35 Minn. 112, holding that general power over streets did not embrace the power to authorize the use of streets by horse railways.

² *Brown v. Duplessis*, 14 La. An. 842. The Supreme Court of *Louisiana*, in the case just cited, in holding that the adjacent lot-owners could not enjoin the city from authorizing the use of the public streets for laying down and operating horse railways, assign the following reasons for their judgment: “Streets, public walks, and quays are things which belong in

common to all inhabitants of cities and other places, and to the use of which all the inhabitants of a city or other place, and even strangers, are entitled in common (Civil Code, 449, 444, 445). Plaintiffs cannot, then, claim an exclusive use of the streets, or complain if their use be impeded by a similar use of the streets by other persons. . . . No citizen has a legal right to complain that the streets are used by other citizens in a peculiar manner, even if it cause him a little inconvenience, so long as he himself is allowed the free use of the streets in his peculiar mode. The streets are destined for public use, but not for a particular mode of public use. If the city of New Orleans wished to expend the money necessary for the laying of rails throughout the city, for the purpose of permitting all who wished to run their own cars thereupon, drawn by horses or mules, no one could complain [if it had the power thus to expend money] so long as it did not prevent other modes of traversing the streets; for travelling in cars on rails is one mode of using public streets, and there is no reason in the nature of things why it should be lawful to travel in a carriage or gig upon the streets, and not lawful to travel in a car upon rails fixed in the streets, but not so laid as to prevent the use of the

§ 1239 (719). **Charter Power of Municipalities as to Street Railways.** — Aside from the question as to the right of adjoining lot-owners to additional compensation, the legislature has, in the absence of special constitutional restriction, the undoubted power to authorize at pleasure the use of streets for railroad purposes; and the usual extensive powers conferred upon municipal corporations to improve and control streets and regulate their use, will, if there are no provisions showing a different legislative intent, it is believed, ordinarily authorize them to use or permit the use, in the usual manner, under municipal regulation, of a reasonable portion of the street *for horse railways*, provided they do not surrender or abdicate their legislative and police powers and functions with respect to the streets and the persons or corporations thus licensed to use them.¹ The legislature may authorize the municipalities to give or withhold an absolute assent to such a use of their streets, or it *may leave them free to annex conditions*, or it may itself require certain conditions to be met before the grant shall be made by the municipal authorities.²

streets by other modes of conveyance. If it does not suit the public coffers or the public convenience that the city should lay rails for the free use of the public, it follows, from the premises [but see, on this point, *Davis v. New York, supra*] that the city has the prerogative of selling the right of way, for a specified time, to one or more persons, who shall lay rails and have the privilege of running cars, drawn by horses or mules, according to a tariff fixed by the common council. This does not impede the ordinary mode of use, promotes trade, unites distant parts of the city, benefits the health of citizens by enabling them to live beyond the crowded thoroughfares, and is not an alienation or appropriation of a portion of the public streets for private uses." *Per Cole, J.*, in *Brown v. Duplessis*, 14 La. An. 842. *Ante*, §§ 245, 1235, 1236.

¹ But see *supra*, §§ 1237, 1238, and cases cited in the foregoing notes on this subject. As to *steam railways* in streets the legislative authority must appear by express provision or clear implication. *Supra*, § 1233; *Story v. New York Elev. R. Co.*, 90 N. Y. 122, 160.

² *Northern Cent. R. Co. v. Baltimore*, 21 Md. 93; *Pacific R. Co. v. Leavenworth*, 1 Dillon C. C. R. 393; *Frankford & Phila. Pass. R. Co. v. Phila-*

delphia, 58 Pa. St. 119; *Moses v. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 516, 522; *Clinton v. Cedar Rap. & Mo. R. Co.*, 24 Iowa, 455; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-Second Street, &c. R. Co.*, 50 N. Y. 206; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Commonwealth v. Central Pass. R. Co.*, 52 Pa. St. 506; *Philadelphia v. Lombard & S. S. Pass. R. Co.*, 3 Grant (Pa.), 403; *New Albany & S. R. Co. v. O'Daily*, 13 Ind. 353; *Lex. & O. R. Co. v. Applegate*, 8 Dana (Ky.), 289; *Louisville City R. Co. v. Louisville*, 4 Bush (Ky.), 478; *Cosby v. Owensboro & R. R. Co.*, 10 Bush (Ky.), 288; *Tennessee & Ala. R. Co. v. Adams*, 3 Head (Tenn.), 596; *People v. New York & H. R. Co.*, 45 Barb. (N. Y.) 73; *Sixth Av. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63; *McFarland v. Orange & N. H. C. R. Co.*, 13 N. J. Eq. 17; *Brooklyn Central R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *N. Y. & Harlem R. Co. v. New York*, 1 Hilton (N. Y.), 562; *Mercer v. Pittsburgh, & Ft. W. & C. R. Co.*, 36 Pa. St. 99; *Memphis City R. Co. v. Memphis*, 4 Coldw. (Tenn.) 406; *Jersey City & B. R. Co. v. Jersey City & Hob. H. R. Co.*, 20 N. J. Eq. 61; *Damour v. Lyons*, 44 Iowa, 276, citing text; *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603.

The extent of municipal power and

§ 1240 (721). **Rights and Liabilities of the Company.**— Rails laid down by a street railroad corporation in a public street *are the private property of the corporation*, so that a rival corporation cannot use them on the ground that they, as part of the public, have the right to travel and run cars anywhere on such street.¹ The right to

control over street railways and common railways depends, of course, on the charter of the company and that of the municipality, subject to the provisions of the Constitution. See *State v. Hoboken*, 30 N. J. L. 225; *Middlesex R. Co. v. Wakefield* (full discussion), 103 Mass. 261; *Frankford & P. Pass. R. Co. v. Philadelphia*, 58 Pa. St. 119; *New York v. Third Ave. R. Co.*, 33 N. Y. 42; *Philadelphia v. Lombard & S. S. Pass. R. Co.*, 3 Grant (Pa.), 403; *Cinc. & S. G. Av. Statten R. Co. v. Cummins-ville*, 14 Ohio St. 523; *McFarland v. Orange & N. H. C. R. Co.*, 13 N. J. Eq. 17; *State v. Jersey City*, 29 N. J. L. 170; *Pittsburgh & B. Pass. R. Co. v. Birmingham Bor.*, 51 Pa. St. 41; *Wolfe v. Covington & L. R. Co.* 15 B. Mon. (Ky.) 404; *Redfield on Railways*, § 76, and notes; *State v. Herod*, 29 Iowa, 123; *Slatten v. Des M. Val. R. Co.*, *Ib.* 148; *Hobart v. Milwaukee*, 27 Wis. 194; *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.), 415; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Lewis, Em. Dom.* § 125, and cases; *Mills, Em. Dom.* § 205, and cases. Relator had a grant from the city to lay a double track for a railroad on certain streets upon condition *inter alia* that no steam power should be used. It constructed and used a horse railway. Afterwards it proposed to adopt the *cable system*, and applied to the commissioner of public works for a permit to make the necessary excavations in the street, which being refused, the relator sought to compel the granting of the permit by *mandamus*. It was held that he was not entitled to the writ, on the ground that the franchise granted did not embrace the right to excavate and use the streets for a cable road. *People v. Newton*, 112 N. Y. 396. But the *legislature* has power to authorize the *change from horse to cable power*, and on such authority being given *mandamus* will be granted to compel the commissioner to issue the permit. *Matter of Third Ave. R. Co.*, 121 N. Y. 536, *rev'g* 56 Hun (N. Y.), 537.

¹ *Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co.*, 101 Fed. Rep. 347; *North Baltimore Pass. R. Co. v. North Ave. R. Co.*, 75 Md. 233; *North Baltimore Pass. R. Co. v. Baltimore*, 75 Md. 247; *Central Pass. R. Co. v. Philadelphia, W. & B. R. Co.*, 95 Md. 428, 439; *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *Philadelphia, M. & S. St. R. Co.'s Petition*, 203 Pa. 354. See *Denver & S. R. Co. v. Denver City R. Co.*, 2 Colo. 673. As to the validity and construction of conditions in municipal grants or consents to the use of the street reserving the right to other companies to use the tracks of the grantee, see *ante*, § 1230. In *Texas*, it has been held that a city has the power to grant a railroad company the right to lay a track in a street, but after granting such right it may not without the consent of the company authorize another railway company to use the same track, although it may authorize the construction of another track in the street. *Texarkana & S. F. R. Co. v. Texas & N. O. R. Co.* (Tex. Civ. App.) 67 S. W. Rep. 525. Express authority to a railroad company to construct a street railway on certain specified streets, held to carry the *incidental power* to erect poles and wires on other unnamed streets for the purpose of *transmitting electric power from the power station to the lines*. *Beaumont Traction Co. v. Brock*, 43 Tex. Civ. App. 41; 106 S. W. Rep. 460.

Preferential right to use of its track. Passenger car on street railway is entitled, as against common vehicles, to *preference in the use of its rails*, and to an unobstructed road. *Wilbrand v. Eighth Ave. R. Co.*, 3 Bosw. (N. Y.) 314; *s. p.* *Adolph v. Central Park, N. & E. R. R. Co.*, 65 N. Y. 554. Municipal ordinance giving such preference sustained, and obstruction defined. *State v. Foley*, 31 Iowa, 527; *Commonwealth v. Temple*, 14 Gray (Mass.), 69. In *California*, a street railroad company was held to have only an equal right with the travelling public to the

use a part of the tracks of an existing street railway for a part of the distance is usually conferred upon other companies by a reservation in the franchise, or by statutory provisions giving to the second company the right to do so upon making just compensation. But in *Pennsylvania*, where no such statute had been enacted and no such right existed at the time when the existing tracks were constructed and the franchise therefor conferred on the street railway company, it was held that the legislature could not, by statute, authorize a street railway company, upon the payment of compensation, to use the existing tracks of another company organized for the same purpose. Such a statute is, it was held, unconstitutional and beyond the power of the legislature, because it merely takes from the company owning the existing tracks the use of a portion of its property and transfers that use to another company organized for the same purpose. The second use, the Supreme Court of Pennsylvania regarded as being merely private in relation to the rights and obligations of the company owning the tracks, and not such a public use

use of the street where its track is laid, with a few exceptions, such as, that the cars run on a track, and where a vehicle meets a car it must give way. *Shea v. Potrero & B. V. R. Co.*, 44 Cal. 414; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148.

Liability ex delicto: It was held by the Commission of Appeals that a street car company was liable for a negligent injury to a person who was driving his wagon along the track of a street railroad. The court was of opinion that one has a right thus to use the track of the company at all times, if the preferred right of the cars to the use of the track be not unnecessarily interfered with. *Adolph v. Central Park, N. & E. R. R. Co.*, 65 N. Y. 554, two judges dissenting.

Street railway company held *liable for an injury* to a traveller with carriage, caused by the projection of a spike, which ought not to have been permitted. *Fash v. Third Ave. R. Co.*, 1 Daly (N. Y.), 148. It is the duty of the company on the one hand, to exercise due care to avoid collisions, and the duty of travellers, on the other hand, to use proper diligence, to avoid accidents and injuries. *Liddy v. St. Louis R. Co.*, 40 Mo. 506; *Lovett v. Salem & S. D. R. Co. (injury to boy)*, 9 Allen (Mass.), 557; *Washington & G. R. Co. v. Gladmon (injury to child)*, 15 Wall. (U. S.), 401; *Burton v. Phila., W. & B.*

R. Co., 4 Harring. (Del.) 252; *Louisville & P. St. R. Co. v. Smith*, 2 Duvall (Ky.), 556; *State v. Foley*, 31 Iowa, 527; *Chicago City R. Co. v. Young*, 62 Ill. 238; *Covington St. R. Co. v. Packer (injury causing death)*, 9 Bush (Ky.), 455; *Whitaker v. Eighth Ave. R. Co.*, 51 N. Y. 295; *Mowrey v. Central City R. Co. (injury to child)*, 51 N. Y. 666.

In an action for damages against a street railroad company for running over a person on a street, where it appears that plaintiff was guilty of negligence directly contributing to the accident, he must show that the accident might have been avoided by defendant by the use of merely ordinary care. A driver is not bound to regulate his speed at such a rate as may be necessary to avoid harm to persons crossing the road in an unreasonable and improper manner. It is as much the duty of persons crossing the street to look out for vehicles as it is the duty of the driver to look out for those crossing the road. Where there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, there can be no recovery. *Meyer v. Lindell R. Co.*, 6 Mo. App. 27. See also *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Williams v. Richards*, 3 C. & K. 81; *Cornman v. Eastern Counties Ry.*, 5 Jur. N. S. 657.

with relation thereto as justified the exercise of the power of eminent domain.¹

§ 1241. **Railroad Uses must not exclude Public Travel.** — A grant by statute, or by a municipality under delegated authority, to a railroad or other corporation of a privilege upon a street or highway to enter, cross, or pass along it with its tracks and structures, is, in the absence of a clearly expressed intention to the contrary, *a grant subject to the existing public right of use*, and is to be exercised in such manner as to interfere as little as possible with those for whose benefit the street or highway was originally laid out and opened.² Hence, authority conferred upon a municipality to grant the right to construct, or to consent to the construction of, any kind of railroad in a city street, is *limited in its scope* to the grant of a right which permits the concurrent use of the street by the railroad and by the public, and the municipality has no power thereunder to confer upon a railroad company the right to so occupy the street with its tracks as to destroy the street for purposes of travel and to exclude the public therefrom.³ It follows from these principles that

¹ Philadelphia, M. & S. St. R. Co.'s petition, 203 Pa. 354; Commonwealth v. Uwchlan St. R. Co., 203 Pa. 608; Commonwealth v. Bond, 214 Pa. 307. See also Harrisburg C. & C. Turnpike R. Co. v. Harrisburg & M. Elect. R. Co., 177 Pa. 585; Altoona St. R. Co. v. City Pass. R. Co., 209 Pa. 281. But *quaere*. Is the second use *merely* private? In applying the principle involved in these decisions the Supreme Court of Pennsylvania also held that under a condition which reserved to the municipality the right to authorize another street railway to construct its tracks in a street already occupied by the tracks of a street railway company, the municipality could not authorize the second company to straddle the existing tracks as this was in effect an unconstitutional taking of the property of the first company for private use without compensation. The fact that the street was wide enough to allow the construction of both tracks without interfering with each other influenced the court in reaching this decision. Commonwealth v. Bond, 214 Pa. 307. Right of one company to *make crossing* over the track of another. Market Street R. Co. v. Central R. Co., 51 Cal. 583.

² Central Pass. R. Co. v. Philadelphia, W. & B. R. Co., 95 Md. 428;

Lynn & B. R. Co. v. Boston & L. R. Co., 114 Mass. 88, 91; Wayzata v. Great Northern R. Co., 50 Minn. 438; St. Paul v. Chicago, M. & St. P. R. Co., 63 Minn. 330, 346; Jones v. Erie & W. V. R. Co., 169 Pa. 333; Taber v. New York, B. & P. R. Co., 28 R. I. 269; Pepper v. Union R. Co., 113 Tenn. 53, 60; Evans v. Chicago, St. P., M. & O. R. Co., 86 Wis. 597.

In *California* the condemnation of land in a street for the use of a railroad company, to enable it to lay and operate its track, gives it no title to the land condemned, or any interest in it, except a mere easement in common with the general public. So. Pacific R. Co. v. Reed, 41 Cal. 256.

³ Atchison, T. & S. F. R. Co. v. General Elect. R. Co., 112 Fed. Rep. 689, 692; East St. Louis R. Co. v. Louisville & N. R. Co., 149 Fed. Rep. 159; Ford v. Santa Cruz R. Co., 59 Cal. 290; Palatka & I. R. Co. v. State, 23 Fla. 546; Ligare v. Chicago, 139 Ill. 46; Pennsylvania Co. v. Bond, 202 Ill. 95, aff'g 99 Ill. App. 535; Chicago, R. I. & P. R. Co. v. People, 120 Ill. App. 306; Pittsburg, C. & St. L. R. Co. v. Warrum, 42 Ind. App. 179; 82 N. E. Rep. 934; Gilcrest Co. v. Des Moines, 128 Iowa, 49; Hepting v. New Orleans Pac. R. Co., 36 La. An. 898;

the right of a steam or commercial railroad company, whose tracks occupy or cross a city street, is subject to the right of the municipality to apply the street to all proper street uses and to adapt it to public travel. The construction and operation of a street railway is, as we have elsewhere seen, a proper public use of the street and not an additional burden thereon; and when a street railway is constructed across a steam railroad which intersects the route of the street railway, the steam or commercial railroad company cannot claim compensation from the street railway company as for an additional burden, because the rights of the steam railroad in the street are subject to all proper street uses, among which is the use of the street for street railway purposes.¹ And the same principles apply when

Dubach v. Hannibal & St. J. R. Co., 89 Mo. 483; Lockwood v. Wabash R. Co., 122 Mo. 86; Knapp v. St. Louis Transfer R. Co., 126 Mo. 26; Schulenberg & B. L. Co. v. St. Louis, K. & N. W. R. Co., 129 Mo. 455; Sherlock v. Kansas City B. R. Co., 142 Mo. 172; Corby v. Chicago, R. I. & P. R. Co., 150 Mo. 457; Nagel v. Lindell R. Co., 167 Mo. 89, 97; De Geofroy v. Merchants' Bridge Terminal R. Co., 179 Mo. 698, 715; State v. Wabash R. Co., 206 Mo. 251; Reining v. New York, L. & W. R. Co., 128 N. Y. 157; Delaware, L. & W. R. Co. v. Buffalo, 158 N. Y. 266, 478, aff'g 4 N. Y. App. Div. 562; Taber v. New York, B. & P. R. Co., 28 R. I. 269; Pepper v. Union R. Co., 113 Tenn. 53; Evans v. Chicago, St. P., M. & O. R. Co., 86 Wis. 597. See also Woonsocket St. R. Co. v. Woonsocket, 22 R. I. 64.

Under the right conferred by a municipal grant, it was held that a railroad could not occupy two-thirds of a street with four tracks fenced in to the exclusion of the public. Pennsylvania Co. v. Bond, 202 Ill. 95, aff'g 99 Ill. App. 535. Authority to construct an ordinary steam railroad upon or along a highway does not authorize the construction upon the highway of stations, depots, freight-houses, and other buildings. Wayzata v. Great Northern R. Co., 50 Minn. 438; St. Paul v. Chicago, M. & St. P. R. Co., 63 Minn. 330, 346. See also Chicago, R. I. & P. R. Co. v. People, 120 Ill. App. 306; San Antonio & A. P. R. Co. v. Bergsland, 12 Tex. Civ. App. 97. Mere general legislative authority to a railroad company to cross a city street with the consent of the local authorities gives it no right

to occupy a large portion of the street with abutments and piers for the support of its structures to the great inconvenience and detriment of the public. Delaware, L. & W. R. Co. v. Buffalo, 158 N. Y. 266, 478, aff'g 4 N. Y. App. Div. 562.

¹ Pennsylvania Co. v. Lake Erie, B. G. & N. R. Co., 146 Fed. Rep. 446; Market St. R. Co. v. Central R. Co., 51 Cal. 583; New York, N. H. & H. R. Co. v. Bridgeport Traction Co., 65 Conn. 410; New York, N. H. & H. R. Co. v. Fair Haven & W. R. Co., 70 Conn. 610; Philadelphia, W. & B. R. Co. v. Wilmington City R. Co., 8 Del. Ch. 134; Southern R. Co. v. Atlanta R. & P. Co., 111 Ga. 679; Chicago, B. & Q. R. Co. v. West Chicago St. R. Co., 156 Ill. 255; Chicago & C. T. R. Co. v. Whiting, H. & E. C. St. R. Co., 139 Ind. 297; s. c. 151 Ind. 577; South East & St. L. R. Co. v. Evansville & M. V. Elect. R. Co., 169 Ind. 339; Michigan Cent. R. Co. v. Hammond, W. & E. C. R. Co., 42 Ind. App. 66; 83 N. E. Rep. 651; Central Pass. R. Co. v. Philadelphia, W. & B. R. Co., 95 Md. 428; Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co., 97 Mo. 457; Chicago, B. & Q. R. Co. v. Steel, 47 Neb. 741; Morris & E. R. Co. v. Newark Pass. R. Co., 51 N. J. Eq. 379, aff'd 52 N. J. Eq. 340; Consolidated Traction Co. v. South Orange & M. Traction Co., 56 N. J. Eq. 569; Cincinnati & H. Elect. St. R. Co. v. Cincinnati, H. & I. R. Co., 12 Ohio Cir. Dec. 113, aff'd 64 Ohio St. 550; Akron & C. F. R. T. Co. v. Erie R. Co., 28 Ohio Cir. Ct. 36. See also Lynn & B. R. Co. v. Boston & L. R. Co., 114 Mass. 88, 91.

the tracks of one street railway are laid across the tracks of another street railway at intersecting points.¹

§ 1242. **Contract Rights which cannot be impaired.** — A legislative grant of the right to use the city streets for a public service upon condition of the performance of the service by the grantee, when accepted and acted upon by the grantee, is a contract between the grantee and the State which is *protected by the constitution of the United States*, and which cannot be impaired by subsequent State legislation.² When the grant of the right to so use the streets flows

¹ Consolidated Traction Co. v. South Orange & M. Traction Co., 56 N. J. Eq. 569.

² New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; Knoxville v. Africa, 77 Fed. Rep. 501; Southern Bell Tel. & Tel. Co. v. Mobile, 162 Fed. Rep. 523; Michigan Tel. Co. v. St. Joseph, 121 Mich. 502, 509, 510; People v. O'Brien, 111 N. Y. 41; New York City v. Twenty-third St. R. Co., 113 N. Y. 311, 317; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 182; Suburban R. T. Co. v. New York City, 128 N. Y. 510, 520; Hudson Riv. Tel. Co. v. Watervliet T. & R. Co., 135 N. Y. 393, 408; White v. Manhattan R. Co., 139 N. Y. 19, 26; People v. Deehan, 153 N. Y. 528; Skaneateles Water Works Co. v. Skaneateles, 161 N. Y. 154, 167; Rochester & L. O. W. Co. v. Rochester, 176 N. Y. 36, 50; Heerwagen v. Crosstown St. R. Co., 179 N. Y. 99, 103.

The *property rights* of a corporation include not only its franchises (other than those incident to its corporate life), but also all the rights which are incident to and necessary for the exercise of its franchise rights. Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 182. Under a *reserved power to repeal* the charter of a corporation, the legislature may destroy the corporate life of the corporation, but it cannot, by virtue thereof, deprive it of its property or interfere with and annul its valid contracts with third parties including its franchise rights in city streets. People v. O'Brien, 111 N. Y. 1; New York City v. Twenty-third St. R. Co., 113 N. Y. 311, 317. Under the *reserved power to alter, amend, or repeal*, the legislature may provide that a

street railroad company shall pay into the treasury of the city a percentage of its gross receipts instead of a license fee for each car used by it. New York City v. Twenty-third St. R. Co., 113 N. Y. 311, 317.

A statutory provision that *every grant* to a street railway company of the right to use the streets shall be *subject* to the right of the public authorities to control the use, improvement, and repair of such street to the same extent as if no such grant had been made, and to make all necessary police regulations concerning the management and operation of such railroad, whether such right is reserved in the grant or not, does not prevent the grant from becoming a *contract in other respects* not reserved. Madison v. Alton, G. & St. L. Trac. Co., 235 Ill. 346. Although the charter of a railroad company may be inviolable, yet its right to exercise in the future the power of eminent domain thereunder may be affected, limited, and controlled by a *constitutional amendment* requiring it to make compensation for property damaged as well as for property taken. Pennsylvania R. Co. v. Miller, 132 U. S. 75. The *right or privilege of charging a certain fare per mile* held to be a franchise or privilege in the nature of property which vested in the corporation, and, until repealed under a reserved power to repeal, entitled to the same protection from invasion as any other species of property. Parker v. Elmira, C. & N. R. Co., 165 N. Y. 274, 280.

Under the New York legislation and decisions, certain priorities as between corporations seeking to exercise similar franchises are created by the filing of a map and profile in certain public offices. See Suburban R. T. Co. v. New York City, 128 N. Y. 510; Rochester H. &

from the act of the municipality, similar principles apply. The municipality acts by virtue of delegated authority from the legislature, and as the representative or agent of the State for that purpose. Hence, *an ordinance of a city*, made pursuant to legislative authority, granting the right to use the streets of the city for a railroad, or for gas or water mains and pipes, or for electric poles, wires, or conduits, or for any other recognized public service, *is*, when accepted and acted upon by the grantee, *a contract within the protection of the Federal Constitution*; and new conditions cannot, in the absence of a reserved power, be imposed on the exercise of the right granted, except, as we shall hereafter see, so far as these conditions may be authorized by the exercise of the police power.¹ And if the municipi-

L. R. Co. v. New York, L. E. & W. R. Co., 110 N. Y. 128. But the mere filing of such map and profile without the consents of the abutters and of the municipality necessary to perfect the franchise for a street railroad under the New York Constitution, does not create a vested contract or property right to construct and operate the railroad. It is only when these consents have been procured that a vested contract and property right attaches. Matter of Rochester Elect. R. Co., 123 N. Y. 351; Adirondack R. Co. v. New York, 176 U. S. 335, aff'g People v. Adirondack R. Co., 160 N. Y. 225; Underground R. Co. v. New York City, 193 U. S. 416, aff'g 116 Fed. Rep. 952.

¹ City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; Louisville Trust Co. v. Cincinnati, 47 U. S. App. 36; Lewis v. Newton, 75 Fed. Rep. 884; Iron Mountain R. Co. v. Memphis, 96 Fed. Rep. 113; Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 Fed. Rep. 347; Morristown v. East Tennessee Tel. Co., 115 Fed. Rep. 304; Mercantile Trust Co. v. Denver, 161 Fed. Rep. 769; Southern Bell Tel. & Tel. Co. v. Mobile, 162 Fed. Rep. 523; Mobile v. Louisville & N. R. Co., 84 Ala. 115; Chicago Municipal G. L. & F. Co. v. Lake, 130 Ill. 42; Bellville v. Citizens' Horse R. Co., 152 Ill. 171; Harvey v. Aurora & G. R. Co., 186 Ill. 283; People v. Central Union Tel. Co., 192 Ill. 307; Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324, 347; London Mills v. White, 208 Ill. 289, aff'g 105 Ill. App. 146; Madison v. Alton, G. & St. L. Trac. Co., 235 Ill. 346; Rock Island v. Central Un. Tel. Co., 132 Ill. App. 248; Western Pav. & Supply Co. v. Citizens' St. R. Co., 128 Ind. 525; Williams v. Citizens' R.

Co., 130 Ind. 71; City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. Rep. 157; Columbus St. R. & L. Co. v. Columbus, 43 Ind. App. 265; 86 N. E. Rep. 83; Shugars v. Hamilton, 122 Ky. 606, 612; New Orleans v. Great Southern Tel. Co., 4 La. An. 41; Shreveport Traction Co. v. Shreveport, 122 La. 1; 47 So. Rep. 40; Chesapeake & P. Tel. Co. v. Baltimore, 89 Md. 689; Michigan Tel. Co. v. St. Joseph, 121 Mich. 502; Northwestern Tel. Exch. Co. v. Minneapolis, 81 Minn. 140, 147; Duluth v. Duluth Tel. Co., 84 Minn. 486; Hudson Tel. Co. v. Jersey City, 49 N. J. L. 303; Asbury Park & S. G. R. Co. v. Neptune, 73 N. J. Eq. 323; 67 Atl. Rep. 790; Ingersoll v. Nassau Elect. R. Co., 157 N. Y. 453, 463; Northwestern Tel. Exch. Co. v. Anderson, 12 N. Dak. 585; Commonwealth v. Warwick, 185 Pa. 623; Rutland Elect. L. Co. v. Marble City Elect. L. Co., 65 Vt. 377; Commercial Elect. L. & P. Co. v. Tacoma, 17 Wash. 661; Eastern Wisconsin R. & L. Co. v. Hackett, 135 Wis. 464.

Where a city, exercising power delegated to it by the legislature, made an absolute grant to a horse railway company to use certain streets, and the company, having accepted the grant, built its road at great expense, it was held that these acts constituted a contract on behalf of the State, which could not be impaired by subsequent legislation in the way of an amendment of the city charter. Hovelman v. Kansas City Horse R. Co., 79 Mo. 632.

Where a railway company is, by law, authorized to mortgage its property and franchises, it may include in the mortgage its rights derived from a municipality granting to it a right of way

pality has the power to grant such right or franchise, and a corporation, believing and assuming that it has the consent or grant of the municipality, has, with the knowledge of the proper municipal authorities, proceeded to exercise the right or franchise, and has constructed, maintained, and operated its works and appliances in the city streets, the *municipality will*, in a proper case, *be estopped by the acts and conduct of its officers* and representatives in knowingly permitting and acquiescing in the use and occupation of the streets, from asserting the invalidity of the grant of the franchise, so far, at least, as concerns its own failure to pass an ordinance or take the steps necessary to effectuate the grant.¹ But the principle of estoppel in such cases must be very cautiously applied and restricted to cases where justice manifestly requires its application.

§ 1243. **Exercise of Conflicting Franchises.** — Every corporation which acquires a franchise to use the city streets which is not by its terms or true construction shown or *declared to be exclusive*, takes the franchise subject to the power of the legislature or the city to grant similar rights to others. But as between two companies exercising similar rights, *priority of possession confers superiority*. The corporation or individual first installing its pipes, mains, or appliances, acquires certain superiority of rights in the use of the city street therefor. Each company may exercise its own franchise as fully as is compatible with the necessary rights of others, but where any interference is unavoidable, the later occupant must give way.²

through streets therein, with the right to construct its railroad thereon, and such rights and franchises pass to the purchaser at a foreclosure sale, and may be exercised by him, including the right to operate the railroad and take tolls thereon. The grantee, having constructed its road under such authority, has a vested right of property which cannot be destroyed by a direct repeal, or by the grant of the same rights over the same streets and route, unless the power to do this was reserved at the time. *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501. The grant by a city of the right to use streets to lay down railroad tracks held *not* to be revocable after confirmation by the legislature. *Nash v. Lowry*, 37 Minn. 261; *Harrison v. New Orleans Pac. R. Co.*, 34 La. An. 462; *Burlington & Mo. River R. Co. v. Reinhackle*, 15 Neb. 279.

¹ *Potter v. Calumet Elect. St. R.*

Co., 158 Fed. Rep. 521, 529; *Chicago v. Union Stockyards Co.*, 164 Ill. 224; *London Mills v. White*, 208 Ill. 289, 297; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 167 Pa. 62; *Bradford v. New York & P. Tel. & Tel. Co.* 206 Pa. 582; *Missouri Riv. Tel. Co. v. Mitchell*, 22 S. Dak. 191; 116 N. W. Rep. 67; *Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379.

² *Cumberland T. & T. Co. v. United El. R. Co.*, 42 Fed. Rep. 273; *Western Un. Tel. Co. v. Los Angeles Elect. Co.*, 76 Fed. Rep. 178; *Louisville Home Tel. Co. v. Cumberland Tel. & Tel. Co.*, 111 Fed. Rep. 663; *Consolidated Elect. L. Co. v. Peoples' Elect. L. & G. Co.*, 94 Ala. 372, 374; *Northwestern Tel. Exch. Co. v. Twin City Tel. Co.*, 89 Minn. 495; *Western Un. Tel. Co. v. Guernsey & S. Elect. L. Co.*, 46 Mo. App. 120; *Nebraska Tel. Co. v. York Gas & Elect. L. Co.*, 27 Neb. 284; *Edison El. L. & P. Co. v. Merchants' & M. El. L. H. &*

But the first occupant of the streets is only protected against unreasonable and unnecessary interference.¹ The control of the streets above and below the surface is vested in the municipality, and if it sees fit it may authorize or require the later corporation to place its lines or appliances so near those of the first corporation as to make access somewhat inconvenient and expensive. The city cannot destroy the first corporation's lines or appliances, nor can it prevent reasonable access to them, but it is not obliged to consult its mere convenience or study to save it from expense to the detriment of the public. Hence, while the city could not grant to another the right to use the same space already occupied by a corporation, it could authorize the use of any other space provided access to the line or appliances of the first corporation was left

P. Co., 200 Pa. 209; Cumberland Tel. & Tel. Co. v. United Elect. R. Co., 93 Tenn. 492; Paris Elect. L. & R. Co. v. Southwestern Tel. Co. (Tex. Civ. App.), 27 S. W. Rep. 902; Rutland Elect. L. Co. v. Marble City Elect. L. Co., 65 Vt. 377; Bell Tel. Co. v. Belleville El. L. Co., 12 Ont. 571.

In *Edison Elect. L. & P. Co. v. Merchants' & M. Elect. L. H. & P. Co.*, 200 Pa. 209, it was held that *priority of location* and construction carries *superiority of right*, but that equity will adjust conflicting interests as far as possible to the end that both companies may exercise their franchises. If interference in the enjoyment of the franchises is unavoidable, the later occupant must give way to the prior in point of time. In *Birmingham Traction Co. v. Southern Bell Tel. & Tel. Co.*, 119 Ala. 144, where a telephone company sought to enjoin the traction company from erecting its wires in such a manner as to short circuit the wires of the telephone company, the court said that all that the traction company could claim was a right to use the streets of the city equally in all respects to the right of the telephone company to the use of the streets for the purpose of its telephone system, and granted an injunction on a showing that the damage to the telephone company could be avoided by a proper construction of the traction company's line, as such damages would be continuous and tend to multiplicity of suits. Although prior occupancy of the street by the telephone company might not confer superior privileges over the traction company, such prior occupancy might be considered in denial of the latter's

assertion of superior rights in the streets. See to the same effect *Cumberland Tel. & Tel. Co. v. United Elect. R. Co.*, 93 Tenn. 492. But where an action was brought by a telephone company to restrain a railroad company from operating its street railway by the single trolley system, it was held that as the telephone company had accepted its franchise to use the streets upon the express condition that its lines should not be so constructed as to incommode the public use, and as the railroad company was occupying the streets in such manner as to expedite the public travel and promote the public use to which they were devoted, the *telephone company's franchise was of a subordinate character*, and it could not complain that the system adopted by the railroad company after the construction of its telephone lines interfered with the operation thereof. *Hudson River Tel. Co. v. Watervliet Turnpike & R. Co.*, 135 N. Y. 393.

¹ *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, aff'g 100 Ill. App. 57. See also *Louisville Home Tel. Co. v. Cumberland Tel. & Tel. Co.*, 111 Fed. Rep. 663; *Moore v. New Orleans Water Works Co.*, 114 Fed. Rep. 380. Where two systems of telegraph or telephone wires both carry low potential currents of electricity, so that injury to the wires of the first company by the placing of the wires of the second company above those of the first company or by "paralleling" is very remote, such overhead wiring or "paralleling" will not be enjoined. *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, aff'g 100 Ill. App. 57.

open, even if it was less convenient and more expensive.¹ If in constructing its works, the later grantee of a franchise *negligently injures* the existing works or structures of a prior grantee holding a franchise to use the city streets, the later grantee is liable to the prior occupant of the streets for such damages as result from his failure to exercise ordinary care.² But in a question between a prior occupant of the street under a franchise or grant from the municipality or from the State, and a person or corporation seeking to exercise a license to use the street *for private purposes* in connection with abutting premises, *e. g.*, for a vault, it has been held that such subsequent licensee, in constructing his vault in the street, is bound to so construct it as to leave unimpaired the works or structures of the prior grantee and occupant of the streets. If in constructing his vault, the subsequent licensee destroys or damages the structure or works of the prior occupant, he is bound to indemnify the prior occupant for such loss and damage without regard to any question of negligence.³

¹ *Western Union Tel. Co. v. Syracuse El. Light & P. Co.*, 178 N. Y. 325. The first comer under its franchise *cannot claim more space* in the street or highway than is reasonably necessary for the safe and successful operation of its works. *Consolidated Elect. L. Co. v. People's Elect. L. & G. Co.*, 94 Ala. 372, 374. The common council of a city in granting a franchise to a *telegraph company to construct conduits for its lines*, provided, as authorized by the charter of the city, that nothing therein contained could be deemed to give it "any *exclusive* franchise to use the streets for a subway or for any other purpose" and *reserved* all rights and privileges not specifically given. Subsequently another company located its subway, under the authority and direction of the city and its officers, so close to the plaintiff's subway as to cause it inconvenience and expense in making repairs. It was held that the franchise granted to the plaintiff permitting it to place its conduits beneath the streets was to be construed in the interest of the public and in view of the fact that the space below the surface of the city streets is becoming more valuable every year for the purpose of conducting water, heat, and light to the dwellings of private citizens as well as for the construction of sewers and subway lines and other agencies of great public utility, that the plaintiff could not complain, if,

under the circumstances, the location of the new subway was not an unreasonable interference with plaintiff's rights. *Western Union Tel. Co. v. Syracuse El. Light & P. Co.*, 178 N. Y. 325.

² *Gas pipes* had been laid in a city street under a franchise granted by the State. The municipality proceeded to *construct a sewer*, and the contractor with the municipality negligently removed the supporting earth and permitted the gas pipes to remain without proper support. It was held that the contractor was liable for the damages resulting therefrom, but the court declared that he was not an insurer and was only liable for the failure to exercise ordinary care. *Millville Gas Light Co. v. Sweeten*, 75 N. J. L. 23.

³ In *New York Steam Co. v. Foundation Co.*, 195 N. Y. 43, rev'g 123 N. Y. App. Div. 254, the owner of a building obtained a permit or license from the city to *construct a vault* beneath the sidewalk. The plaintiff, under a legislative grant, had laid certain steam pipes in the street to furnish steam for heating and power purposes. In constructing the vault and without any negligence on its part, the defendant, who had contracted with the owner of the abutting property to construct the vault, damaged the plaintiff's pipes under the streets, such injuries being the inevitable result of the construction of the vault. The court held that

§ 1244 (708). **Unauthorized Use of Street for Railroads and other Utilities; Remedies.** — We have seen that the right or privilege to use the streets of a city for certain purposes is a *franchise* depending upon legislative grant.¹ The construction of a railroad on a street or highway without statutory authority therefor, either expressly conferred or necessarily implied, is a *public nuisance*.² For

inasmuch as the occupation of the street by the defendant was subsequent, temporary, and for a *private purpose*, it owed the absolute duty to the plaintiff to so construct the vault that the plaintiff's pipes would not be damaged. *Vann, J.*, who delivered the opinion of the court, distinguished *Western Union Tel. Co. v. Syracuse Elect. L. & P. Co.*, 178 N. Y. 325, cited *supra*, and said: "The principles that we regard as controlling are, that no one can derogate from his own grant, and that every one must so use his own property as not to injure that of another. Both parties were lawfully in the street, but the occupation by the plaintiff was prior, permanent, and for a semi-public purpose, while that of the defendant was subsequent, temporary, and for a purely private purpose. The plaintiff had an indestructible property right in the street, and the defendant, which for the time being was clothed with all the power of the abutting owner, acted under a revocable license only. The city owned the fee of the street in trust for the public, and having lawfully granted a franchise to use the street for a *quasi*-public purpose, it could not derogate from that grant, especially when making another for a mere private purpose. No such power was reserved either expressly or impliedly. The question does not arise between two public service corporations, or between one of that class and the city, but between a public service corporation and an abutting owner with no absolute right in the street, so that there was no reservation such as sometimes arises by implication when the public is interested. The defendant had no greater right than the city gave the abutting owner, and the city could not give the latter the right to do anything in the street for a purpose wholly private, which, even if done without negligence, would injure the structure of the plaintiff lawfully in the street for a purpose partly public, without derogating from its own grant. The plain-

tiff had the superior right from the priority and the purpose of its occupation, and the city could not and did not grant any part of that right to the defendant or its employer. *The vault license*, therefore, did not authorize the defendant to injure, directly or indirectly, the plaintiff's property, even from necessity, when prosecuting its work with due care. The abutting owner, under its license, had a lawful right to build a vault in the street under the sidewalk, and that also was property, or a property right, although not indestructible as to the city. When it came to the work of construction, through the defendant, its agent, it found the property of the plaintiff already in the street pursuant to lawful authority, and in use to furnish many human beings with a necessary of life. Under the principle, *sic utere tuo ut alienum non laedas*, it was bound to use its right so as not to injure that property. It owed the plaintiff a legal duty not to injure its plant without making compensation. It could not disturb an existing structure lawfully in the street without becoming liable for the damages caused thereby. The defendant rested under the same obligation, and hence proceeded at its peril. Good intentions have no bearing, for the law 'does not so much regard the intent of the actor as the loss and damage of the party suffering.' Even the exercise of due care did not relieve the defendant from the obligation springing out of the fundamental right of every person to enjoy his own property without interference therewith by the use made of the property of another."

¹ *Ante*, § 1210.

² *Pittsburg, C. & St. L. R. Co. v. Hood*, 94 Fed. Rep. 618; *Denver & S. R. Co. v. Denver City R. Co.*, 2 Colo. 673; *Sherlock v. Kansas City B. R. Co.*, 142 Mo. 172; *Van Horne v. Newark Pass. R. Co.*, 48 N. J. Eq. 332 (horse railway); *Edwards v. Pittsburg Junc. R. Co.*, 215 Pa. 597; *Rosenthal v. Taylor, B. & H. R. Co.*, 79 Tex. 325,

such an unauthorized construction and operation the company is liable to indictment for creating and maintaining a nuisance.¹ The general rule seems to be that inasmuch as the right claimed emanates from the State and involves the performance of a public duty, *quo warranto* in the name of the State and on the relation of the attorney-general, or at his suit, is a proper method to challenge the validity of a street franchise or the right of a corporation to exercise it.² But the remedy for an unlawful use of the street without legislative authority is not confined to *quo warranto*, and an abutter, who is affected thereby, may, when he sustains special and peculiar damage to his property, maintain a suit in equity to enjoin any corporation attempting to exercise the right without lawful authority.³ When

¹ *Pittsburg, C. & St. L. R. Co. v. Hood*, 94 Fed. Rep. 618, citing text; *Commonwealth v. Old Colony & F. R. Co.*, 14 Gray (Mass.), 93; *Pittsburg, V. & C. R. Co. v. Commonwealth*, 101 Pa. 192. A railroad company is indictable for a nuisance, if without lawful authority it erects and continues a building in a public highway or street, *State v. Morris & E. R. Co.*, 23 N. J. L. 360; *Milbau v. Sharp*, 27 N. Y. 611, 625; or uses a street crossing as a place of storage or deposit for its cars, *Mason v. Ohio Riv. R. Co.*, 51 W. Va. 183. But when street railway tracks have been constructed under color of authority, and it does not clearly appear that the authority has been exceeded, the municipality cannot summarily and forcibly remove them as an unlawful obstruction and a nuisance. *Cape May v. Cape May, D. B. & S. P. R. Co.*, 60 N. J. L. 224. Where the nuisance is created by an unauthorized use of the tracks, the remedy of the municipality is not to abate the nuisance by removing the tracks, but to take proceedings to compel the operation of the railroad in conformity to law. *Chicago v. Union Stock Yards & Transit Co.*, 164 Ill. 224; *Spokane Street R. Co. v. Spokane Falls*, 6 Wash. 521. A property owner may recover damages suffered by him from a railroad company creating and maintaining a nuisance by constructing and operating a railroad in the street without authority of law. *Pittsburg, C. & St. L. R. Co. v. Hood*, 94 Fed. Rep. 618; *Cain v. Chicago, R. I. & P. R. Co.*, 54 Iowa, 255; *Stange v. Hill & W. D. S. R. Co.*, 54 Iowa, 669; *Grand Rapids & I. R. Co. v. Heisel*, 47 Mich. 393.

² *Swarth v. People*, 109 Ill. 621;

Martens v. People, 186 Ill. 314; *People v. Chicago Tel. Co.*, 220 Ill. 238, 245; *State v. Des Moines City R. Co.*, 135 Iowa, 694; *Thirteenth & F. Sts. P. R. Co. v. Broad St. R. T. Co.*, 219 Pa. 10; *Andel v. Duquesne St. R. Co.*, 219 Pa. 635, 637; *State v. Portage City Water Co.*, 107 Wis. 441; *State v. Milwaukee, B. & L. G. R. Co.*, 116 Wis. 142; *State v. Milwaukee Indep. Tel. Co.*, 133 Wis. 588. The unauthorized carriage of freight by a street railway, the charging of excessive fares, and the obstructing of the city streets, is not sufficient ground for the forfeiture of the franchises of the company or of the rights to operate the street railway in a proceeding in *quo warranto* brought by the attorney-general. These improper acts are only ground for regulating the business of the company. *Attorney-General v. Toledo & M. R. Co.*, 151 Mich. 473.

³ *Hart v. Buckner*, 2 U. S. App. 488; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190; *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146; *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601; *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 271; *Southern Cotton Oil Co. v. Bull*, 116 Ga. 776; *Coker v. Atlanta, K. & N. W. R. Co.*, 123 Ga. 483, 488; *Bell v. Edwards*, 37 La. An. 475; *Swinhart v. St. Louis & S. R. Co.*, 207 Mo. 423; *Stockton v. Atlantic Highlands, R. B. & L. B. El. R. Co.*, 53 N. J. Eq. 418; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524, 531; *Fanning v. Osborne*, 102 N. Y. 441; *Black v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 468; *Thomas v. Inter-County St. R. Co.*, 167 Pa. 120; *Hopkins v. Catasauqua Mfg. Co.*, 180 Pa. 199; *Mory v. Oley Valley R. Co.*,

the *abutting owner* is also the owner of the fee of the street, it is held in many jurisdictions that he has a remedy against the unlawful and unauthorized construction of a street railroad in the street by action of *ejectment*.¹ Similarly, legislative grants of franchises to

199 Pa. 152; *Hannum v. Media, M. A. & C. Elect. R. Co.*, 200 Pa. 44; *Edwards v. Pittsburg Junc. R. Co.*, 215 Pa. 597; *Cereghino v. Oregon Short Line R. Co.*, 26 Utah, 467; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21; *Linden L. Co. v. Milwaukee E. R. & L. Co.*, 107 Wis. 510; *Allen v. Clausen*, 114 Wis. 244. As to the rule adopted in *Illinois*, and the right of an abutter to obtain relief from the unauthorized construction of a railroad by injunction or by action for damages, see post, § 1253.

Individual citizens merely as such have been held to have no standing to enjoin the unlawful exercise of an asserted franchise. *Thirteenth & F. Sts. P. R. Co. v. Broad St. R. T. Co.*, 219 Pa. 10; *Andel v. Duquesne St. R. Co.*, 219 Pa. 635. It has been held that the jurisdiction of a court of equity to abate an existing and prevent a threatened nuisance upon the application of the attorney-general, suing on behalf of the State, is limited to those public nuisances which affect and endanger the public safety or convenience, and require immediate judicial interposition, and where the relief sought may not with equal facility be obtained by other constituted authorities and public officers. Hence, an action cannot be maintained by the attorney-general, in the name of the State, against a gas light company to restrain the laying of gas pipes in a city street on the ground that the corporate power of the company had ceased because of its failure to commence business within the prescribed period. *People v. Equity Gas Light Co.*, 141 N. Y. 232. See also *Matter of Attorney-General*, 124 N. Y. App. Div. 401, 408; *People v. Consolidated Gas Co.*, 130 N. Y. App. Div. 626; *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515, 516; *Bay State Brick Co. v. Foster*, 115 Mass. 431, 438; *Kenney v. Consumers' Gas Co.*, 142 Mass. 417. But compare, *District Attorney v. Lynn & B. R. Co.*, 16 Gray (Mass.), 242; *Attorney-General v. Cambridge*, 16 Gray (Mass.), 247. An information in equity in the name of the attorney-general will lie, at the relation of persons interested for the re-

moval as public nuisances of permanent structures erected within the limits of land designated as a public landing place, although standing on a part thereof not in general use. *Attorney-General v. Tarr*, 148 Mass. 309. Also against a quasi-public corporation doing *ultra vires* and illegal acts, as by entering on and drawing therefrom without right the water of a great pond, thereby creating a public nuisance. *Attorney-General v. Jamaica Pond Aqueduct Co.*, 133 Mass. 361. In *New Jersey* it has been held that the attorney-general has the right to a preliminary injunction-restraining the construction of an illegal street railway without procuring the necessary consent of the local authorities and of the abutting owners. *Stockton v. Atlantic Highlands, R. B. & L. B. El. R. Co.*, 53 N. J. Eq. 418. A municipal corporation has the same right to question the corporate existence and the rights of a railroad company seeking to use its streets as a private owner would have where the use of his property is sought. *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524. Such railroad company must be one *de jure*, not simply *de facto*. *N. Y. Cable Co. v. New York*, 104 N. Y. 1, 43; *Tate v. Ohio & Miss. R. Co.*, 7 Ind. 470, 479; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *Hine v. Keokuk & D. M. R. Co.*, 42 Iowa, 636; *New Albany & S. R. Co. v. O'Daily*, 13 Ind. 353; *People v. Kerr*, 27 N. Y. 188; *Clinton v. Cedar Rap. & Mo. R. R. Co.*, 24 Iowa, 455; *Chicago, N. & S. W. R. Co. v. Newton*, 36 Iowa, 299; *Lackland v. North Mo. R. Co.*, 31 Mo. 180; *Porter v. North Mo. R. Co.*, 33 Mo. 128; *James River Co. v. Anderson*, 12 Leigh (Va.), 276; *Chicago v. Robbins*, 2 Black (U. S.), 418, 424; *ante*, §§ 115, 1128. See *South Car. R. Co. v. Steiner*, 44 Ga. 546; *Vason v. South Car. R. Co.*, 42 Ga. 631.

¹ *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202; *Finch v. Riverside & A. R. Co.*, 87 Cal. 597; *Louisville, St. L. & T. R. Co. v. Hess*, 92 Ky. 407; *Bork v. United New Jersey R. & C. Co.*, 70 N. J. L. 268; *Burlington v. Pennsylvania R. Co.*, 56 N. J. Eq. 259, *aff'd*

use the streets confer privileges which are necessarily exclusive in their nature as against all persons upon whom similar rights have not been conferred. Any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a direct invasion of the private property rights of those upon whom similar franchises have been conferred. Hence, the *grantee of a valid franchise*, although it may not be exclusive in its terms, is entitled in proper cases to the aid of a court of equity to protect by *injunction* its property rights from unlawful invasion by persons and corporations seeking to exercise similar franchises without lawful authority.¹

58 N. J. Eq. 547; *Phillips v. Dunkirk, W. & P. R. Co.*, 78 Pa. 177.

Whether the *remedy by ejectment* will be regarded as an adequate remedy at law and therefore *precluding recourse to equity* for a relief by injunction, will be found to depend upon the practice of the different jurisdictions. In *New York* it has been said that where a railroad is constructed in a street without authority of law, the *abutter* whose title extends to the centre of the street has three remedies. He may bring successive suits to recover damages for the trespass; he may sue in equity to enjoin the operation of the railroad; or he may maintain ejectment when the highway has been exclusively appropriated. *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.*, 67 Hun (N. Y.), 153, 161; *Wright v. Syracuse, O. & N. Y. R. Co.*, 92 Hun (N. Y.), 32. In *New Jersey*, if the abutter owns the fee of the street, it is held that he has an adequate remedy at law by action of ejectment, and that he cannot obtain relief in equity by injunction. *St. Columba's Church v. North Jersey St. R. Co.* (N. J. Eq.), 70 Atl. Rep. 692. The construction of a railroad of any kind in a street without legislative authority is a trespass on the land when the fee of the street or highway is vested in the abutter and not in the public. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146.

¹ *Atlanta R. & P. Co. v. Atlanta R. T. Co.*, 113 Ga. 481; *Raritan & D. B. R. Co. v. Delaware & R. Canal Co.*, 18 N. J. Eq. 546, 569; *Pennsylvania R. Co. v. National R. Co.*, 23 N. J. Eq. 441, 447; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242, 250; *Elizabethtown Gas Co. v. Green*, 46 N. J. Eq. 118, 124; *Millville G. L. Co. v. Vine-*

land L. & P. Co., 72 N. J. Eq. 305; 65 Atl. Rep. 504; *Texarkana & F. S. R. Co. v. Texas & N. O. R. Co.* (Tex. Civ. App.), 67 S. W. Rep. 525. *Contra*: *Franklin Trust Co. v. Peninsular Pure Water Co.*, 161 Fed. Rep. 855.

But in *Coffeyville Mining & Gas Co. v. Citizens' Nat. Gas & Mining Co.*, 55 Kan. 173, the right of the grantee of a franchise, which is not exclusive, to an injunction restraining the usurpation without authority of a competing franchise to use the streets and highways is denied. In this case, the plaintiff sought to enjoin the defendant from laying mains and pipes in the city streets for the purpose of supplying natural gas. *Allen, J.*, who delivered the opinion of the court, declared that the main scope and purpose of the suit was to maintain a monopoly of the plaintiff's business; that plaintiff sought to test the validity of ordinances granting the defendant the use of the streets, and to restrain the defendant from using the privilege granted; that for these purposes the plaintiff had no standing in court, as the city authorities were charged with the duty of preventing encroachments on the streets and public grounds; that the proper public officers alone could test the validity of the ordinances under which the defendant claimed; and that a private person or corporation, even if it exercised a similar franchise, could not be recognized in a court of justice for the purpose of protecting purely public interests.

If the franchise of the complaining company is invalid, it has no standing in a court of equity to enjoin the use of the streets by its rival. *Rough River Tel. Co. v. Cumberland Tel. & Tel. Co.*, 119 Ky. 470; *Rural Home Tel. Co. v. Ken-*

§ 1245 (712). **The Doctrine of Abutters' Easements.** — The doctrine that the owner of the abutting property, although he owns no part of the fee of the street, has certain easements or incorporeal rights in the street which entitle him to the use thereof for all legitimate purposes, and that such easements or incorporeal rights are *private property* in a constitutional sense of which he cannot be deprived without just compensation, has been developed in the judicial decisions of the last thirty years in a number of States.¹

tucky & I. Tel. Co., 128 Ky. 209; 107 S. W. Rep. 787.

Where a corporation is a taxpayer of a city and is also vested with a valid franchise to use the city streets, — *e. g.* for telephone purposes, — it may, by virtue of its standing as a citizen and taxpayer, maintain an action in equity to enjoin another corporation from exercising a similar franchise without purchasing the same after advertisement and public competition as required by law. Merchants' Police & Dist. Rel. Co. v. Citizens' Tel. Co., 123 Ky. 90. Index, *Taxpayers' Suits*. It has been held that where the grantee of a franchise to use the streets for *lighting purposes* claimed an *exclusive* franchise, a subsequent grantee of a similar franchise was entitled to an injunction restraining the first grantee from claiming exclusive rights, and that too although the second grantee was not in possession of the streets. Citizens' G. L. Co. v. Louisville Gas Co., 81 Ky. 263; Peoples' El. L. & P. Co. v. Capital Gas & El. L. Co., 116 Ky. 76; Crescent City G. L. Co. v. New Orleans G. L. Co., 27 La. An. 138.

If the persons complaining are merely seeking a rival franchise and have not obtained or perfected it, they have no right to an injunction. Larimer & L. St. R. Co. v. Larimer St. R. Co., 137 Pa. 533; Andel v. Duquesne St. R. Co., 219 Pa. 635. It has been held that even where a street railway has obtained a charter to construct its lines on certain streets, but *failed to secure a municipal grant* to use the same, it had *no standing in equity* to enjoin another company which had secured not only a franchise from the State, but authority to use the streets from the municipality. Larimer & L. St. R. Co. v. Larimer St. R. Co., 137 Pa. 533. The construction and operation of a street railway will not be enjoined at the suit of a rival company whose franchise is disputed by the city,

and is the subject of litigation in another suit between the company and the city. Tacoma R. & P. Co. v. Pacific Traction Co., 155 Fed. Rep. 259.

¹ *Decisions recognizing the doctrine of abutters' easements:* Denver v. Bayer, 7 Col. 113; Burkam v. Ohio & M. R. Co., 122 Ind. 344, 345; Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577; Lostutter v. Aurora, 126 Ind. 436; O'Brien v. Central Iron & Steel Co., 158 Ind. 218; Elizabethtown, L. & B. S. R. Co. v. Combs, 10 Bush (Ky.), 382, 388; Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush (Ky.), 667, 674; Fulton v. Short Route R. T. Co., 85 Ky. 640, 652; Willis v. Kentucky & I. Bridge Co., 104 Ky. 186; Adams v. Chicago, B. & N. R. Co., 39 Minn. 286; Carroll v. Wisconsin Cent. Co., 40 Minn. 168, 170; Lamm v. Chicago, St. P. M. & O. R. Co., 45 Minn. 71; Gustafson v. Hamm, 56 Minn. 334, 339; Vanderburgh v. Minneapolis, 98 Minn. 329, 336; Theobald v. Louisville, N. O. & T. R. Co., 66 Miss. 279, 287; Richardson v. Mississippi Levee Com'rs. 77 Miss. 518, 536; Hazlehurst v. Mayes, 84 Miss. 7, 11; Story v. New York Elev. R. Co., 90 N. Y. 122; Lahr v. Metropolitan Elev. R. Co., 104 N. Y. 268; Rensselaer v. Leopold, 106 N. Y. 29; Abendroth v. Manhattan R. Co., 122 N. Y. 1; Kane v. New York Elev. R. Co., 125 N. Y. 164; Reining v. New York, L. & W. R. Co., 128 N. Y. 157; Bohm v. Metropolitan Elev. R. Co., 129 N. Y. 576; Hughes v. Metropolitan Elev. R. Co., 130 N. Y. 14; Egerer v. New York Cent. & H. R. R. Co., 130 N. Y. 108; State v. King County Super. Ct. 26 Wash. 278; Hatch v. Tacoma, O. & G. H. R. Co., 6 Wash. 1, 10. The judicial recognition of certain property easements or incorporeal rights in the abutter has received a liberal and extended application in the decisions of many jurisdictions with reference to the *vacating of streets*. See *ante*, § 1160. Index, *Vacation of Streets*.

This doctrine that certain rights of the abutters are *property* beyond legislative control is peculiarly the creation or growth of judicial decision,¹ but in the application of the doctrine a marked difference is to be found in the decisions of the courts. The same course of judicial decision which originated such easements or incorporeal rights will in all probability be the chief agent ultimately to define, qualify, and limit them. These easements or incorporeal rights are the creatures of local law, and all questions affecting their nature, qualifications, and limitations must, subject only to the Federal Constitution, be for the final determination of the courts of the respective States. These courts originated the doctrine that such easements are *property* in the abutter when they might have declared that the landowner had no easement which was property in or over the abutting street and that the power of the legislature to determine what was a legitimate street use was supreme; and the same courts may, and frequently have, in their respective jurisdictions, determined that the abutter has a limited easement for specific and definite purposes, and seldom or never that he has an absolute and unqualified easement entitling him to the continued maintenance of the street in its existing condition and to freedom from legislative interference therewith for novel uses. The courts of different States have modified or overruled their own decisions, and each State has in the end defined and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy.² No general and comprehensive definition of abutters' property easements which are beyond legislative control has hitherto been given by the courts, and, in the nature of the case, it is doubtful whether it is possible to do so. The

¹ See remarks of Mr. Justice *Peckham* in *Bohm v. Metropolitan Elev. R. Co.*, 129 N. Y. 576, 587, quoted *ante*, § 1124, as to the underlying causes inducing a thorough consideration of the subject and the establishment of the doctrine in New York.

In *American Bank Note Co. v. New York Elev. R. Co.*, 129 N. Y. 252, 271, *Finch, J.*, made the following instructive and important explication and comment on the New York decisions of which the *Story Case*, 90 N. Y. 122, was the first: "No consequential damages flowing from the lawful corporate user [of the streets for elevated railroad purposes] could be recovered but from the fact that some of them, though not all of them, have been by the *Story case*

transformed from consequential injuries into invasions of property rights. To the extent of that transformation the rule of damages must feel the effects of the change, but beyond that the further consequential injuries have not lost or changed their character, and to allow them as elements of compensation is to transform them also into invasions of property, and add a new brood of easements to those already awarded to the abutter, instead of leaving them where the *Story case* left them, the mere incidents of a lawful use."

² See remarks of Mr. Justice *Moody*, in *Sauer v. New York City*, 206 U. S. 536, 548.

courts have determined each case upon its own particular circumstances and upon the principles of law peculiar to the jurisdiction as laid down in the decisions of the court. The result is that the scope of the easements of abutters varies in the different States; and in some States, by reason of these easements, redress is given to the abutter for certain wrongs which is denied in other jurisdictions. Thus, we find that in New York the easements of light, air, and access of the abutter are taken or impaired by the erection of an *elevated railroad* in front of his premises, and he is entitled, as a *constitutional right*, to compensation for the damage to such easements caused thereby;¹ but the courts of that State hold that by the use, under legislative sanction, of a street for the construction, maintenance, and operation thereon of a *steam or commercial railroad at grade*, the easements of the abutter in the street are not taken or impaired.² On the other hand, in other jurisdictions the same easements or incorporeal rights appurtenant to abutting property have, under similar circumstances, but with varying qualifications and limitations, been considered to give to the abutter the right to damages or compensation for injuries caused by the construction of a steam or commercial railroad in the street at grade in front of his premises.³

On the general subject of the nature and extent of the rights of abutters in the streets, it may be observed that the important and controverted question is not whether the abutter has not certain private rights as distinguished from rights of the public, such as the

¹ See *ante*, §§ 1124, 1125; *post*, §§ 1255, 1259-1264. Index, *Abutter*; *Dedication*; *Easements*; *Eminent Domain*; *Fee*; *Railroads in Streets*; *Streets*.

² See *post*, § 1255.

³ *Post*, § 1252. In *Theobald v. Louisville, N. O. & T. R. Co.*, 66 Miss. 279, 287, where the right of an abutter to compensation for the construction of a steam railroad in the street in front of his premises was sustained, *Arnold, C. J.*, said: "The abutting owner has special interests and rights in a public street which are valuable and indispensable to the proper and beneficial enjoyment of his property. His right to use the street as a street is as much property as the street itself, and neither the public nor a corporation nor an individual can lawfully deprive him of it against his will without compensation." In *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush (Ky.), 382, 388, where a recovery against a

steam railroad company by an abutter was also sustained, *Cofer, J.*, said: "The owners of lots have a peculiar interest in the adjacent street which neither the local nor general public can pretend to claim,—a right in the nature of an incorporeal hereditament legally attached to their *contiguous* grant,—an incidental title to certain facilities and franchises issued to them by contract and by law, and which are as inviolable as the property in the lots themselves."

But in *Kentucky*, the construction of a *steam railroad in a street* is not a taking of the abutters' easements *per se*; whether these easements have been taken depends upon the fact of substantial and material interference with the abutters' right of ingress and egress. *Fulton v. Short Route R. T. Co.*, 85 Ky. 640; *Louisville & N. R. Co. v. Orr*, 91 Ky. 109.

right to light, air, access, &c.; but the disputed question is, how far such rights of the abutter in the street are "private property," within the meaning of the constitutional provision on that subject, and therefore beyond the lawful power of the legislature, acting in the public interest, to interfere therewith by authorizing the use of the streets for certain specified public purposes without providing for compensation to the abutter. The doctrine in the New York Elevated Railroad cases, holding that, without any constitutional or statutory provision to that effect, the abutter's rights are such private property, in the constitutional sense, and to that extent practically converting *consequential damages into rights of property*, necessarily restricts the supremacy of the legislature over the general subject as to what in the public interest is or may be a proper and legitimate use of the streets.

The essential *public* character of streets ought never to be overlooked. Although the abutter has special and peculiar interests in the continued maintenance of the street in front of his premises, free from obstruction for *non-street* uses, which impair its usefulness to him, yet streets and highways are in their primary conception and essential character intended chiefly for public use for purposes of travel, passage, and communication, and other legitimate street uses, and the rights of the abutter are justly subordinate thereto. The public and paramount rights in these highways ought to be exercised and controlled by the representatives of the people, that is, by the legislature, or the municipality acting under delegated authority; and any rule of law, resting alone upon judicial creation, which denies or materially restricts the paramount authority of the people over the uses to which the streets and highways may be devoted *in the public interest*, is of doubtful legal soundness and of doubtful economic value. The use of the streets for railroads and other public utilities does not spring alone from the enterprise of private corporations or from the needs of the populace, but it is largely created by and originates in the use to which the owners of abutting property devote their lots. When streets were first laid out, neither the public authorities nor the original proprietors of lands foresaw the invention of the elevator and the growth of population and business which now induce landowners in the larger cities to erect buildings twenty, thirty, and forty stories in height, and to excavate under them basements, cellars, and sub-cellars, to be ventilated by the use of engines, to be lighted by electricity, and to be filled with merchandise. They did not think that the surface of the streets would, in time, become insufficient for the use of the people with convenience and comfort

in moving to and fro, and passing in and out in the transaction of business and the pursuit of pleasure.¹ The founders of the cities never dreamed of the extended use which is now being made of sub-surface portions of the streets. In populous cities the demand for sub-surface uses of the streets has become so exigent that we can already foresee the time when there will be no available space left beneath the surface. Underground railways are required in order to relieve the congestion of travel and business on the surface; and there are already places where elevated, street surface, and underground railroads are to be found, one above the other. Not only so, but in some localities the public necessity calls for additional sub-surface or underground railways at points where such railways already exist, and the construction of two, three, or four sub-surface railroads at different levels is contemplated.² A casual consideration of the subject shows that the depth to which these underground railroads can be constructed to advantage is limited, and that soon the public interests will demand the appropriation of the space above the surface to relieve the congestion of travel upon and beneath the surface. When it is sought to appropriate the space above the surface, then the question of the abutters' easements and the right to compensation will again come before the courts under novel conditions, and the doctrine that these easements are, without any constitutional or statutory provision to that effect, *property* which is protected by the Constitution may be found to stand in the way of beneficial public improvements. Just as it has become necessary to construct two, three, or four tiers of railroads beneath the surface, so it may be found necessary to erect two, three, or four tiers of ways above the surface, because the abutting owners have erected such enormous structures on their lands and have brought such crowds of persons to the locality for business and pleasure, that they cannot otherwise be accommodated. If abutting owners are permitted to build without limit as to height,³ it would seem to be just to hold that the use of the streets for elevated structures not materially obstructing or interfering with the ordinary surface uses of the street by the public, to accommodate the public travel rendered

¹ See remarks of *Knowlton*, C. J., in *Sears v. Crocker*, 184 Mass. 586, 587, quoted *ante*, § 1155.

² On Forty-second Street in New York City, in the vicinity of the Grand Central Station, the Public Service Commission has recently had in consideration the construction of an underground railway connecting with Jersey

City by a tunnel under the Hudson River which, according to the reports, is to be constructed at the fourth level beneath the surface.

³ To the effect that the legislature may constitutionally limit the height of buildings, see *ante*, § 696; *Cochran v. Preston*, 108 Md. 220; 70 Atl. Rep. 113.

necessary by the acts of the abutting owners, should not confer upon the abutters an unqualified right to compensation which is beyond legislative control or regulation, and which cannot be limited or moulded to meet the precise circumstances of each case or situation as it arises.

§ 1246 (710). **Liability of City for Damages sustained by Abutter.**

— When a city, pursuant to power delegated to it by the legislature, makes a grant to a railroad company of the right to use the streets for its purposes, the city is under no liability of any kind to the abutter for damages resulting from the construction or operation of the railroad. The redress of the abutter, if any, is against the railroad company.¹ We have seen that streets cannot be appropriated to private use, and that switches connecting private premises with the tracks of a railroad company are sometimes regarded as a private and unauthorized use when constructed solely for the benefit of private individuals.² No liability for damages sustained by

¹ *Denver v. Bayer*, 7 Colo. 113; *Sorensen v. Greeley*, 10 Colo. 369; *Burkam v. Ohio & M. R. Co.*, 122 Ind. 344; *Davenport v. Stevenson*, 34 Iowa, 225; *Hedrick v. Olathe*, 30 Kan. 348; *Dillenbach v. Xenia*, 41 Ohio St. 207; *Zanesville v. Fannan*, 53 Ohio St. 605; *Redford v. Coggeshall*, 19 R. I. 313. *Infra*, § 1249.

"It is the settled law of this court, as well as in most of the other States of the Union, that it is a legitimate use of a street or highway to allow [under legislative authority] a railroad track to be laid down in it, and for so doing the city is not liable for any damages which may accrue to individuals." *Per Caton*, C. J., *Murphy v. Chicago*, 29 Ill. 279, 286. See also *Davenport v. Stevenson*, 34 Iowa, 225; *Frith v. Dubuque*, 45 Iowa, 406.

² See *ante*, § 1176. See also to the same effect, *Gustafson v. Hamm*, 56 Minn. 334; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21. "We think it may be laid down broadly and upon general principles, that no city has any right or authority to give permission to any individual or corporation to construct or operate a purely private railroad upon any of the public streets of the city; and that all the statutes which have reference to railroad companies or others constructing or operating railroads through or upon the public streets of a city, simply have reference

to such railroad companies as perform the duties of common or public carriers, and to such railroads as are public, or quasi-public, in their character." *Valentine, J.*, *Mikesell v. Durkee*, 34 Kan. 509. But where a railroad company has obtained a charter and franchise to construct and operate its railroad for the use of the public, abutting owners cannot, by merely alleging that the only object of the company is to serve the private purposes of the particular persons or corporations, enjoin the construction and operation of the railroad in the street. The facts negating the public use must be clearly alleged. *Mangum v. Texas Transportation Co.*, 18 Tex. Civ. App. 478.

In *Illinois*, where tracks are laid in streets connecting railroads with public warehouses, manufactories, wharves, &c., they are considered public and for the public good. *Per Schofield, J.* "In such cases the tracks so laid become in legal contemplation, to all intents and effects, tracks of the railway with which they are connected, and open to the public use and subject to the public control in all respects as other railway tracks are open to public use. We have not regarded the circumstances that they were laid with private funds, and that they terminated opposite or within convenient contiguity of a private manufacturing establishment, as ma-

abutters attaches to the municipality, merely because it has made an unauthorized or illegal grant of the franchise or privilege of constructing a railroad in the street. If a city, without authority in its charter or by statute, and without rent or compensation, licenses individuals to occupy for their *private benefit* a public street with a railroad, and other property owners suffer special damage, the city is not liable therefor, even though the licensees may have given it a bond of indemnity. Such licensees are not the agents of the city, and the license does not authorize them to do any damage to others. If it had the power to grant such a license, "that power would not authorize it to make itself responsible for the acts of others, from which neither it nor its citizens derived any benefit, and which were not done for the accommodation of the public travel and business."¹ Such a case is to be distinguished from tortious acts done by the direction, procurement, or sanction of a city corporation, for which it is liable.²

§ 1247 (711). **Legislative Authority protects from Public Prosecution, but not from Liability to Abutter where his Property Rights are invaded.** — Where there is legislative authority, either immediately or through the authorized action of municipalities, for the occupation and use of streets for the uses of a railroad, this will protect the railway companies from prosecutions and suits for public nuisances, but it will not affect their liability to adjoining owners in those States where such owners are entitled to compensation for the additional servitude of such a use of their lands.³ There are cases

terially affecting them and giving a private character to their use. . . . It may be, in such cases, that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturing establishment, yet, if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question." *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 167. See also *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561; *Mills v. Parlin*, 106 Ill. 60.

¹ *Green v. Portland*, 32 Me. 431; *Roll v. Augusta*, 34 Ga. 326.

² *Thayer v. Boston*, 19 Pick. 511; *post*, chap. xxxii. It has been held that the city, as well as the railroad company, would be liable for damages to abutting property if the city furnished the grade of the street to the railroad

company, directed where and how it should be cut down, how the railroad should be laid, and supervised and directed the grading of the street and the laying of the track. *Sed quære?* But if it did not direct the work, it would not be liable merely for damages resulting from its assent to the construction of the railroad. *Laager v. San Antonio* (Tex. Civ. App.), 57 S. W. Rep. 61.

³ *Fletcher v. Auburn & S. R. Co.*, 25 Wend. 462; *Mahon v. Utica & S. R. Co.*, Hill & D. Suppl. (N. Y.) 156; *Hamilton v. N. Y. & H. R. Co.*, 9 Paige (N. Y.), 171; *Drake v. Hudson River R. Co.*, 7 Barb. 508; *Robinson v. N. Y. & Erie R. Co.*, 27 Barb. 512; *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467; *Redfield on Railways*, § 76, and notes; *So. Pac. R. Co. v. Reed*, 41 Cal. 256. See also *supra*, §§ 1222-1245, and notes;

which hold that when railroad companies are authorized to use streets, either by the legislature or by competent municipal action, there is a liability, in certain cases, *to the adjoining proprietor for consequential damages, other than for property taken*; but elaborate treatment of questions of this character does not fall within the province of this work.¹

§ 1248 (722) Use for Horse Railway*not an Additional Servitude.
— Whether the use of a street for a horse railway is an additional

State v. St. Paul, Minneapolis & M. R. Co., 35 Minn. 131; Gulf, C. & S. F. R. Co. v. Fuller, 63 Tex. 467.

"It is a legal solecism to call that a public nuisance which is maintained by public authority." Danville, H. & W. R. Co. v. Commonwealth, 73 Pa. St. 38; Randle v. Pacific R. Co., 65 Mo. 325, 333. Damage from smoke, soot, or fire from locomotives thrown or blown into or against houses adjacent in such case will entitle the owner to recover therefor. *The measure of damage* in such cases will be the diminution of the value of the property occasioned by these circumstances, and not the difference between the value of the property before and after the building of the road. Elizabethtown, L. & B. S. R. Co. v. Combs, 10 Bush (Ky.), 382. In *Pennsylvania*, in the absence of any express provision therefor in the charter, the company is not liable in damages for the annoyance arising from the noise, cinders, and smoke, and the hindrance to the passage of carriages. Struthers v. Dunkirk, W. & P. R. Co., 87 Pa. St. 282. See Story v. N. Y. Elev. R. Co., 90 N. Y. 122; Lahr v. Metrop. Elev. R. Co., 104 N. Y. 268; Uline v. N. Y. Central & H. R. R. Co. (leading New York case on measure of damages), 101 N. Y. 98; Wheelock v. Noonan, 108 N. Y. 179; Reed v. State, 108 N. Y. 407.

¹ New Albany & S. R. Co. v. O'Daily, 13 Ind. 353; s. c. 12 Ind. 551; Lackland v. No. Mo. R. Co., 34 Mo. 259; Same v. Same, 31 Mo. 180; Porter v. Same, 33 Mo. 128; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75; Hogenkamp v. Same, *Id.* 83; Zabriskie v. Jersey City & B. R. Co., 13 N. J. Eq. 314; McLaughlin v. Charlotte & S. C. R. Co., 5 Rich. L. (S. Car.) 583; Cincinnati & S. G. Ave. St. R. Co. v. Cummins v. 14 Ohio St. 523; Atchison & N. R. Co. v. Garside, 10 Kan. 552,

where the liability of the railroad company to the lot-owners is fully considered by *Valentine, J.*; Elizabethtown, L. & B. S. R. Co. v. Combs, 10 Bush (Ky.), 382; Pekin v. Brereton, 67 Ill. 477.

In *Indiana*, the fee of the streets in towns and cities seems to be in the public; at all events, it is held that taking the street for the laying down of the track of a railroad is not taking such an "interest in the land" as, under the statute, will entitle the adjoining proprietor to the statutory remedy for compensation. Such proprietor may sue for the consequential injury, but cannot *restrain* on the ground that a railroad in a city is a nuisance. New Albany & S. R. Co. v. O'Daily, 13 Ind. 353; s. c. 12 Ind. 551; Protzman v. Indianapolis & C. R. Co., 9 Ind. 467. See Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; Dwenger v. Chicago & G. T. R. Co., 98 Ind. 153; Terre Haute & L. R. Co. v. Bissell, 108 Ind. 113; compare with Story v. N. Y. Elev. R. Co., 90 N. Y. 122; Lahr v. Metrop. Elev. R. Co., 104 N. Y. 268; Pond v. Metrop. Elev. R. Co., 112 N. Y. 186. Further, as to nature of rights of adjoining lot-owner in street, regarding the use of the street as "appurtenant to the lot," and as property. Haynes v. Thomas, 7 Ind. 38; Crawford v. Delaware, 7 Ohio St. 459; Cook v. Burlington, 30 Iowa, 94, 102; *ante*, § 1123 *et seq.*; *post*, § 1677, and note. City council cannot, by its license, give a railroad company such a right to lay down a track in a public street as will protect it from an action by the adjacent lot-owner who is injured by a change in the grade or elevation of the street. Protzman v. Indianapolis & C. R. Co., 9 Ind. 467. Distinguished from Snyder v. Rockport, 6 Ind. 237. But see Slatten v. Des Moines Val. R. Co., 29 Iowa, 148.

burden upon the land of the adjoining proprietor, or upon his easements in the street, is a question upon which there is a diversity of judicial opinion. In New York the decisions on the subject are hardly satisfactory. In cases where, as in the city of New York, the city has a qualified fee in the streets, a horse railway is not considered to be a new servitude for which the adjacent owner is entitled to compensation. Otherwise, if the fee of the street is in the adjacent owner.¹ Recent New York decisions regard the distinction which is based on the location of the fee as an established rule of property.² In Connecticut such a use is not a new servi-

¹ In *People v. Kerr*, 27 N. Y. 188 (1863), relating to the construction of a horse railway in the streets of New York under the express authority of an act of the legislature, and without the assent of the city having been obtained, the court held (it appearing that the fee of the streets was in the city in trust for public uses as streets), that the construction of such a railroad, on the surface of the street, was a legitimate use, or could be so declared by the legislature, as had been done in that case; and it was consequently held that the abutter had no right to enjoin defendant company from such a use of the streets. The case of *People v. Kerr*, and what precisely was decided therein, were much considered in *Kellinger v. Forty-second Street & G. S. R. Co.*, 50 N. Y. 206, and in *Story v. N. Y. Elev. R. R. Co.*, 90 N. Y. 122, 157, 159, 171, 173, by which it would appear that it can only be regarded as determining that legislative authority to construct a street railroad on the surface of the streets of New York City, without a change of grade, and without providing for compensation to the abutter, is a legitimate exercise of the power to regulate the use of public streets for public purposes. The fee in the streets in *Kerr's Case* was in the city of New York, subject to a trust for street uses proper. *Craig's Case*. But in *Craig v. Rochester City & B. R. R. Co.*, 39 N. Y. 404 (1868), it was held by the Court of Appeals that the building and operation of a horse railway on the surface of the streets of Rochester, the fee being in the abutter, was an additional servitude which the legislature could not impose without compensation. It was further held that an uncompensated abutter could enjoin such a use of the street, although the common council of the city had given

its consent. As precisely the opposite conclusion had been reached in the *Kerr Case* in respect to a horse railway in the streets of the city of New York, the difference of result can only be explained by the fact that in the *Kerr Case*, the fee of the streets was in the city in trust for public uses as streets, and in the *Craig Case* the fee was in the abutter, subject to the right of the public to use them for all proper street purposes. *Kellinger's Case*, 50 N. Y. 206, followed the doctrine of the *Kerr Case*. In *Kellinger's Case* the abutting owner of property on a street of New York City (the fee being in the city in trust for street uses), was held to have no action against the horse railway company because it laid its track so near the sidewalk, in front of the plaintiff's property, as not to leave a sufficient space for a vehicle to stand. This, said the court, was a mere consequential or incidental injury. "When it is determined," says *Church, C. J.*, "that a horse railroad is a public use of the street, the question is settled, that incidental inconveniences must be submitted to" (p. 211). Compare *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122; *Lahr v. Metrop. Elev. R. Co.*, 104 N. Y. 268. *Infra*, §§ 1264, 1259, 1261.

² When the question came before the Court of Appeals whether an *electric street railway* is an additional burden or servitude on a street, the fee of which is in the abutter, that court considered itself bound by the decision in the *Craig Case* as establishing a rule of property, and held that an electric street railway could not be constructed upon a street or highway of which the fee is in the abutter without the consent of, or compensation to, the owner of the fee. *Peck v. Schenectady R. Co.*, 170 N. Y. 298, aff'd 67 N. Y. App. Div. 359; *Paige v. Schenectady R. Co.*, 178

tude upon the street, although in that State it is declared to be the law that a street or highway cannot be used for an *ordinary* railway without compensation for such use to the owner of the fee.¹ And it is the general and prevailing opinion of the courts that a *horse railway*, legislatively authorized, is an ordinary street use and is *not* the imposition of an additional burden on the fee.²

N. Y. 102. See also *Clark v. Middletown-Goshen Traction Co.*, 10 N. Y. App. Div. 354. *Infra*, § 1255.

¹ *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579, distinguished from *Imlay v. Union B. R. Co.*, 26 Conn. 249, and that case commented on.

² *Detroit Citizens' St. R. Co. v. Detroit*, 22 U. S. App. 570; *Carson v. Central R. Co.*, 35 Cal. 325; *Finch v. Riverside & A. R. Co.*, 97 Cal. 597; *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; *State v. Jacksonville St. R. Co.*, 29 Fla. 590; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *Floyd County v. Rome St. R. Co.*, 77 Ga. 614; *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320; *Chicago, B. & Q. R. Co. v. West Chicago S. R. Co.*, 156 Ill. 255; *Eichels v. Evansville St. R. Co.*, 78 Ind. 261; *Sears v. Marshalltown St. R. Co.*, 65 Iowa, 742; *Brown v. Duplessis*, 14 La. An. 842; *Briggs v. Lewiston & A. H. R. Co.*, 79 Me. 363; *Peddicord v. Baltimore, C. & E. M. P. R. Co.*, 34 Md. 463; *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603; *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Newell v. Minneapolis, L. & M. R. Co.*, 35 Minn. 112; *State v. Corrigan Consol. St. R. Co.*, 85 Mo. 263; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 65; *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61; *Patterson & P. H. R. Co. v. Paterson*, 24 N. J. Eq. 158; *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267; *West Jersey R. Co. v. Cape May & S. L. R. Co.*, 34 N. J. Eq. 164; *Van Horne v. Newark Pass. R. Co.*, 48 N. J. Eq. 332; *Morris & E. R. Co. v. Newark Pass. R. Co.*, 51 N. J. Eq. 379; *Smith v. East End St. R. Co.*, 87 Tenn. 626; *Texas & P. R. Co. v. Rosedale St. R. Co.*, 64 Tex. 80; *Hobart v. Milwaukee*, 27 Wis. 194.

Upon a full consideration of the adjudged cases upon the point, the Supreme Court of *Wisconsin* adopts the view that a *horse railway* on the public

streets is not a new burden entitling the owner of the fee to compensation, unless, to use the language of Chief Justice *Dixon*, "such owner shows that he will suffer some private and pecuniary injury by being deprived of that free access to his premises he would otherwise have and enjoy;" but it was held that the right of the owner of a store to have drays and vehicles stand transversely upon the street while discharging goods was not such an injury as to give the right to compensation. *Hobart v. Milwaukee*, 27 Wis. 194.

Ohio. In this State the rule seems to be that the construction of a *horse railway* is not in itself an additional servitude or burden upon the fee of a street, but that it gives a cause of action if it materially interferes with the easement of access appurtenant to abutting property. This result is reached upon the theory that when the public authorities have taken possession of a street or highway and regularly defined the interests and improvements necessary for the use of the public by establishing grades, &c., lot-owners have the right to make their improvements in reference thereto and no subsequent change which obstructs or impairs access to such improvements can be lawfully made without compensating the abutters for the injury. Hence, it was held that where a street railway was constructed within two feet of the sidewalk, and the court found that there was a substantial injury to the access to the property, the company was liable to the abutter in damages. *Cincinnati & S. G. Ave. St. R. Co. v. Cummins*, 14 Ohio St. 523. This doctrine appears to have been embodied in a statutory enactment applicable to street railways. See *Scioto Valley R. Co. v. Lawrence*, 38 Ohio St. 41.

Lewis, in his elaborate work on *Eminent Domain* (§ 124), says: "It has been determined in numerous decisions and without dissent, except in the State of New York, that the use of a street

The author regards the appropriation under legislative authority of a reasonable portion of a street for a horse railway, constructed on the graduated surface of the street, and used under reasonable municipal regulation in the ordinary mode, to be such a use as falls

by a horse railroad constructed and operated in the ordinary manner, falls within the purpose for which streets are established, and consequently, that for any damage resulting from such use to the abutting owner, he can recover no compensation, whether the fee is in him or in the public." Mills, Em. Dom. § 205, refers to many of the cases, and deduces from them the same result. See also 1 Hare, Am. Const. Law, 365.

Steam motors in public streets. The power of municipal authorities to authorize a "steam motor," to be used to propel horse cars upon the public streets, the fee whereof was in the municipality in trust for the public, was fully considered, under the laws of Iowa, by the Supreme Court of that State, in Stanley v. Davenport, 54 Iowa, 463; adhered to on rehearing at October term, 1880. It was decided on demurrer to the complaint that the city had no authority to permit a steam motor to be used upon its streets, and also (conceding the allegations of the complaint to be true) that the city was liable in damages to a traveller whose horse was frightened by the motor, and who was in consequence thrown out of his wagon and injured. After reviewing the decisions in Iowa and elsewhere, Seevers, J., in delivering the opinion of the court on the rehearing, said:

"No adjudication to which our attention has been called, and we believe it may be safely affirmed none exists, in which it has been held a city may authorize a railroad operated by the use of steam to occupy the streets of a city, unless authority to this effect has been granted by the sovereign power. It is said all courts everywhere have for the last fifteen years, without a dissenting opinion, conceded the authority of cities to grant the use of streets for horse railways; because of this, it is further said, when it is admitted cities have authority to decide that one kind of advanced mode of travel may be allowed, their jurisdiction is conceded and cannot be controlled by the courts. We shall not stop to discuss either proposition. It will be conceded, if no

change is made in the grade of the street, the weight of authority seems to be the city may authorize a horse railway to occupy the same. [See Sears v. Marshalltown St. R. Co., 65 Iowa, 742.] This doctrine is based on the ground, 'there is no annoyance from fire, smoke, steam-whistles, or rapid progress, and it does not signify that the street railroad has an exclusive right to use its own track when occasion requires.' Mills, Em. Dom. § 205. It was so held in Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75, and in that State the fee of the streets is in the abutting owner. It had been previously held in Starr v. Camden & Atl. R. Co., 24 N. J. L. 592, that a highway could not be occupied by a railroad operated by steam, with legislative consent, without compensating the abutting owner. Both these cases are referred to with approval in Jersey City & B. R. Co. v. Jersey City & Hob. H. R. Co., 20 N. J. Eq. 61, upon the ground, it is presumed, stated in Springfield v. Conn. River R. Co., 4 Cush. (Mass.) 63, that where a road is operated by steam and by the general public also, the two uses are 'almost, if not wholly inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated.' This doctrine has not, to our knowledge, been anywhere impugned. It does not therefore follow from the conceded proposition that a city may lawfully allow the streets to be occupied by a horse railroad, that it may do so when the road is operated by steam power." As to steam-engines in streets as a means of locomotion, see post, § 1168, note. In Minnesota, where the fee of the soil of a street is in the owner of the abutting property, it is held that the use of a public street, with the permission of the municipal authorities, by a railway company which propels its cars by a steam motor, enclosed in a cab, is the use of it in aid of a passenger street railway, and is not the imposition of an additional servitude. Newell v. Minneapolis, L. & M. R. Co., 35 Minn. 112. *Infra*, § 1249.

within the purposes for which the streets are dedicated or acquired under the power of eminent domain. When thus authorized, and so regulated by the public authorities as not to destroy the ordinary and usual street uses, this *is a public use* within the fair scope of the intention of the proprietor when he dedicates the street or is paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use which are reasonably consistent with the use of the street by ordinary vehicles, and in the usual modes. There is solid ground to distinguish between horse railways in streets, as ordinarily laid and used, which do not exclude the public, and extra-municipal steam railways, which are generally so constructed as altogether to exclude a portion of the street from public use in the accustomed methods;¹ and there is much to recommend as sound the view that where property is dedicated to the public for a street, the dedicator must be presumed to intend that it may be used as a street in such way as the legislature representing the public, and best acquainted with the public needs, may authorize, the limitations being that such use must not deprive the abutter of *his* peculiar rights and easements in the street, or destroy the ordinary uses of the street as a public and common highway open to all.²

§ 1249. **Street Railways operated by Mechanical Power.** — The rule generally adopted by the courts that horse railways intended for ordinary street traffic do not constitute an additional burden or servitude upon the fee of the street or highway, whilst, as held by many courts, a steam railway does, is founded upon a consideration of the purposes for which horse railways were originally constructed. They were intended to facilitate travel upon the city streets, and their method of operation contemplated that passengers might

¹ *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, approving text; *Chicago B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, citing text. *Infra*, § 1249. The substitution of a *double track electric street car line* for a single track horse car line is not the imposition of an additional servitude or burden on a street, although the title to the fee thereof may be vested in the abutter. *Reid v. Norfolk City R. Co.*, 94 Va. 117.

In *Michigan*, it is held that a street railway company may without incurring any liability to the abutter remove shade trees whenever it is neces-

sary to do so for the construction of its lines. But before doing so, the company must give the owner notice of its intention and an opportunity to remove them himself. *Miller v. Detroit, Y. & A. A. R. Co.*, 125 Mich. 171. See further on this subject, § 721, *ante*.

² *Briggs v. Lewiston & A. Horse R. Co.*, 79 Me. 363, where it was said *obiter* that "the motor is not the criterion; it is rather the *use* of the street. A change of motor is not a change of use." In this case the horse railway company was authorized to use *steam* motors.

board the horse cars or leave them at any point on the street which was convenient to them. This method of use is the controlling test in determining whether a *street railroad, when operated by mechanical power*, is a proper street use or not. In determining whether the property of the owner of the fee of the street is taken, the courts look to the manner of the construction and use of the railroad rather than to the motive power. If the vehicle and appliances do not permanently and exclusively occupy all or a material portion of the street to the continued exclusion of the rest of the public, and are a mere adjunct or convenience to promote travel along the street, there is no additional burden on the fee, but if they involve the permanent and exclusive occupation of all or a material portion of the street and are not intended to facilitate travel on the street, but for general purposes of commerce and communication with distant places, then they are an additional burden.¹ Applying these principles the

¹ In *La Crosse City R. Co. v. Higbee*, 107 Wis. 389, the *Wisconsin* Supreme Court, in discussing this question, well said: "In determining whether a *street railroad is an additional burden* upon the land already set aside for the public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse, electric, or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and not violate private rights; and either may be so used, and the road be so constructed and operated as to have the opposite effect. *Electric railroads* constructed in the usual way and operated by the use of the overhead trolley wire supported by cross-wires fastened to poles set at the curb lines of the street, or otherwise located so as not to materially interfere with the ordinary common use of the street, belong to the former class, as we shall see later; and that has become so firmly established by the courts that it cannot be considered open to serious question. If the crucial test, to be applied in determining whether a street railway company is entitled to a free right of way along a public street as against abutting property owners, were whether a different motive power is used than was contemplated when the street right of the public was acquired, all new discoveries of improved modes of travel

would require, as has often been remarked, dealing with the owners of the fee of the land on which the streets are located before the public could have the benefit thereof. When a new mode of using the public streets and highways is adopted, the question arises whether it violates the rights of the owners of the fee to the streets and is inconsistent with the original design in setting the land aside for a public thoroughfare, keeping in view the fact that such design is presumed to have contemplated the adoption from time to time of improvements in mechanical appliances and their use in aid of travel upon the street — the keeping abreast with the march of civilization, with the growth of population and consequent increase of travel, so as to adequately satisfy public needs and conveniences. Lands are set aside for public streets and highways, not for the present, with its necessities and modes of use, but for all time, with all the added demands that may be made upon the public ways within the scope of their original design, in the course of natural development that is constantly going on. Subject to that test the *traction engine, automobile and street railways*, regardless of the motive power used, are entitled to the use of the street, subject to the necessity for consent by public authority in proper cases, and reasonable police regulations."

In *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, the late eminent

Supreme Court of Wisconsin has declared that a railroad constructed on the grade of a street and operated so as not materially to interfere with the common use thereof for public travel by ordinary modes, or with the private rights of abutting landowners, and for the purpose of transporting persons from place to place on such street, at their reasonable convenience, is not an additional burden on the fee thereof. A railroad satisfies the above essentials, regardless of the motive power or how it is applied, if it be strictly a street railroad for the carriage of passengers on the street, taking them on and discharging them at reasonable points, and if it be so constructed and operated as not materially to interfere with the ordinary modes of using the street for public travel or with private rights.¹ Hence, the mere fact that a *street railway* is not operated by horses or animals, as vehicles for the transportation of persons or merchandise have been from the beginning of time, but *is operated by electricity* or other mechanical power, *does not impose an additional burden or easement* on the street, if the railway be intended for the local accommodation of persons using the street who would otherwise use the street for ordinary purposes of travel or passage.² But authority is also to

Mr. Justice *Cooley* forcibly said: "A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel instead of constituting an embarrassment. It is for this reason that the owners of lands over which a city street is laid are denied compensation if a street railway is subsequently authorized within it; if they were compensated for the taking of their land originally, they are supposed to be compensated for all possible losses they may suffer from its being put to proper uses as an avenue of local trade and passage, and if without compensation they dedicated it to the public, they are supposed to have contemplated and assented to all such uses."

¹ *La Crosse City R. Co. v. Higbee*, 107 Wis. 389.

² *Detroit Citizens' R. Co. v. Detroit*, 64 Fed. Rep. 628; 22 U. S. App. 570; *De Lucca v. North Little Rock*, 142 Fed. Rep. 597, 603; *Birmingham Traction Co. v. Birmingham R. & El. Co.*, 119 Ala. 137; *Baker v. Selma St. & Sub. R. Co.*, 130 Ala. 474; *Finch v.*

Riverside & A. R. Co., 87 Cal. 597; *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146; *Currie v. Consolidated R. Co.*, 81 Conn. 384; *Philadelphia, W. & B. Co. v. Wilmington City R. Co.*, 8 Del. Ch. 134; *Southern R. Co. v. Atlanta R. & P. Co.*, 111 Ga. 679; *Chicago & W. I. R. Co. v. General El. R. Co.*, 79 Ill. App. 569; *General Electric R. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588; *Wilder v. Aurora, D. & R. Elect. Tr. Co.*, 216 Ill. 493; *Chicago & C. T. R. Co. v. Whiting, H. & E. C. St. R. Co.*, 139 Ind. 297; *Snyder v. Ft. Madison St. R. Co.*, 105 Iowa, 284; *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.*, 95 Ky. 50; *Georgetown & L. Traction Co. v. Mulholland (Ky.)*, 25 Ky. Law Rep. 578; 76 S. W. Rep. 148; *Taylor v. Portsmouth, K. & Y. St. R. Co.*, 91 Me. 193; *Appeal of Milbridge & C. Elect. R. Co.*, 96 Me. 110; *Parsons v. Waterville & O. St. R. Co.*, 101 Me. 173; *Koch v. North Ave. R. Co.*, 75 Md. 222; *Green v. City & Suburban R. Co.*, 78 Md. 294; *Poole v. Falls Road Elect. R. Co.*, 88 Md. 533; *Jeffers v. Annapolis*, 107 Md. 268; *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515; *Howe v. West End St. R. Co.*, 167 Mass. 46; *Eustis v. Milton St. R. Co.*, 183 Mass.

be found in some jurisdictions to the effect that if a street railway, or the electrical poles and appliances erected for the operation thereof,

586; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Nichols v. Ann Arbor & Y. St. R. Co.*, 87 Mich. 361; *People v. Ft. Wayne & E. R. Co.*, 92 Mich. 522; *Dean v. Ann Arbor St. R. Co.*, 93 Mich. 330; *Detroit, Ft. W. & B. I. R. Co. v. Com'rs of Railroads*, 127 Mich. 219, 232; *Austin v. Detroit, Y. & A. A. R. Co.*, 134 Mich. 149; *Smith v. Jackson & B. C. Traction Co.*, 137 Mich. 20; *Mannel v. Detroit, Mt. C. & M. C. R. Co.*, 139 Mich. 106; *Ecorse v. Jackson, A. A. & D. R. Co.*, 153 Mich. 393; *Elfelt v. Stillwater St. R. Co.*, 53 Minn. 68; *Placke v. Union Depot R. Co.*, 140 Mo. 634; *De Geofroy v. Merchants' Bridge T. R. Co.*, 179 Mo. 698; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605; *Kennelly v. Jersey City*, 57 N. J. L. 293; *Roebeling v. Trenton Pass. R. Co.*, 58 N. J. L. 666; *Budd v. Camden Horse R. Co.*, 70 N. J. L. 782; *Montclair Military Academy v. North Jersey St. R. Co.*, 70 N. J. L. 229; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. L. Eq. 380; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213; *West Jersey R. Co. v. Camden, G. & W. R. Co.*, 52 N. J. Eq. 31; *Ehret v. Camden & T. R. Co.*, 61 N. J. Eq. 171; *Morris & E. R. Co. v. Newark Pass. R. Co.*, 51 N. J. Eq. 379; *Merrick v. Intramontaine R. Co.*, 118 N. Car. 1081; *Hester v. Durham Traction Co.*, 138 N. Car. 288; *Simmons v. Toledo*, 4 Ohio Circ. Dec. 69, aff'd 51 Ohio St. 626; *Akron & C. F. R. T. Co. v. Erie R. Co.*, 28 Ohio Cir. Ct. 36; *Lockhart v. Craig St. R. Co.*, 139 Pa. 419; *Heilman v. Lebanon & A. St. R. Co.*, 145 Pa. St. 23; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; *Taggart v. Newport St. R. Co.*, 16 R. I. 668; *Cumberland Tel. & Tel. Co. v. United Elect. R. Co.*, 93 Tenn. 492; *San Antonio R. T. St. R. Co. v. Limburger*, 88 Tex. 79; *Reid v. Norfolk City R. Co.*, 94 Va. 117; *Richmond Traction Co. v. Murphy*, 98 Va. 104; *Wagner v. Bristol B. L. R. Co.*, 108 Va. 594; 62 S. E. Rep. 391; *La Crosse City R. Co. v. Higbee*, 107 Wis. 389; *Linden Land Co. v. Milwaukee Elect. R. & L. Co.*, 107 Wis. 493, 511; *Younkin v. Milwaukee L. H. & Traction Co.*, 120 Wis. 477.

New York. This State forms a substantial exception to the rule generally adopted. The right of an abutter to compensation for the con-

struction of an electric railway in the street depends upon the ownership of the fee. When the fee of a street or highway was in the abutting property owner, the courts of this State held that even a horse railway was an additional servitude or burden thereon. *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404. See *supra*, § 1248. This decision having been followed and acted upon during many years, the Court of Appeals considered itself bound to regard it as establishing a rule of property, and, on the authority thereof, held that when the fee of a street or highway is in the abutter, an electric street railway cannot be constructed thereon without the consent of the owner of the fee or compensation to him. *Peck v. Schenectady R. Co.*, 170 N. Y. 298, aff'g 67 App. Div. 359; *Paige v. Schenectady R. Co.*, 178 N. Y. 102.

It has been expressly held that an abutter is not entitled to recover damages for the construction of an electric street railway in a street in front of his premises by virtue of a constitutional provision giving the right to compensation for property "damaged" as well as for property "taken" by the construction of a public improvement. *Southern R. Co. v. Atlanta R. & P. Co.*, 111 Ga. 679; *Wagner v. Bristol B. L. R. Co.*, 108 Va. 594; 62 S. E. Rep. 391. Index, *Constitutional Provisions*; *Eminent Domain*. A similar rule obtains in *Missouri* under decisions of that State holding that an ordinary steam railroad in a street at grade is not a new public use conferring a right to compensation upon abutting owners. The fact that the Constitution provides that no property shall be "damaged" for public use does not confer the right to compensation. *Gaus Mfg. Co. v. St. Louis K. & N. W. R. Co.*, 113 Mo. 308. The courts of *Missouri* have adopted a similar construction of a statutory provision requiring a company constructing a railroad in a street "before taking or damaging any property in the construction of a railroad" to cause the damages to be ascertained or paid. *Ruckert v. Grand Ave. R. Co.*, 163 Mo. 260; *Nagel v. Lindell R. Co.*, 167 Mo. 89, 98. See also *post*, § 1254.

It has also been pointed out that

so permanently and exclusively occupy a portion of the street as to interfere with the property or rights of a person abutting thereon, and to cause special damage to him differing in character from that sustained by the public generally, such interference is to be regarded as conferring upon the abutter a cause of action.¹

the courts of *California, Pennsylvania*, and some other States deny compensation to abutters for the construction and operation of an electric street railway, although the Constitutions of these States also contain provisions requiring compensation to be made for property "damaged" by the construction of a public improvement. See cases cited *supra*.

Mississippi. But in this State the contrary view has been adopted. A constitutional provision requires compensation to be made for the *damaging* as well as for the taking of property for a public improvement. According to the decisions of this State an abutter is entitled, by virtue of the constitutional provision, to damages or compensation for all changes of grade. *Vicksburg v. Herman*, 72 Miss. 211; *Warren County v. Rand*, 88 Miss. 395; *Jackson v. Williams*, 92 Miss. 301; 46 So. Rep. 551. Reasoning from these decisions, the court has held that, although the damage to an abutter's property may result from adapting a street to its ordinary uses, the abutter becomes entitled to compensation; and that therefore, under the constitutional provision, a street railway must be regarded as the imposition of an additional burden on the street entitling the owner to recover from the railway company any damages which he may sustain. *Slaughter v. Meridian L. & R. Co.* (Miss.), 48 So. Rep. 6.

The substitution of a *double track electric street railway for a single track horse car line* is not the imposition of an additional burden or servitude upon the street, the fee of which is in the abutter. *Reid v. Norfolk City R. Co.*, 94 Va. 117.

Dummy Engines. In *Minnesota* it has been held that the use of a public street by a railway company to propel its cars by *steam motor enclosed in a cab*, — a dummy engine, — is the use of the street in aid of a passenger street railway and is not the imposition of an additional servitude. *Newell*

v. Minneapolis L. & M. R. Co., 35 Minn. 112. See also to the same effect, *Williams v. City Elect. St. R. Co.*, 41 Fed. Rep. 556. The use of *steam as a motive power* for a street railway is not in itself sufficient to create an additional servitude or burden upon a highway entitling abutting owners to compensation. *Briggs v. Lewiston & A. H. R. Co.*, 79 Me. 363; *Nichols v. Ann Arbor & Y. St. R. Co.*, 87 Mich. 361, 369; *supra*, § 1248. *Cableroad*. A street passenger railway operated as a *cable road* is not an additional servitude upon the fee of the highway. *Rafferty v. Central Traction Co.*, 147 Pa. 579.

Trolley poles and wires. In *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380, an *electric street railway* was constructed upon a street, the fee of which to the middle thereof was in the abutter. The trolley poles and wires were erected in the centre of the street. It was conceded that the railway itself was a proper street use and not a new servitude, but it was claimed that a different rule applied to the trolley poles and wires. The court, however, held that the *trolley poles and wires* were not the imposition of a new and additional servitude. A *spur track* of a street railway connecting the railway with the *car barns* erected on private property and abutting on the street on which the tracks are laid, is not in itself the imposition of an additional servitude entitling the owner of a lot adjoining the car barns to compensation, but if the spur track is laid at such an elevation as seriously to interfere with the proper and reasonable use of the sidewalk, there is an interference with the abutter's easement, which entitles him to recover. *Donner v. Metropolitan St. R. Co.*, 133 Mo. App. 527. A street railway cannot place a *signal tower* at the intersection of two streets without the consent of or compensation to abutters. Such an erection takes the abutter's easements. *Williams v. Los Angeles R. Co.*, 150 Cal. 592.

¹ In *Hobart v. Milwaukee*, 27 Wis.

§ 1250 (702). **Railroads; Where the Fee is in the Public.** — In the earlier decisions, the doctrine seems to have been generally regarded as settled that if *the fee in the streets or highways was in the public or in the municipality in trust for public use*, and not in the abutter, the *legislature* might authorize them to be used by either a steam or commercial railroad company, or an ordinary street railway company, in the construction of its road without compensation to the adjoining owners.¹

194, the Supreme Court of Wisconsin adopted the view that a horse railway in the public streets is not a new burden entitling the owner of the fee to compensation, unless to use the language of *Dixon, C. J.*, "such owner shows that he will suffer some private and pecuniary injury by being deprived of that free access to his premises he would otherwise have and enjoy." But in this case it was held that the right of the owner of a store to have drays and vehicles stand transversely upon the street while discharging goods was not such an injury as to give the right to compensation. In *Linden Land Co. v. Milwaukee El. R. Co.*, 107 Wis. 493, a similar decision was made with reference to *trolley wires and poles*, the court declaring that they were not additional servitudes, unless they were so located as to interfere with the right of access of the abutter to his property. See also to the same effect, *La Crosse City R. Co. v. Higbee*, 107 Wis. 389, cited *supra*.

Nebraska. In *Jaynes v. Omaha St. R. Co.*, 53 Neb. 631, the court appears to have ruled that *inasmuch as trolley poles and wires permanently and exclusively occupy a portion of the highway*, they constitute an additional burden or servitude thereon, entitling the abutter to compensation in respect of such permanent occupation and exclusion. But the mere fact that the cars on the surface of the streets are operated by electricity is not sufficient to constitute an additional burden or servitude.

In *Utah*, it has been held that abutting owners' have easements of access in the street, although the fee may be in the city, and that an abutter is entitled to compensation if street railway tracks are constructed of such a number and in such a manner as *materially to affect the access to his abutting lots*. In the absence of a

material interference with such access, the abutter is not entitled to compensation. *Block v. Salt Lake R. T. Co.*, 9 Utah, 31.

It has been held that an *electric railroad* is an additional servitude upon a highway if it does not conform to the grade, but is laid in a cut or on fills; and under such conditions, the abutting owner is entitled to compensation. *Nichols v. Ann Arbor & Y. Street R. Co.*, 87 Mich. 361. But an electric street railway company may, with the consent of the municipal authorities, change the grade of the street to accommodate its line. In that event the change of the grade is lawful and the abutter is not entitled to claim compensation. *Austin v. Detroit, Y. & A. A. R. Co.*, 134 Mich. 149. The fact that in laying out a street or highway a *specific space is reserved for electric railways* does not constitute the imposition of a new and additional burden on the fee. *Eustis v. Milton St. R. Co.*, 183 Mass. 586.

In *White v. Blanchard Bros. Granite Co.*, 178 Mass. 363, it was held that a *horse railroad* maintained on a country highway for *transporting granite from a quarry to a railroad station* not only might be authorized, but that it did not constitute the imposition of an additional burden or servitude on the fee. The court was of the opinion that it might be to the interests of the public that the granite should be transported on rails, so that the highway would not be broken and rutted by the wheels of wagons carrying it, and therefore, the legislature was warranted in recognizing this use of the highway as a proper public use. But see cases *contra* cited *supra*, §§ 1176, 1246, to the effect that a switch connecting private premises with a street or other railroad is a private use of the highway and cannot be authorized.

¹ *Simplot v. Chicago, M. & St. P. R.*

§ 1251 (703). **Railroads; where the Fee is in the Abutter.** — But where the *public have only an easement in the street or highway*, it has been, and still is generally, but not always, held that against the proprietor of the soil the use of the street or highway for the purpose of a *steam railroad* between distant places is an additional burden, which, under the Constitutions of the different States, cannot be imposed by the legislature without compensation to such proprietor for the new servitude.¹

- Co., 5 McCrary C. C. 158; Carson v. Central R. Co., 35 Cal. 325; Severy v. Central Pac. R. Co., 51 Cal. 194; Moses v. Pittsburg, F. W. & C. R. Co., 21 Ill. 516; Murphy v. Chicago, 29 Ill. 279; Indianapolis, B. & W. R. Co. v. Hartley, 67 Ill. 439; Chicago, B. & Q. R. Co. v. McGinnis, 79 Ill. 269; Olney v. Wharf, 115 Ill. 519, 523; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203; Dwengen v. Chicago & G. T. R. Co., 98 Ind. 153; Terre Haute & L. R. Co. v. Bissell, 108 Ind. 113; Indiana, B. & W. R. Co. v. Eberle, 110 Ind. 542; Decker v. Egansville, S. & N. R. Co., 133 Ind. 493; Milburn v. Cedar Rapids, 12 Iowa, 246; Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; Slatten v. Des Moines Val. R. Co., 29 Iowa, 148; Ingraham v. Chicago, D. & M. R. Co., 34 Iowa, 249; Davenport v. Stevenson, 34 Iowa, 225; Chicago, N. & S. W. R. Co. v. Newton, 36 Iowa, 299; Kucheman v. Chicago, C. & D. R. Co., 46 Iowa, 366; Davis v. Chicago & N. W. R. Co., 46 Iowa, 389; Lexington & O. R. Co. v. Applegate, 8 Dana (Ky.), 289; Louisville & F. R. Co. v. Brown, 17 B. Mon. (Ky.) 763; Elizabethtown & P. R. Co. v. Thompson, 79 Ky. 52; Harrison v. New Orleans Pac. R. Co., 34 La. An. 462; Werges v. St. Louis, C. & N. O. R. Co., 35 La. An. 641; Hill v. Chicago, St. L. & N. O. R. Co., 38 La. An. 599; Lackland v. North Missouri R. Co., 31 Mo. 180; Porter v. North Missouri R. Co., 33 Mo. 128; Cross v. St. Louis, K. C. & N. R. Co., 77 Mo. 318, 321; Rude v. St. Louis, 93 Mo. 408, 414; Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co., 97 Mo. 457, 469; Smith v. Kansas City, St. J. & C. B. R. Co., 98 Mo. 20, 24; Morris & E. R. Co. v. Newark, 10 N. J. Eq. 352; Williams v. New York Cent. R. Co., 16 N. Y. 97; Wager v. Troy U. R. Co., 25 N. Y. 526, 533; Fobes v. Rome, W. & O. R. Co., 121 N. Y. 505; Kane v. New York Elev. R. Co., 125 N. Y. 164, 176; Reining v. New York, L. & W. R. Co., 128 N. Y. 157, 162; Conabeer v. New York Cent. & H. R. R. Co., 156 N. Y. 474, 487; Drake v. Hudson River R. Co., 7 Barb. (N. Y.) 508; Dolan v. New York & H. R. Co., 74 N. Y. App. Div. 434, 435; Philadelphia & R. R. Co., v. Philadelphia & T. R. Co., 6 Whart. (Pa.) 25, 46; Snyder v. Pennsylvania R. Co., 55 Pa. 340; Struthers v. Dunkirk, W. & P. R. Co., 87 Pa. 282; Hatch v. Vermont Cent. R. Co., 25 Vt. 49. But compare Southern Pac. R. Co. v. Reed, 41 Cal. 256; Ford v. Santa Cruz R. Co., 59 Cal. 290; Hogan v. Central Pac. R. Co., 71 Cal. 83. After much conflict of opinion, the Supreme Court of *Louisiana* reached the conclusion that the legislature of the State had the power to authorize a railway company to use for its road, without compensation to abutting owners, part of the *batture* or *levee* in front of New Orleans. New Orleans, M. & C. R. Co. v. New Orleans, 26 La. An. 478; Harrison v. New Orleans R. Co., 34 La. An. 462; Hill v. Chicago, St. L. & N. O. R. Co., 38 La. An. 599.
- ¹ Perry v. New Orleans, M. & C. Co., 55 Ala. 413; Southern Pacific R. Co. v. Reed, 41 Cal. 256; Ford v. Santa Cruz R. Co., 59 Cal. 290; Weyl v. Sonoma Valley R. Co., 69 Cal. 202; Imlay v. Union B. R. Co., 26 Conn. 249, 260; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 150; McKeon v. New York, N. H. & H. R. Co., 75 Conn. 343, 347; Florida So. R. Co. v. Brown, 23 Fla. 104; Seaboard A. L. R. Co. v. Southern Inv. Co., 53 Fla. 832; 44 So. Rep. 351; Indianapolis, B. & W. R. Co. v. Hartley, 67 Ill. 439; St. Louis, V. & T. H. R. Co. v. Capps, 67 Ill. 607; Cairo & V. R. Co. v. People, 92 Ill. 777; Bond v. Pennsylvania Co., 171 Ill. 508; O'Connell v. Chicago Terminal Transfer R. Co., 184 Ill. 308, 325; Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 179; Kucheman v. Chicago, C. & D. R. Co., 46 Iowa, 366; Gray v. St.

§ 1252. **Steam Railroad an Additional Burden.**—Although as stated above the earlier decisions on the subject made a clear dis-

Paul & Pac. R. Co., 13 Minn. 315; Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215, 224; Carli v. Stillwater St. R. & T. Co., 28 Minn. 373; Carli v. Union Depot, S. R. & T. Co., 32 Minn. 101; Williams v. Natural Br. Pl. R. Co., 21 Mo. 580; Randle v. Pacific R. Co., 65 Mo. 325; Swenson v. Lexington, 69 Mo. 157; Cross v. St. Louis, K. C. & N. R. Co., 77 Mo. 318; Starr v. Camden & A. R. Co., 24 N. J. L. 592; Central R. Co. v. Hatfield, 29 N. J. L. 206; Williams v. New York Cent. R. Co., 16 N. Y. 97; Bissell v. New York Cent. R. Co., 23 N. Y. 61; Carpenter v. Oswego & S. R. Co., 24 N. Y. 655; Mahon v. New York Cent. R. Co., 24 N. Y. 658; Wager v. Troy U. R. Co., 25 N. Y. 526; Fletcher v. Auburn & S. R. Co., 25 Wend. (N. Y.) 462; Lawrence R. Co. v. Williams, 35 Ohio St. 168; East End St. R. Co. v. Doyle, 88 Tenn. 747; Hodges v. Seaboard & R. R. Co., 88 Va. 653, citing text; Ford v. Chicago & N. W. R. Co., 14 Wis. 609; Pomeroy v. Milwaukee & C. R. Co., 16 Wis. 640; Buchner v. Chicago, M. & N. W. R. Co., 60 Wis. 264, 272; Lange v. La Crosse & E. R. Co., 118 Wis. 558.

The rule stated in the text is not adopted in *Kentucky*. *Elizabethtown & P. R. Co. v. Thompson*, 79 Ky. 52. A power to grant the right to lay down railroad tracks in streets, only after obtaining the consent of a majority of the owners of lands bordering thereon, held not to authorize the exercise of the right of eminent domain in favor of steam railroads operated by steam, because not providing for the compensation of the land owners. *Chamberlain v. Elizabethport S. Cordage Co.*, 41 N. J. Eq. 43.

Discussing the subject referred to in §§ 1250 and 1251 of the text, the Supreme Court of *Illinois* says: "A distinction is made where the *municipality* granting the right to lay the track *owns the fee* in the street, and where the fee remains in the abutting land-owner, and it seems to us that it rests on sound principles, and is supported by the highest authorities. Where the fee remains in the original proprietor, it is immaterial how the public acquired an easement over the lands, whether by condemnation or by dedication; it is only for the use of ordinary travel, such

as we are accustomed to see on streets or highways. In case the proprietor dedicated the land it was for no other purpose, and if it was condemned his damages were assessed with no other view. A different use of the land from that for which it was intended cannot be justified on the ground that a railway is an improved highway. Railway companies are only public corporations in a limited sense. The right of way, the road-bed, and the carriages propelled thereon, are owned by private individuals and not by the public. Fares are charged for travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, but at the same time they are intended to subserve the public good. The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance without paying tolls or fares. The uses are totally different, and even inconsistent. The one is exclusive, in favor of private interest, and the other is open and free to all. The doctrine most in consonance with our sense of justice is, where the fee of the street remains in the abutting land-owner, the corporation may grant the right to a railway company to lay its track along or across any street; but the company avails of its privilege at its peril. If in laying its track it causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained." *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439. The same rules were applied to the construction of *telegraph lines* in streets, in *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507. And this, referring to the doctrine stated in the text, says Judge *Cooley*, appears to be the weight of judicial authority. *Const. Lim.* 549. Such is also the opinion of Judge *Redfield*. *Redfield on Railways*, § 76, and note. *Lewis (Em. Dom.* § 115) says that where the fee is in the abutter the great weight of authority is that he may recover; that where it is in the public the authorities leave the abutter's right to recover in much doubt, and the learned author collects many of the cases in his note. The question is examined with great fulness

inction between those cases where the fee of a street was vested in the public or in the municipality in trust for the public use, and cases

of research in *Kucheman v. Chicago*, C. & D. R. Co., 46 Iowa, 366, and there was considerable diversity of opinion among the judges. See *Mulholland v. Des Moines*, A. & W. R. Co., 60 Iowa, 740; *Morgan v. Des Moines & St. L. R. Co.*, 64 Iowa, 589. See *Barney v. Keokuk*, 94 U. S. 324; s. c. below, 4 Dillon, 593. Text cited, *Atchison & Neb. R. Co. v. Garside*, 10 Kan. 552, 565. An owner of land adjoining, but not including any portion of, a street cannot enjoin the obstruction of the street by a railroad, acting under legislative or authorized municipal authority, unless his injury is of a different character, and not merely in degree, from that suffered by the public in general. *Crowley v. Davis*, 63 Cal. 460, following *Payne v. McKinley*, 54 Cal. 532, and *Bigley v. Nunan*, 35 Cal. 403. In *Ohio* an owner of abutting property who suffers material injury by the construction of a steam railroad in a street may enjoin the construction until the right of constructing is acquired under proceedings in condemnation, and it is not material whether he or the city owns the fee in the street. *Scioto Val. R. Co. v. Lawrence*, 38 Ohio St. 41.

It is now established as law in *New York*, by the cases above cited (§§ 1248, 1249, 1255), that the use of a street or highway for an ordinary steam railroad is an *additional* burden beyond the public easement which cannot be imposed by the legislature directly, or by a municipal corporation derivatively, without compensation to the abutter, who is the owner of the fee, whether it be city lots or country property; that such use, without his consent or without acquiring the right under the law, by compensating him for it, is a wrong, for which trespass will lie, or ejectment to recover possession of the land, subject to the public easement. Where the statute authorizes a railroad company to acquire only the *use* of lands for operating its road, the fee remains with the owner, and the railroad company can grant to a city no greater rights than it possesses; and on the abandonment of the *specific* use, the owner of the fee may re-enter, and cannot be deprived of his rights by legislative enactment without compensation. *Heard v. Brooklyn*, 60 N. Y. 242. Such a case is distinguishable from one where the *fee*

is granted or taken, for then the owner has no reversionary interest. *Heath v. Barmore*, 50 N. Y. 302; *ante*, § 1023. See *supra*, § 1225; *infra*, §§ 1259-1261. Consult *Porter v. Northern Mo. R. Co.*, 33 Mo. 128. See *South Carolina R. Co. v. Steiner*, 44 Ga. 546. In the absence of special constitutional restrictions, and where property rights are not invaded, the power of the legislature over all streets and highways and public places, and their *uses*, is plenary. The leading case in *Pennsylvania* on this subject is *Commonwealth v. Phila. & Trenton R. Co.*, 6 Whart. (Pa.) 25; affirmed, 27 Pa. St. 339, 354; criticised, *Williams v. N. Y. Cent. R. Co.*, 16 N. Y. 97, 106. See also *O'Connor v. Pittsburgh*, 18 Pa. St. 187, 189; *Commonwealth v. Passmore*, 1 Serg. & R. 217; approved, *Chicago v. Robbins*, 2 Black (U. S.), 418; *Struthers v. Dunkirk, W. & P. R. Co.*, 87 Pa. St. 282; *Pusey v. Allegheny*, 98 Pa. St. 522; *Reading v. Althouse*, 93 Pa. St. 400. A railroad proposed to be built exclusively *under the surface of a street* is a "street railroad" within the meaning of the *Constitution of New York* declaring that no law shall authorize the construction of a street railroad except upon the consent of the owners of one-half of the adjacent property, &c. *New York District R. Co., In re*, 107 N. Y. 42.

In *Georgia* legislative authority to a railroad company to use a public street for its track and trains does not exempt the company from liability for injuries to the adjoining property caused by smoke, noise, shaking down plastering, &c.; but *quære*. *South Carolina R. Co. v. Steiner*, 44 Ga. 546. If a party dedicates a public street through his land, and a railroad company afterwards procures a condemnation of land along the street for its track, and damages are awarded him therefor, this is no reason why he should not be awarded further damages, to be paid by another railroad company which seeks to build another track on the same street. *Southern Pac. R. Co. v. Reed*, 41 Cal. 256. Where a *strip of land outside of the original street* was acquired by the city under condemnation proceedings for widening the street, an abutting owner holding the fee to the centre still holds the fee to some part of the land lying

where the fee of the street was in the abutting owner, the modern tendency is to eliminate any such distinction, and to hold that, whether the fee be in the public or in the abutter, the construction and operation of a steam or commercial railroad in the street at grade is the imposition of an additional servitude or burden upon the street, interfering with the abutting owner's private or special property rights or easements, assuring to him the use of the street for obtaining access to his property and for other legitimate purposes in connection with his lots. Hence, we find that some recent cases have declared that whether the fee be in the abutter or in the public, the construction and operation of an *ordinary steam or commercial railroad* therein is a *taking or damaging of the property of the abutter* in such a sense as to entitle him to compensation under the constitutional guarantee.¹ An important factor inducing this change in

between the centre of the street and the former boundary, and where he did not consent to the construction of the railway over his premises he may in a proper case enjoin the operation of the road over that portion although its value is merely nominal. *Paige v. Schenectady R. Co.*, 178 N. Y. 102, rev'g 84 N. Y. App. Div. 91.

¹ *Denver v. Bayer*, 7 Colo. 113, 117; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Denver & R. G. R. Co. v. Bourne*, 11 Colo. 59; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 251; *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122; *Atlanta & W. P. R. Co. v. Atlanta B. & A. R. Co.*, 125 Ga. 529; *Athens Terminal Co. v. Athens Foundry & Machine Works*, 129 Ga. 393, 400; *Tate v. Ohio & M. R. Co.*, 7 Ind. 470, 479; *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178; *Terre Haute & S. E. R. Co. v. Rodel*, 89 Ind. 128; *Mordhurst v. Ft. Wayne & S. W. Traction Co.*, 163 Ind. 268; *Illinois Cent. R. Co. v. Elliott*, 129 Ky. 121; 110 S. W. Rep. 817; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Hoffman v. Flint & P. M. R. Co.*, 114 Mich. 316; *Ecorse v. Jackson, A. A. & D. R. Co.*, 153 Mich. 393; *Brakken v. Minneapolis & St. L. R. Co.*, 29 Minn. 41; *Carli v. Union Depot S. R. & T. Co.*, 32 Minn. 101; *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286; *Lamm v. Chicago, St. P. M. & O. R. Co.*, 45 Minn. 71; *Gustafson v. Hamm*, 56 Minn. 334, 338; *Theobald v. Louisville, N. O. & T. R. Co.*, 66 Miss. 279; *Alabama & V. R. Co. v. Bloom*, 71 Miss. 247; *Jaynes v. Omaha St. R. Co.*, 53 Neb. 631; *Bork v. United New Jersey*

R. Co., 70 N. J. L. 268; *White v. Northwestern N. C. R. Co.*, 113 N. Car. 610; *Staton v. Atlantic C. L. R. Co.*, 147 N. Car. 428; *Scioto Valley R. Co. v. Lawrence*, 38 Ohio St. 41; *South Bound R. Co. v. Burton*, 67 S. Car. 515; *Hatch v. Tacoma, O. & G. H. R. Co.*, 6 Wash. 1; *State v. King County Super. Ct.*, 26 Wash. 278; *Lund v. Idaho & W. N. R. Co.*, 50 Wash. 574; *Chicago & N. W. R. Co. v. Milwaukee R. & K. Elect. R. Co.*, 95 Wis. 561; *supra*, § 1245.

Oklahoma. In this State it has been held that although a steam railroad upon a public highway may occasion incidental inconvenience and injury to an abutting landowner, yet until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on his soil, his injury is the same in kind as that suffered by the community in general, and he cannot recover therefor. *Scrutchfield v. Choctaw, O. & W. R. Co.*, 18 Okla. 308; *Foster Lumber Co. v. Arkansas Valley & W. R. Co.*, 20 Okla. 583; 95 Pac. Rep. 224.

Tennessee. If a steam railroad constructed in a street leaves the abutters ingress and egress reasonably sufficient, an abutter, who does not own the fee of the street, is not entitled to recover for injuries which merely result from the legal and reasonable use of the street by a steam railway company. *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522; *Brumit v. Virginia & S. W. R. Co.*, 106 Tenn. 124; *Acker v. Knoxville*, 117 Tenn. 224, 228. But the rule is otherwise when the rail-

the judicial attitude has doubtless been the constitutional provision which has been adopted in many States declaring that property shall be neither taken nor "*damaged*" for public use without just compensation to the owner. This constitutional provision has, in many instances, been the controlling feature in the decisions of the courts. They have generally, though not uniformly, decided that when abutting property *sustains a special loss and injury peculiar to itself* by reason of the construction and operation of a steam or commercial railroad in the street upon which it abuts that such special and peculiar injury constitutes "damage" entitling the abutting owner to a recovery against the railroad company under the provision of the Constitution.¹ Under this constitutional pro-

road is so constructed as to practically destroy the use of the street for travel. *Pepper v. Union R. Co.*, 113 Tenn. 53, 60. And when the fee of the street is in the abutter, the construction of a steam or commercial railroad therein is the imposition of an additional servitude entitling the abutter to recover compensation. *East End St. R. Co. v. Doyle*, 88 Tenn. 747.

In *Kentucky*, the owner of abutting property cannot recover damages for loss which is merely caused by the *noise of operation* of a steam railroad in the street. *Cosby v. Owensboro & R. R. Co.*, 10 Bush (Ky.), 288, 294; *Louisville & N. R. Co. v. Kleymeier*, 105 Ky. 609; *Chesapeake & O. R. Co. v. Gross* (Ky.), 43 S. W. Rep. 203; *Illinois Cent. R. Co. v. Elliott*, 129 Ky. 121; 110 S. W. Rep. 817.

An *increase of traffic* over the tracks of a steam railroad in a street is within the original servitude which has been obtained by the company. *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122. But *additional tracks* in the street will entitle the abutter to additional damages when the additional tracks were not provided for or contemplated at the time of the original assessment of damages. *Bond v. Pennsylvania Co.*, 171 Ill. 508; *Davenport & R. I. Bridge R. & T. Co. v. Johnson*, 188 Ill. 472; *Rock Island & P. R. Co. v. Johnson*, 204 Ill. 488; *Henry v. Mason City & F. D. R. Co.*, 140 Iowa, 201; 118 N. W. Rep. 310. A tunnel to accommodate a street railway was held to cause special damage to plaintiff's property which entitled him to recover where the entrance of the tunnel was eighty feet distant from the plaintiff's lot, but the tunnel practically created a *cul de*

sac and turned pedestrian travel in other directions. The construction of the tunnel was held to be an interference with the abutter's property rights. *Fitzer v. St. Paul City R. Co.*, 105 Minn. 221.

¹ For the construction and application of the constitutional provision giving compensation for property "*damaged*" as well as for property "*taken*" for public use, in cases which involved the construction and operation of a steam or commercial railroad in streets, see *Denver v. Bayer*, 7 Colo. 113, 117; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Denver & R. G. R. Co. v. Bourne*, 11 Colo. 59; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 251; *Illinois Cent. R. Co. v. Elliott*, 129 Ky. 121; 110 S. W. Rep. 817; *Slaughter v. Meridian L. & R. Co. (Miss.)*, 48 So. Rep. 6; *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *Gulf, C. S. & F. R. Co. v. Bock*, 63 Tex. 245; *Gulf, C. & S. F. R. Co. v. Fuller*, 63 Tex. 467; *Gainesville, H. & W. R. Co. v. Hall*, 78 Tex. 169; *Hatch v. Tacoma, O. & G. H. R. Co.*, 6 Wash. 1; *Lund v. Idaho & W. N. R. Co.*, 50 Wash. 574. See, *post*, chapter on *Liability* and *Actions*.

Arkansas. Under the constitutional provision of this State, giving compensation for property *damaged* by a public improvement, a railroad company constructing its railroad in a public street is liable to the abutter for consequential injuries to his property resulting from such construction. *Hot Springs R. Co. v. Williamson*, 136 U. S. 121, aff'g 45 Ark. 429; *Little Rock & F. S. R. Co. v. Greer*, 77 Ark. 387. See also *Hot Springs R. Co. v. Williamson*, 72 Ark. 52. But the owner of property

vision the courts in the States where it has been adopted have not been under the necessity of determining whether easements or incorporeal rights in the nature of easements appurtenant to the abutting property are taken or destroyed, as the constitutional provision has generally been deemed sufficient to warrant a recovery whether property be *taken* or not. But contemporaneously with the adoption of this constitutional provision, the doctrine of easements, or incorporeal appurtenant rights in the nature of easements, of light, air, and access appurtenant to property abutting on a street has been

which abuts on a part of the street which is not occupied by the railroad only suffers damage in common with the public by reason of the construction of the railroad in another part of the street, and cannot recover. *Little Rock & H. S. W. R. Co. v. Newman*, 73 Ark. 1.

In *Illinois*, the construction and operation of a steam or commercial railroad in a street is held to entitle the abutting owner to recover damages for the loss or injury sustained thereby because of the constitutional provision in respect to property *damaged*, although without that provision he would have no recovery therefor. See *post*, § 1253.

Nebraska. Under the constitutional provision of this State giving compensation for property "damaged" as well as for property "taken," the courts have held that the deprivation of any right in the street necessary to the enjoyment of the lot is special and peculiar damage to the property which is not common to the public generally, and that the right to construct a *street railroad* pursuant to legislative and municipal authority is subject to the obligation to make compensation to lot-owners who suffer special damages by the obstruction of the street. *Gottschalk v. Chicago*, B. & Q. R. Co., 14 Neb. 550; *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279; *Omaha & R. V. R. Co. v. Rogers*, 16 Neb. 117; *Republican Val. R. Co. v. Fellers*, 16 Neb. 169; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364; *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240; *Chicago, R. I. & P. R. Co. v. Sturey*, 55 Neb. 137; *Stehr v. Mason City & F. D. R. Co.*, 77 Neb. 641.

Pennsylvania. Under the constitutional provision of this State, a steam railroad laid down in a street in front of a man's premises with trains con-

stantly passing and repassing interferes with his access, and damages or compensation therefor is recoverable. See *post*, § 1256.

In *Missouri*, precisely the opposite result is reached, and it is held that notwithstanding a constitutional provision giving compensation for property *damaged* for public use, as well as for property *taken*, the construction of an ordinary steam railroad on the surface of a street does not cause any damage of such special and peculiar character as to entitle the abutting owner to a recovery. See *post*, § 1254.

In *Iowa*, the code makes a distinction between steam railways and horse railways, owners of abutting lots being entitled to damages when steam railways are built along streets, but not when horse railways are so built. *Sears v. Marshalltown St. R. Co.*, 65 Iowa, 742.

The *damages* resulting from the construction of the railroad in the street must be *paid before construction* under the provisions of the Constitution of *Washington*, *State v. King County Superior Ct.*, 26 Wash. 278; and also under the Constitution of *Georgia*, *Athens Terminal Co. v. Athens Foundry & Machine Works*, 129 Ga. 393, 401. But in *Washington*, if the abutting owner has permitted the completion of the railroad without objection, his remedy is *limited to an action for compensation*, and he cannot obtain redress by enjoining its operation. *Kakeldy v. Columbia & P. S. R. Co.*, 37 Wash. 675.

In many jurisdictions the *recovery of these damages* is by an action at law in which a single recovery is given for all damages past, present, and future. See *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122; *Staton v. Atlantic C. L. R. Co.*, 147 N. Car. 428. This is also the rule in *Illinois*, see *post*, § 1253; and in *Texas*, *post*, § 1257.

evolved and developed by judicial decision, and the changed attitude of the courts is in many cases to be attributed wholly, or in part, to the recognition of this principle.¹ But in considering and applying the authorities it must always be carefully kept in view that whatever may be the general principles adopted in the different jurisdictions, many minor differences and variations in the course of judicial decision are to be found, and the precise rights of abutting owners and the exact liability of a steam or commercial railroad company can only be determined by a careful consideration of the decisions of the particular State where the question arises. A separate and independent examination of the decisions of each of the States of the Union is beyond the scope of this work, but a statement of the rules adopted in some of these States in important cases will be found instructive and valuable in illuminating the general principles involved.

§ 1253. **Railroads in Streets: Rule in Illinois.** — In Illinois it was held in an early case that where the *fee of a street was vested in the city*, and the city was, by statute, given exclusive control, the owner of property abutting upon the street was *not* entitled to recover compensation or damages for the construction and operation of a steam railroad therein pursuant to legislative authority, or authorized permission or grant of the right from the municipality,² and it followed therefrom that the abutter had no standing in court to enjoin such construction and operation. If, however, the *fee of the street is in the abutter*, it has always been the rule in Illinois that the construction and operation of an ordinary steam or commercial railroad therein constitutes an additional servitude or burden upon the fee, and before the railroad company can lawfully appropriate the street to the use of its railroad, it must condemn the abutting owner's interest therein, although it may be authorized by statute or by city ordinance to lay its tracks therein.³ An abutting owner who owns the fee of the street *is entitled to enjoin* the construction of a steam or commercial railroad where no compensation has been made for

¹ See *ante*, § 1245.

² *Moses v. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279. See also *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Chicago, B. & Q. R. Co. v. McGinnis*, 79 Ill. 269; *Olney v. Wharf*, 115 Ill. 519, 523; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203.

³ *Atchison, T. & S. F. R. Co. v. General Electric R. Co.*, 112 Fed. Rep. 689,

691; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74; *Bond v. Pennsylvania Co.*, 171 Ill. 508, rev'g 69 Ill. App. 507; *O'Connell v. Chicago Terminal Transfer R. Co.*, 184 Ill. 308; *Rock Island & P. R. Co. v. Johnson*, 204 Ill. 488, 493; *Wilder v. Aurora, D. & R. El. R. Co.*, 216 Ill. 493, 527.

the additional servitude or burden imposed upon his interest therein.¹ But it is also the rule that erections upon a public street impose no additional servitude or burden on the fee when they aid and facilitate its use for the purposes of travel and transportation. A *street railroad* is an ordinary use of the street, being merely a modification of the usual method of public travel therein, adding thereto an additional mode of conveyance; and legislative permission to a street railroad company to lay its tracks and operate its cars in a public street is not a grant of an additional servitude or easement in the soil of the street and inflicts no damage on the owner of the fee. Hence, the owner of the fee is not entitled to damages or compensation therefor, either under the rules of the common law or by virtue of the provision of the Constitution shortly to be referred to, which secures to property owners the right to compensation when their property is "damaged" as well as when it is "taken" by the construction of a public improvement.² But in 1870 a new Constitution was adopted in this State which contained a provision that private property shall not be *taken or damaged* for public uses without just compensation.³ Under this provision, the owners of property abutting on a city street, although they may not own the fee thereof, are entitled to compensation for any obstruction or injury to the right of user or

¹ *Bond v. Pennsylvania Co.*, 171 Ill. 508, rev'g 69 Ill. App. 507 (distinguishing *Doane v. Lake Street El. R. Co.*, 165 Ill. 510); *O'Connell v. Chicago Terminal Transfer R. Co.*, 184 Ill. 308; *Davenport & R. I. Bridge R. & T. Co. v. Johnson*, 188 Ill. 472. An owner of abutting property, who is also the owner of the fee of the street, may maintain *an action in trespass* against a steam railroad corporation to recover damage sustained by laying its tracks upon, and using the street for its purposes as a right of way, although the railroad company may be authorized so to do by ordinance passed under power conferred by the legislature. *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439.

² *Atchison, T. & S. F. R. Co. v. General Electric R. Co.*, 112 Fed. Rep. 689, 691; *Pittsburgh, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255; *Bond v. Pennsylvania Co.*, 171 Ill. 508, 513; *General Electric R. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588, rev'g 84 Ill. App. 640. A steam or commercial railroad company which owns the fee of a street is not entitled

to compensation as for the imposition of an additional burden thereon by reason of the construction of the tracks of a *street railroad* along the street under permission from the city in the absence of special and peculiar damage affecting the ordinary operation of the steam railroad. *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255. The right of a steam or commercial railroad to *cross a street* is subordinate to the use of the street for ordinary street purposes. The operation of a street railroad is an ordinary street purpose. Hence, the steam railroad company is not entitled to compensation for the construction of the street railway along the street and across its tracks. *Atchison, T. & S. F. R. Co. v. General Elect. R. Co.*, 112 Fed. Rep. 689. An *electric street railway* is not the imposition of an additional servitude or burden upon the fee whether the fee of the street be in the abutter or in the city. *Ranken v. St. Louis & B. S. R. Co.*, 98 Fed. Rep. 479.

³ Constitution, Illinois, 1870, Art. ii, § 13.

enjoyment of their private property by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally.¹ But this constitutional provision *does not require the prepayment* of the damages for consequential injuries as a condition precedent to the exercise of a grant of power to construct a railroad in a street or make a public improvement.² And when the fee of the street is in the city, the effect of the constitutional provision is not to create any property right or easement in the abutter which he did not previously have. Hence, when the city, and not the abutter, holds the fee of the street, such damages as the abutting owner may suffer from the laying of a steam railroad track in the street *are merely consequential* so far as they affect the abutting property. The railroad is of a permanent character, and all damages for past and future injury to the property of the abutter may be recovered in an action at law, and one recovery in such case is a bar to all future actions for the same cause.³ As the construction and operation of the railroad do not take any property of the abutter, and the damages are only consequential in their nature, and as there is an adequate remedy at law, the abutting owner *is not entitled to an injunction* to restrain the construction and operation of the railroad.⁴ The result of the decisions in this State seems to be that the

¹ Chicago v. Taylor, 125 U. S. 161; Stone v. Fairbury, P. & N. W. R. Co., 68 Ill. 394; Rigney v. Chicago, 102 Ill. 64; Chicago & W. I. R. Co. v. Ayres, 106 Ill. 511; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203; Lake Erie & W. R. Co. v. Scott, 132 Ill. 429; Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 35; Illinois Cent. R. Co. v. Turner, 194 Ill. 575; Calumet & C. C. & Dock Co. v. Morawetz, 195 Ill. 398; Illinois Cent. R. Co. v. Davis, 71 Ill. App. 99; Illinois Cent. R. Co. v. Wolf, 95 Ill. App. 74. See also People v. Walsh, 96 Ill. 232. Under this provision of the Illinois Constitution the right to recover compensation for property "damaged" vests in the owner thereof at the time of the construction of the railroad or the damaging of the property, and does not pass to a purchaser. Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203; Galt v. Chicago & N. W. R. Co., 157 Ill. 125.

² Lorie v. North Chicago City R. Co., 32 Fed. Rep. 270; Parker v. Catholic Bishop, 146 Ill. 158.

³ Chicago & A. R. Co. v. Maher, 91 Ill. 312; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203; Chicago & E. I. R.

Co. v. McAuley, 121 Ill. 160; Kankakee & S. R. Co. v. Horan, 131 Ill. 288; Lake Erie & W. R. Co. v. Scott, 132 Ill. 429; Galt v. Chicago & N. W. R. Co., 157 Ill. 125, 130; Doane v. Lake St. El. R. Co., 165 Ill. 510; Lake Erie & W. R. Co. v. Purcell, 75 Ill. App. 573; Metropolitan W. S. Elev. R. Co. v. Goll, 100 Ill. App. 323; Rockford & I. R. Co. v. Keyt, 117 Ill. App. 32.

⁴ Lorie v. North Chicago City R. Co., 32 Fed. Rep. 270; Stetson v. Chicago & E. R. Co., 75 Ill. 74; Patterson v. Chicago, D. & V. R. Co., 75 Ill. 588; Peoria & R. I. R. Co. v. Schertz, 84 Ill. 135; Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 35; Parker v. Catholic Bishop, 146 Ill. 158; Chicago, B. & Q. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 273; People v. General Electric R. Co., 172 Ill. 129; Pennsylvania Co. v. Chicago, 181 Ill. 289, 297; Wilder v. Aurora, D. & R. Elect. R. Co., 216 Ill. 493; Chicago & W. I. R. Co. v. General Electric R. Co., 79 Ill. App. 569; Atchison, T. & S. F. R. Co. v. Maegerlein, 114 Ill. App. 222; Walther v. Chicago & W. I. R. Co., 117 Ill. App. 364, aff'd 215 Ill. 456. See

right of the abutting owner who does not own the fee of the street to recover damages or compensation for injury sustained through the construction and operation of a railroad therein depends entirely upon the constitutional provision requiring compensation to be made for property *damaged* as well as for property taken for public use. The courts of this State do not appear to have recognized that the abutter has any *property right or easement* in a street, the fee of which is in the city, which is taken or impaired by the construction of a steam or commercial railroad. It would also appear that the Supreme Court of this State does not agree with the decisions of the New York Court of Appeals, and holds that *no property right or easement* in the street *is taken* by the construction and operation of an *elevated railroad* in the street in front of his property, for it has held that the damages therefrom are purely consequential in their nature, that no property right is taken thereby, and that the abutter having an adequate remedy at law must, even in the case of an *elevated railroad*, obtain his redress by an action at law, and not by injunction.¹ But in the *case of an elevated railroad*, just as in the case of a steam surface railroad, the grant of authority by a city to an elevated railroad company to construct its railroad in the street does not relieve the company from liability under the Constitution for *damage* to abutting property. If the abutting property is depreciated in value by the construction and operation of an elevated railroad, the owner may recover damages under the com-

also *Osborne v. Missouri Pac. R. Co.*, 147 U. S. 248.

In *Illinois*, the courts deny to an abutter the right to *enjoin* the construction of any railroad in the street *without lawful authority*. Redress against an unlawful and unauthorized appropriation of the street may be had at the suit of the State or of the municipality. *People v. Decatur, S. & St. L. R. Co.*, 120 Ill. App. 229; *Chicago, R. I. & P. R. Co. v. People*, 120 Ill. App. 306. But according to the rule adopted in the courts of the State the abutter must obtain his redress for loss and injury which he sustains by reason of the unauthorized construction of a railroad in the street by an action at law, and the right of recovery in that action is not defeated by the fact that the railroad company has no authority to maintain and operate its railroad. The recovery of the abutter is governed by the same rules as if the railroad corporation were legally authorized to maintain and operate its

railroad. *Patterson v. Chicago, D. & V. R. Co.*, 75 Ill. 588; *Doane v. Lake St. Elev. R. Co.*, 165 Ill. 510; *General Elect. R. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588; *Rockford & I. R. Co. v. Keyt*, 117 Ill. App. 32; *Thornton v. Stevens Coal Co.*, 117 Ill. App. 376. But, under some circumstances, the Federal Courts in cases coming originally within their jurisdiction have given an injunction to an abutting owner who is not the owner of the fee of the street when he has shown that he is irreparably damaged by the construction of a steam railroad in the street without authority of law, and have refused to follow the decisions of the State courts. *General Electric R. Co. v. Chicago, I. & L. R. Co.*, 98 Fed. Rep. 907; s. c. 107 Fed. Rep. 771.

¹ *Blodgett v. North Western Elev. R. Co.*, 80 Fed. Rep. 601; *Doane v. Lake Street Elev. R. Co.*, 165 Ill. 510; *Phelps v. Lake Street Elev. R. Co.*, 60 Ill. App. 471.

stitutional provision referred to, and his right of recovery is not limited to tortious acts. He may sue after the railroad is constructed, but the measure of damages and the rules of evidence are the same as though a condemnation proceeding had been brought to determine the damages prior to construction.¹

§ 1254. **Railroads in Streets: Rule in Missouri.** — In Missouri it appears to be considered that every owner of a lot abutting on a public street, besides the ownership of the property itself, has rights appurtenant thereto which form a part of the estate, among which may be named an easement for the free admission of light and pure air, and the right of ingress and egress to and from the property. The interest of the lot-owner in the adjacent street is a peculiar interest, which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to the contiguous ground; an incidental title to certain facilities and franchises which is in the nature of property, and which can no more be appropriated against the owner's will than any tangible property of which he may be the owner. Depriving the owner of these incorporeal hereditaments by interfering with their full enjoyment in the appropriation of the street to a new and different public use from that originally contemplated would undoubtedly be a *damage* within the constitutional provision of this State requiring compensation to be made for property taken or *damaged* for public use.² But the courts of this State are also of the opinion that the laying of a *railroad track of any kind* in the street, at grade, and operating the road in the usual manner, is not applying the street to a new public use which requires the payment of compensation for damage to the property. When land is dedicated generally, and without restrictions, or condemned for a public street in a town or city, the owner of the abutting lots who secures the benefit of the street, and persons who purchase and improve property thereon, hold their property rights subject to all the uses to which the street may be lawfully subjected by the public. The uniform course of decision in this State is that the laying of a railroad track

¹ *Aldis v. Union Elev. R. Co.*, 203 Ill. 567; *Chicago Office Building v. Lake St. Elev. R. Co.*, 87 Ill. App. 594. In *Doane v. Lake St. Elev. R. Co.*, 165 Ill. 510, 518, remarks are to be found to the effect that when the fee of a street is in the city, the construction of an elevated railroad therein does not subject the street to a new servi-

tude or unlawful use. These remarks are qualified and explained in *Aldis v. Union Elev. R. Co.*, 203 Ill. 567, cited *supra*.

² *Osborne v. Missouri Pac. R. Co.*, 147 U. S. 248, 256; *Gaus Mfg. Co. v. St. Louis, K. & N. W. R. Co.*, 113 Mo. 308; *DeGeofroy v. Merchants Bridge Terminal R. Co.*, 179 Mo. 698.

on the established grade and operating a steam or commercial railroad thereon in the transaction of commercial business along the street, under proper legislative authority, is not a perversion of the highway from its original purposes.¹ The right to a recovery under the constitutional provision against the *taking or damaging of property* for public use is also denied, because in the contemplation of the law no additional burden or servitude is imposed upon the street and the abutter suffers no injury of which the law can take cognizance.² But, in this State, this doctrine seems to be qualified, if the street is so narrow or the railroad use is so extensive as to necessarily destroy the usefulness of the street as a public way and deprive the owners of property of their *means of access*. A city having authority to authorize the construction and operation of railroads in the streets is not authorized to grant a right which destroys the public way, and the construction of a railroad under such circumstances creates a nuisance, giving a cause of action to abutters whose access to their property is destroyed.³ But the construction,

¹ *Osborne v. Missouri Pac. R. Co.*, 147 U. S. 248, 257; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Porter v. North Missouri R. Co.*, 33 Mo. 128; *Cross v. St. Louis, K. C. & N. R. Co.*, 77 Mo. 318, 321; *Rude v. St. Louis*, 93 Mo. 408, 414; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 457, 469; *Smith v. Kansas City, St. J. & C. B. R. Co.*, 98 Mo. 20, 24; *Gaus Mfg. Co. v. St. Louis, K. & N. W. R. Co.*, 113 Mo. 308; *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 97; *Stephenson v. Missouri Pac. R. Co.*, 68 Mo. App. 642, 649; *Foudry v. St. Louis, I. M. & S. R. Co.*, 130 Mo. App. 104. An ordinary horse street railroad is not an additional burden or servitude upon a city street. *Ransom v. Citizens' R. Co.*, 104 Mo. 375.

In *Gaus Mfg. Co. v. St. Louis, K. & N. W. R. Co.*, 113 Mo. 308, the court said: "It appears from the evidence that the only substantial damage which was special to plaintiff and not common to the public, shown by it, consisted in the interference with its free access from the street to its factory; the obstruction of light and air across the open street; smoke, cinders, and dust from engine and trains; noise and jarring of the ground; all caused by the movement of trains. These may cause damage to and depreciation of the value of the property, but the damage results from a legitimate use of the street and which might have been

anticipated by plaintiff as a probable use when it bought its property and erected its improvements."

² *Gaus Mfg. Co. v. St. Louis, K. & N. R. Co.*, 113 Mo. 308. A statute provided that any railroad corporation constructing a railroad in a street "before taking or damaging any property in the construction of a railroad" should cause the damages to be ascertained or paid. The court held that, in law, no damages were caused by the ordinary construction of a railroad on the surface, and that there could be no recovery under this statute. *Ruckert v. Grand Ave. R. Co.*, 163 Mo. 260; *Nagel v. Lindell R. Co.*, 167 Mo. 89, 98.

³ *Dubach v. Hannibal & St. J. R. Co.*, 89 Mo. 483; *Lockwood v. Wabash R. Co.*, 122 Mo. 86; *Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26; *Schulenberg & B. L. Co. v. St. Louis, K. & N. W. R. Co.*, 129 Mo. 455; *Sherlock v. Kansas City B. R. Co.*, 142 Mo. 172; *Corby v. Chicago, R. I. & P. R. Co.*, 150 Mo. 457; *Nagel v. Lindell R. Co.*, 167 Mo. 89, 97; *DeGeofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 715.

A railroad cannot be constructed on a sidewalk thereby obstructing the access to abutting premises. *Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26; *Schulenberg & B. L. Co. v. St. Louis, K. & N. W. R. Co.*, 129 Mo. 455. If a steam or commercial railroad com-

maintenance, and operation of an *elevated railroad in a city street*, whether the fee thereof be in the abutter or in the city, is the permanent and exclusive appropriation of a portion of the street to the erection of the railroad structure and the operation of trains thereon, and when constructed and maintained under legislative authority, it is a taking of rights or easements of abutters in the street for which compensation must be made.¹ The result of the decisions of this State seems to be that, although property rights in the nature of easements in the street are recognized as appurtenant to abutting property, these property rights or easements are

pany raises embankments in a city street, thereby obstructing access to abutting property, the company is liable in damages. *Cross v. St. Louis, K. C. & N. R. Co.*, 77 Mo. 318; *Smith v. Kansas City, St. J. & C. B. R. Co.*, 98 Mo. 20, 24. There can be no recovery against an *electric street railway* unless it is so defectively constructed as to prevent the concurrent use of the highway by the public in the ordinary course of travel. *Placke v. Union Depot R. Co.*, 140 Mo. 634.

¹ In *DeGeofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, the court considered the question whether the owner of abutting property was entitled to compensation for the construction and operation of an *elevated railroad* in the street. The court reviewed its previous decisions and deduced therefrom the following conclusions: "*First*: The owner of property abutting on a public street or highway in this State has an easement in such street of *air, light, and access* to and from his property by said street, whether the fee to the same is in the municipality or the abutting owners, and this easement is property of which he cannot be deprived without just compensation. *Second*: That the construction and maintenance of a *steam or street railroad on the grade* of such street, in pursuance of municipal authority, the municipal corporation having power to grant it, is *not* a new or additional servitude on the land upon which the street is constructed, but falls within the use contemplated when the street was laid out or acquired by the public. *Third*: That the power of a city or other municipal corporation in Missouri to authorize the construction of railroads in the public streets is 'a modified right, a right hedged about with many quali-

fications;' that it does not include the right to grant a railroad the exclusive use of the surface of a street even when laid at grade. Neither can the municipal authority grant to a railroad company such use of a street as will destroy or unreasonably interfere with the right of an abutting property holder of *access to or egress from his property*, or deprive him of his easement of *light and air* from the street. The street on which a railroad is constructed on the grade cannot be used for side tracks, the storing of cars, for water tanks or like structures. *Fourth*: That the right to construct a railroad in a public street at grade by authority of municipal grant has been too long acquiesced in and too many rights have been vested on the faith of the decisions affirming such right, to now question such a right acquired on the faith of such adjudications. *Fifth*: That whether an elevated railroad, constructed on permanent pillars or arches in the street so as to shut out the light and air of abutting owners and interfere with the free use of the street and their access to and from their premises, is a new and additional servitude, and not in contemplation when the street was acquired or laid out, is an open question in this State and one which we are at liberty to decide on reason and the analogies of the law." The court reviewed the authorities and, following the decision of the *New York Court of Appeals* as laid down in *Story v. New York Elev. R. Co.*, 90 N. Y. 122, held that an elevated railway structure built in a public street, and depriving the owners of free access to and from their building, and of light and air, is an additional servitude and an appropriation of the easements of access, light, and air which entitled the abutting owners to compensation.

not taken or damaged by the construction of a railroad in the street at grade, unless it is constructed and operated under such circumstances as practically to appropriate the street to the exclusive use of the railroad. A recovery of damages resulting from the construction and operation of an ordinary steam railroad under conditions which do not exclude public use, cannot be had either under the principles of common law or under the constitutional provision, but must depend upon a statutory enactment.

§ 1255. **Railroads in Streets: Rule in New York.** — In New York it is the established doctrine that, except in the case of a permanent and exclusive appropriation of some part of the street to the exclusion of the general public by a stationary structure such as an elevated railroad, the right of an abutter to compensation for the construction of a railroad in the street or highway, whether it be a steam or commercial railroad, or a horse or street railway, is dependent upon the title to the fee. If the fee of the street or highway be vested in the public or in the municipality in trust for public use, and if the abutter has no title thereto, *the construction of an ordinary steam railroad on the surface of the street does not take any property* of the abutting owner, is a lawful and proper use of the street, and any loss or injury resulting to the abutting property therefrom is *damnum absque injuria*.¹ But if the public have only a mere easement or right to use the street for street purposes, and the title to the fee is vested in the owners of the abutting property, the construction and operation of a steam or commercial railroad at grade is the imposition of a new and additional servitude upon the soil which entitles the owner thereof to compensation for the property thereby taken.² In this State, no distinction is made with respect to the rights of an abutter to compensation between an ordinary street railroad and a steam or commercial railroad. If the fee of the street be in the public or in the municipality in trust for public use, an ordinary street horse railway is held to be only an appropriation of the street to the purposes for which it was intended, and the abutter is not

¹ *Williams v. New York Central R. & H. R. Co.*; 74 N. Y. App. Div. 434, Co., 16 N. Y. 97, *obiter*; *Wager v.* 435. *Supra*, § 1248.
² *Troy U. R. Co.*, 25 N. Y. 526, 533; *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61; *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 508; *Kane v. New York Elev. R. Co.*, 125 N. Y. 164, 176; *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157, 162; *Conabeer v. N. Y. Cent. & H. R. R. Co.*, 156 N. Y. 474, 487; *Drake v. Hudson Riv. R. Co.*, 7 Barb. (N. Y.) 508; *Dolan v. New York*

entitled to compensation in respect thereof.¹ But if, on the contrary, the fee of the street or highway be in the abutter, and the right or title of the public or of the municipality is a mere easement or right to use the street for street purposes, then the construction of an ordinary horse railroad was held to be the imposition of an additional servitude upon the land of an adjoining proprietor covered by the street, and the adjoining proprietor is entitled to compensation therefor.² And when, with the development of electricity as a motive power, the question came before the court for review in a case growing out of the construction of an electric street railway over a street or highway the fee of which was in an abutting owner, the Court of Appeals declared that the rule which had been adopted with reference to *horse or street railways* had become a *rule of property* which the court could not in justice overthrow. Therefore, notwithstanding the fact that many jurisdictions have held the contrary doctrine, the court applied the doctrine that a horse railway invades the property rights of the owner of the fee in a public street and imposes upon him a burden for which he is entitled to compensation, and held that the building and operation of an *electric street railway* must be controlled by the same principle.³ But when the

¹ *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-Second St. & G. S. R. Co.*, 50 N. Y. 206; *Knox v. New York City*, 55 Barb. (N. Y.) 404, 411. *Ante*, § 1248.

² *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404; *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 515; *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157, 163; *Clark v. Middletown-Goshen Traction Co.*, 10 N. Y. App. Div. 354; s. c. 16 N. Y. App. Div. 631; *McCruden v. Rochester R. Co.*, 5 N. Y. Misc. 59, 61, 62, aff'd 77 Hun (N. Y.), 609, 151 N. Y. 623; *Spofford v. Southern Boulevard R. Co.*, 15 Daly (N. Y.), 162, 165; *Thayer v. Rochester City R. Co.*, 15 Abb. N. Cas. (N. Y.) 52; *Matter of Gilbert Elev. R. Co.*, 38 Hun (N. Y.), 438, 447; *Edridge v. Rochester City & B. R. Co.*, 54 Hun (N. Y.), 194, 195; *Matter of Rochester Elect. R. Co.*, 57 Hun (N. Y.), 56, 60; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.*, 67 Hun (N. Y.), 153, 161.

In *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404, the appellant insisted that there was a *distinction* between a railroad operated in the streets of a public city *by steam and one operated by horse power*, and that the

rule laid down in the former cases was not applicable to the latter class of roads. The Court of Appeals after examining the question, while conceding that there was a difference between a steam railroad and a horse railway in the manner in which the road was constructed and the speed with which the cars were propelled, said, "But there is precisely the same exclusive appropriation of track for the purposes intended in each case, to the absolute exclusion of all who may interfere with its mode of operation," and distinctly held that the building and operation of a horse railroad in the public streets of a city imposed an additional servitude upon the land of an adjoining proprietor covered by a street, and that such a proprietor could maintain a suit to perpetually enjoin a horse railway company from laying down its tracks in the street and from running its cars over it. As to this case, see *ante*, § 1248, note.

³ *Peck v. Schenectady R. Co.*, 170 N. Y. 298, aff'g 67 N. Y. App. Div. 359. See also to the same effect, *Paige v. Schenectady R. Co.*, 178 N. Y. 102, rev'g 84 N. Y. App. Div. 91; *Clark v. Middletown-Goshen Traction*

construction of *elevated railroads operated by steam* in the streets of New York City, the fee of which was vested in the municipality, demonstrated that this use of the street damaged the abutting property to such an extent as to subject the owners of abutting property to an extreme and unprecedented loss and injury, the Court of Appeals re-examined the decisions and principles which it had adopted in previous cases, recognized, or more accurately speaking *created*, the existence of *easements, or incorporeal rights* in the streets in the nature of easements, appurtenant to the abutting lands, declared that these easements were private property in the sense of the Constitution, which even under express legislative authority could not be taken or destroyed without just compensation under the constitutional guarantee, and held that the construction and maintenance in the streets of a permanent elevated railroad structure and its operation even under express legislative sanction were not an ordinary or legitimate street use, but constituted a "*taking*" of the easements or property of the abutting owners, and that the owners of abutting property were entitled to compensation under the constitutional guarantee.¹ The same principle has been applied to the operation of *steam railroads* where, pursuant to statutory and municipal authority, such railroads have been permitted to construct *embankments in the middle of the streets* and to appropriate a portion thereof to their use under such circumstances as to *exclude the public and the abutters* from the use of the portion so appropriated, thereby destroying the easements or incorporeal rights in the nature of easements of the abutters to use the streets in connection with the abutting property for the purposes of obtaining light, air, and access.²

§ 1256. **Railroads in Streets: Rule in Pennsylvania.** — The *Constitution of Pennsylvania*, adopted in 1874, contains a provision,

Co., 10 N. Y. App. Div. 354; s. c. 16 N. Y. App. Div. 631.

¹ *Story v. New York Elev. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268; *Abendroth v. Manhattan Elev. R. Co.*, 122 N. Y. 1; *Kane v. New York Elev. R. Co.*, 125 N. Y. 164; *Bohm v. Metropolitan Elev. R. Co.*, 129 N. Y. 576, 587; *Hughes v. Metropolitan Elev. R. Co.*, 130 N. Y. 14.

² *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157; *Egerer v. New York Cent. & H. R. R. Co.*, 130 N. Y. 108. See also *Fletcher v. Auburn & S. R. Co.*, 25 Wend. (N. Y.) 462. But where a railroad corporation under

statutory authority constructed an embankment in a street upon which it laid its tracks and in order to permit travel upon the intersecting street upon which plaintiff's property abutted, graded the intersecting street to the level of the tracks, it was held that the change which was effected in the intersecting street was a mere change of grade, that it did not constitute any invasion of the rights of the plaintiff and other property owners abutting upon the intersecting street, and that the plaintiff was not entitled to recover. *Rauenstein v. New York, L. & W. R. Co.*, 136 N. Y. 528.

that "municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property *taken, injured, or destroyed* by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." In its application to charters and charter rights previously granted to railroad companies it has been held that this provision operates as an amendment of the charter where the right is reserved to alter, repeal, or amend the charter, and that the obligation of any contract with the State is not impaired thereby, nor is any vested right of the corporation affected.¹ In the application of this constitutional provision, it has been held that where a steam or commercial railroad is laid down upon a public street, and, although at grade, it is so constructed with reference to the property of an abutting owner that, by its operation in a lawful manner, access to the property, if not cut off, is rendered dangerous, the company is liable for the consequential injuries thereby caused.² And the liability of the company for the construction of an elevated structure within the lines of a street pursuant to statutory authority, and the operation thereon of trains propelled by steam, is also such an injury to property abutting on the street and opposite to the structure as entitles the abutting owner to compensation.³ The construction of a bridge across the intersection of two streets diagonally from corner to corner and resting at each corner upon the private property of the railroad company has also been held to give the owner of property abutting upon each street at one of the remaining corners the right to compensation or damages under the constitutional provision.⁴ But the constitutional provision was not

¹ *Pennsylvania R. Co. v. Duncan*, 111 Pa. 352, *aff'd sub nom.* *Pennsylvania R. Co. v. Miller*, 132 U. S. 75.

² *Northern Cent. R. Co. v. Holland*, 117 Pa. 613; *Pennsylvania S. V. R. Co. v. Walsh*, 124 Pa. 544; *Pennsylvania S. V. R. Co. v. Ziemer*, 124 Pa. 560. "It would be an unsavory technicality to hold that a railroad laid down by the curb in front of a man's door, with trains constantly passing and repassing, did not interfere with his access to his house, and was not an injury caused by the construction of the road." *Per Paxson*, C. J., in *Pennsylvania S. V. R. Co. v. Walsh*, 124 Pa. 544, 559.

³ *Duncan v. Pennsylvania R. Co.*, 111 Pa. 352, *aff'd sub nom.* *Pennsylvania R. Co. v. Miller*, 132 U. S. 75.

⁴ A railroad company owned the land at the corners of two streets diagonally opposite to each other. The plaintiff owned the property at one of the other corners. Pursuant to statutory and municipal authority, the company constructed a bridge from corner to corner over the intersection of the streets. The court held that the bridge was the imposition of a new burden on the street, and that the plaintiff was entitled, under the Constitution, to recover damages for its construction. But the court also declared that the only element of damage was the additional servitude, if any, imposed upon plaintiff's property, such as the exclusion of light and air from his dwelling, and that damages for injuries and annoyance

intended to apply to injuries which are the result merely of the operation of the railroad, as distinguished from its construction, and there can be no recovery merely for the annoyance of smoke, noise, and cinders, &c., caused by the running of the company's trains, unaccompanied by negligence; in other words, the injuries resulting from the exercise of a lawful business, in a lawful manner, without negligence, and without malice, are *damnum absque injuria*.¹ Hence, where the railroad is *not constructed in the street*, but consists of an elevated structure erected on the private property of the company on the opposite side of the street, there is no invasion of the rights of owners of property abutting on the opposite side of the street, and the only damage which these property owners sustain *results from noise, smoke, and cinders in the operation* of the railroad on the company's private property, and no recovery therefor can be had under the Constitution.²

resulting from the frightening of horses by trains passing over the bridge were not recoverable. *Jones v. Erie & W. R. Co.*, 151 Pa. 30, 43. *Williams, J.*, who delivered the opinion of the court, said: "The city of Seranton required, at least it authorized, the crossing by means of an overhead bridge. The street over which it had control was upon the surface, but the easement for public travel affected the underlying strata by imposing upon them a servitude to the surface for the support of the way. It affected the open space overhead by imposing a servitude for the supply of light and air to the public while using the way. The owner of the surface upon which the way was opened could neither undermine nor overhang it without municipal consent, for the servitude imposed by the existence of the highway followed his title upward and downward from the surface so far as may be necessary for the safety and convenience of the public; and the owner is precluded from the exercise of acts of ownership in hostility to or inconsistent with the servitude so imposed. The permission of the municipality to cross or enter upon one of its streets, whether upon the surface or above or below it, is an authority to the grantee to enter within the limits affected by the public easement and in subordination to it. The grantee may lawfully enter under this permission, but his rights are subject to the same limitations

that have been already pointed out. He must impose no new servitude upon the land. If he does, he takes not only what the municipality had to grant, but he takes from the owner in addition. In such case, the owner is entitled to compensation for the new servitude to which he is subjected."

¹ *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, *aff'd* 153 U. S. 380.

² *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472; *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, *aff'g* 119 Pa. 541; *Dooner v. Pennsylvania R. Co.*, 142 Pa. 36.

The same principles apply when the annoyance results from the construction of the railroad in a part of the street which is *not opposite* to the plaintiff's premises. Thus, the owner of a lot situated two hundred feet from the place where the railroad occupied the street was held not to be entitled, under the constitutional provision, to recover, although he suffered injury from smoke, dust, and cinders. *Pennsylvania Co. v. Pennsylvania S. V. R. Co.*, 151 Pa. 334. If an *inclined plane* is built across a street from lot to lot and does not overhang any part of the property of another, either within or without the street limits, no recovery can be had under the constitutional provision. *Hartman v. Pittsburgh Incline Plane Co.*, 159 Pa. 442. The *right of action* against a railroad company for conse-

§ 1257. **Railroads in Streets: Rule in Texas.**—The application of a constitutional provision which guarantees compensation to the owner for property “damaged” or “destroyed,” as well as for property “taken” for the public use, is well illustrated by the course of decision in Texas. In applying this constitutional provision to the construction of *steam or commercial railroads*, it has been held that *damage to property abutting on a street* by the construction of a steam or commercial railroad therein, *entitles the owner to a recovery*; that it is not necessary that the railroad should exclusively appropriate the street in order to entitle the adjacent owner to damages for its construction; that when such a railroad along a street inflicts such special injury upon the abutter as practically to deprive him of the ordinary use and enjoyment of his property, an action for damages will lie; and that when by the construction of a steam railroad the use of the street by the adjoining owner is very greatly impaired, the injury is one which is special in its character and is not common to the entire community, and a recovery of such special damages may be permitted. It is immaterial where the fee is.¹ The damage to the value of abutting property which is caused by the non-tortious existence and operation of a steam or commercial railroad in the exercise of its legal powers as a public carrier, is a permanent damage to the real estate in respect of which the *owner of the property has one entire action*, not only for the present and past operation of the railroad, but also for all injuries through its future operation.² There is no lien upon the railroad in respect of this cause of action, when the railroad is confined to the street and none of the abutter's property is taken. The *right of action is purely personal*, and it only exists against the company constructing the railroad. It does not continue against a purchaser of the railroad and its franchises at a receiver's sale.³

quential injuries under the Constitution *accrues* when the railroad is constructed, and not when it is first located and the appropriation made. *Pennsylvania S. V. R. Co. v. Ziemer*, 124 Pa. 560. See also *Lafferty v. Schuylkill Valley R. Co.*, 124 Pa. 297.

¹ *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *Gulf, C. & S. F. R. Co. v. Bock*, 63 Tex. 245; *Gulf, C. & S. F. R. Co. v. Fuller*, 63 Tex. 467; *Gainesville, H. & W. R. Co. v. Hall*, 78 Tex. 169; *Grossman v. Houston, O. L. & M. P. R. Co.*, 99 Tex. 641.

² *Lyles v. Texas & N. O. R. Co.*, 73 Tex. 95; *Rosenthal v. Taylor, B. & H. R. Co.*, 79 Tex. 325; *Missouri, K. &*

T. R. Co. v. Graham, 12 Tex. Civ. App. 54; *Settegast v. Houston, O. L. & M. P. R. Co.*, 38 Tex. Civ. App. 623; *Hutchison v. International & G. N. R. Co.* (Tex. Civ. App.), 111 S. W. Rep. 1101.

³ *Houston & T. C. R. Co. v. Shirley*, 54 Tex. 125; *Hicks v. International & G. N. R. Co.*, 62 Tex. 38; *Gulf, C. & S. F. R. Co. v. Newell*, 73 Tex. 334; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1; *Eddy v. Hinnant*, 82 Tex. 354; *Houston & T. C. R. Co. v. Crawford*, 88 Tex. 277; *Hammond v. Tarver*, 11 Tex. Civ. App. 48; *Williams v. Texas Midland R. Co.*, 22 Tex. Civ. App. 278; *Settegast v. Houston, O. L.*

§ 1258. **Interurban Street Railways.** — Intermediate *between street railways within a municipality* which are intended merely for local convenience and to facilitate travel from point to point within the municipality or the suburban districts immediately adjacent thereto and the steam railroad intended for general commerce between the different cities and places without respect to distance, a species of railroad has been developed by the use of electric power which embraces some of the characteristics of both the ordinary street railway and the general steam or commercial railway. The development of electrical and other mechanical power in its application to street railroads has gradually extended this method of transportation, until we find in many instances that populous cities and villages situated at considerable distance from each other are connected by interurban systems of railroad transportation, which embody many of the features of the general, commercial, or steam railroad. These interurban railways usually follow the streets of the cities and the highways of the rural districts, but it is not uncommon to find that, in the rural districts particularly, they are operated on private rights of way. It is also not uncommon to operate these interurban railroads, in the rural districts particularly, at a high speed, whether upon their own right of way or upon the public highway, and the general resemblance to the commercial railroad is increased by the fact that they frequently furnish facilities for the transportation of express packages, light merchandise, and mail. Without undertaking to give an exhaustive definition of a street railway, it has been said that a street railroad is a railroad constructed in a street or highway for the purpose of conveying passengers living upon or having business upon such street or highway, its main object being to accommodate travel.¹ If an *electric railroad* be operated on a *rural highway* strictly as a street railway to accommodate travel on the highway, there is authority to the effect that it is not an additional servitude thereon, but is a proper use of the highway and within the public easement.² The mere location of the railroad does

& M. P. R. Co., 38 Tex. Civ. App. 623; *Hutchinson v. International & G. N. R. Co.* (Tex. Civ. App.), 111 S. W. Rep. 1101.

¹ *Harvey v. Aurora & G. R. Co.*, 174 Ill. 295, 307. See also *Williams v. City Elect. St. R. Co.*, 41 Fed. Rep. 556; *Spalding v. Macomb & W. I. R. Co.*, 225 Ill. 585, 591; *Freiday v. Sioux City R. T. Co.*, 92 Iowa, 191; *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118 Iowa, 287.

² *Philadelphia, W. & B. R. Co. v. Wilmington City R. Co.*, 8 Del. Ch. 134; *Georgetown & L. Tr. Co. v. Mulholland* (Ky.), 25 Ky. Law Rep. 578; 76 S. W. Rep. 148; *Green v. City & Suburban R. Co.*, 78 Md. 294; *Austin v. Detroit, Y. & A. A. R. Co.*, 134 Mich. 149; *Ehret v. Camden & T. R. Co.*, 61 N. J. Eq. 171. But see to the contrary *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 167 Pa. 62; *Pennsylvania R. Co. v.*

not determine its character as a street railway or otherwise. Whether the railroad be a street railroad or not, depends on the character of its traffic or service.¹ Quite a number of cases have been decided to the effect that interurban railroads operated by electricity and carrying freight, express, and mail, as well as passengers, between municipalities situated at a considerable distance from each other, are not to be classed as street railways, although they may have some of the incidents thereof, but are to be treated as on the same basis as the ordinary steam or commercial railroad; and hence such railroads are not a proper use of the public easement in cases and jurisdictions where steam railroads would not be a legitimate use, but are an additional servitude upon the streets and highways over which they pass in cases and states where ordinary steam railroads are considered an additional servitude.² But in Indiana, it is held that

Greensburg & H. Elect. St. R. Co., 176 Pa. 559; *Dempster v. United Traction Co.*, 205 Pa. 70.

¹ *Spalding v. Maccomb & W. I. R. Co.*, 225 Ill. 585, 591. "The operation of a railroad running to distant points is not a street purpose. It is not ordinarily used to transport freight or passengers from one part of a city to another, and has no direct connection with a city's internal traffic or travel, which are the distinctive uses of its streets." *South Bound R. Co. v. Burton*, 67 S. Car. 515.

² In *Wilder v. Aurora, D. & R. El. Tr. Co.*, 216 Ill. 493, the railroad ran from one city to another and through four counties. It was operated by electricity, and was authorized by the ordinance granting its rights to carry milk as well as passengers, baggage, mail and express matter. It was held that the railroad was a commercial railroad and an additional servitude upon the fee of the street owned by the abutter. See to the same effect, *Spalding v. Maccomb & W. I. R. Co.*, 225 Ill. 595. See also *Greene v. Aurora R. Co.*, 157 Fed. Rep. 85; *Aurora v. Elgin, A. & S. Tr. Co.*, 128 Ill. App. 77. In *Hannah v. Metropolitan St. R. Co.*, 81 Mo. App. 78, the railroad company was sued for stock killed upon its right of way, and the question presented to the court was whether it was a street railway or a commercial railroad, and as such bound to fence its tracks. The railroad was operated by electricity between Kansas City and Independence, a distance of ten miles. It carried passengers only, but had

regular stations at which they embarked and disembarked. It was held that it was a commercial railway, and as such was bound to fence its track. In *Schaaf v. Cleveland, M. & S. R. Co.*, 66 Ohio St. 215, an electric interurban railroad carried freight, express matter, and mail, as well as passengers. It was authorized to run an unlimited number of cars and trains. It was held that the maintenance and operation of the railroad was an additional servitude on a country highway. See also *Cincinnati, L. & A. Elec. St. R. Co. v. Lohr*, 68 Ohio St. 101. In *Rische v. Texas Transportation Co.*, 27 Tex. Civ. App. 33, a railroad was operated on T-rails by electric motors in trains of from three to five cars, and used the city streets for the purpose of transporting freight from one part of the city to another. It was held that the railroad was an additional servitude on the street and the abutter was entitled to compensation.

In *Wisconsin*, the statutes provide for the incorporation and organization of interurban railways in a different manner from street railways. *Milwaukee L. H. & Tr. Co. v. Milwaukee Northern R. Co.*, 132 Wis. 313. Under the statute, the consent of the municipality or grant of the right to use the streets for a street railway is not sufficient to authorize use by an interurban railway. *Beloit, D. L. & J. R. Co. v. Macloon*, 136 Wis. 218; 116 N. W. Rep. 897. An interurban electric railroad for merchandise, personal baggage, mail and express matter, as

an *interurban street passenger railway*, although also authorized to transport express matter, baggage, and United States mail, does not impose an additional servitude on the street, by virtue of which the abutter is entitled to compensation. But in so holding, the court also declared that for any actual or special damage sustained by the abutting lot-owner by reason of the construction of the interurban railroad or resulting from its use, the lot-owner has his remedy by action at law to recover damages.¹ It is perhaps impossible to lay

well as passengers, is an *additional servitude* on the city street and the abutter is entitled to compensation. *Chicago & N. W. R. Co. v. Milwaukee R. & K. E. R. Co.*, 95 Wis. 561. Such a railroad is also an additional servitude upon a *rural highway*. *Zehren v. Milwaukee El. R. & L. Co.*, 99 Wis. 83. It is an additional servitude on the city street, although it runs over the tracks of a *street railway company*. Thus, in *Younkin v. Milwaukee L. H. & Tr. Co.*, 120 Wis. 477, the tracks had been laid and used for street cars within the city limits. Thereafter, the interurban railroad company used the same tracks to operate its cars. It was held that although the abutter was not entitled to compensation for the use of the tracks for street railway purposes, yet he was entitled to compensation for the use of the tracks for the interurban railway. Where the company had constructed a double track within a city and operated a *combined city and interurban railway*, the cars running as interurban cars but at the same time giving street transportation within the city limits, it was held that, in condemnation proceedings to acquire the street rights of abutters owning the fee of the street, the abutters were entitled to compensation on the same rules as in the case of a taking for a commercial or steam railroad, and that the measure of damages was the difference in value of the abutting property with the railroad maintained and operated in the street and with the street free therefrom. *Abbott v. Milwaukee L. H. & Tr. Co.*, 126 Wis. 634. See also *Marsh v. Milwaukee L. H. & Tr. Co.*, 134 Wis. 384.

In *Kentucky*, it has been held that an *electric railway* authorized to perform the duties of carrier of freight and passengers between Louisville, Ky., and Nashville, Tenn., and all intermediate points, is not a *street railway*, but is a *trunk railway* within the

meaning of the provision of the Kentucky Constitution, § 164, requiring all franchises, except for trunk railways, to be advertised and sold publicly. *Diebold v. Kentucky Tr. Co.*, 117 Ky. 146. See also *Elizabethtown, L. & B. S. R. Co. v. Ashland & C. St. R. Co.*, 96 Ky. 347; *Devon v. Cincinnati, C. & E. R. Co.*, 128 Ky. 768; 109 S. W. Rep. 361.

¹ In *Mordhurst v. Ft. Wayne & S. W. T. R. Co.*, 163 Ind. 268, the plaintiff, a property owner within the city of Ft. Wayne, sought to enjoin the defendant from operating an interurban railway over a street of the city. The defendant's railway was constructed from Ft. Wayne, and thence to the cities of Huntingdon, Wabash, and such other cities and counties as the defendant might select. In the grant of authority from the city of Ft. Wayne, the kind of rail to be laid was not specified, and a T-rail such as that used by steam and other railroads might be adopted. The company was also granted the privilege of constructing, erecting, and maintaining all necessary turnouts, switches, feed wires, and poles. The road was to be operated by *electricity*, and the cars were to be of the best pattern and designated as express and passenger cars. Express cars were to be used exclusively for hauling light express matter, passenger baggage, and the United States mail. The passenger cars were to be used exclusively for the transportation of passengers and baggage, light express matter and United States mail combined. No train consisting of more than one car was to be run over the railroad except that upon the petition of the company the board of public works of the city might authorize the running of a train of two cars. The court held that *this railway, so constructed and operated, was not the operation of a steam passenger and freight railroad, but was a proper street*

down any universal rule as to the legal *status* of interurban railways as being street railways or commercial railways.

use in furtherance of the primary purpose for which the streets were constructed, and *did not constitute an additional servitude* or burden upon the fee of the street within the city. *Dowling, J.*, who delivered the opinion of the court, said with much reason and force: "Rapid and cheap transportation of passengers, light express and mail matter, between neighboring towns and cities, may be quite as necessary and as largely conducive to the general welfare of the places so connected and their inhabitants as the like conveniences within the town or city. Where such transportation is furnished by an interurban electric railroad operated under the conditions and restrictions contained in the agreement between the appellee and the city of Ft. Wayne, we do not think the construction and operation of such a railroad in such a manner constitutes an additional servitude upon the street which entitles abutting property owners to compensation." But in so holding, *Dowling, J.*, also added: "For any actual and special damage sustained by the abutting lot-owner by reason of the construction of the appellee's railroad or resulting from its use, the lot-owner has his remedy by action at law. The railroad company will be liable to the abutting lot-owner for any special injury to his property occasioned by the negligence of the company in constructing its railroad or in operating it. Nothing that we have said in this opinion is to be understood as denying or in any degree abridging that right."

This decision was followed and applied by the same court in *Kinsey v. Union Traction Co.*, 169 Ind. 563. The defendant railroad company operated an interurban railroad extending from Indianapolis to Marion, a distance of eighty miles, and in other directions a distance of sixty miles. The cars were sixty feet long and carried one hundred and fifty passengers. Both freight and passenger cars were operated. On the through cars no stop was made after leaving the terminal station. The passenger cars were frequently run in trains of three cars. Outside the city a speed of forty to sixty miles was reached on the private right of way of the com-

pany, and inside the city limits a speed of from twenty to thirty miles was not uncommon. The court held that the operation of these cars was not the imposition of an additional servitude upon the city streets, but that they caused special damage to the plaintiff, the owner of property abutting on the railroad within the rule laid down in the *Mordhurst Case*, *supra*; and that the plaintiff was entitled to a judgment against the railroad company in respect thereof.

In *Maryland*, the court held in a case which involved the power of the municipality to grant a franchise and the validity of the ordinances granting it, that *an electric railway is a street railway within the city limits*, although when it leaves the city it becomes an interurban railway. The court also declared that such a railway is not the imposition of a new servitude, and that abutters are not entitled to compensation or to an injunction against its construction. *Jeffers v. Annapolis*, 107 Md. 268.

The author ventures to observe that, in respect of motor power employed and especially of the character of the service rendered, many suburban and even interurban electric railways, especially in populous localities, more resemble what are called street railways than ordinary steam railways. They facilitate traffic, communication, and transportation. They do not destroy or seriously interfere with the ordinary modes of using the streets and highways, and when legislatively authorized they seem to be a proper use of the street or highway, for which the legislature may or may not provide compensation to the abutter as it may determine, the rule of justice dictating that where the value of the abutters' property is lessened over and beyond the benefits received the legislature ought to provide that he should be paid in money for such diminished value. For example, would an electric line of railway connecting the Oranges in New Jersey with each other and with Newark, Hoboken, and Jersey City fall within the category of an ordinary commercial steam railway rather than that of a street railway? Such a line may stand in a class by itself, and it does not seem to the

§ 1259 (723 a). **Elevated Railways in Streets; New York Legislation and its Construction; Correlative Rights of the Abutting Owner and of the Public; Scope of Legislative Power.** — The construction and operation on a large scale of elevated steam railways in certain streets of the cities of New York and Brooklyn have given rise to interesting questions of general constitutional law concerning the respective rights of the abutting owners and of the public; concerning the legitimate uses of streets, and the extent of legislative power to determine or to enlarge such uses, and the limitations on such power; and to special questions of constitutional law concerning the franchises of the companies to construct their railways, as affected by the constitutional amendment of January 1, 1875, elsewhere referred to, on the subject of laying down railroad tracks in streets, and the construction and operation of street railways. The two main railways, the New York Elevated Railway and the Metropolitan Elevated Railway, had been authorized by special charters which antedated the constitutional amendment just mentioned; but the railways were in part constructed under authority given by the General Rapid Transit Act of June 18, 1875, passed after that amendment took effect.¹ In what are known as the *New York*

author that simply because it connects different places it necessarily imposes an additional burden upon the abutter. Each case must be considered on its circumstances. Each line is *what it is*, and not something else.

¹ For brief history of the legislation and litigation relating to these Elevated Railroads, and for the earlier cases in lower court, see 3 Abbott's New Cases, 301 *et seq.*, note.

New York statutes relating to Elevated Roads. Chap. 885, p. 2179, Act of June 17, 1872 (Gilbert Company); chap. 837, p. 1253, Act of June 26, 1873 (Amendment to same); chap. 275, p. 331, Act of June 28, 1874; chap. 606, p. 740, Act of June 18, 1875 (Rapid Transit Act). Statute regulating management of trains on Elevated Roads. Laws of 1881, p. 540, chap. 399.

Decisions construing statutes. *Re N. Y. Elev. R. Co.*, 70 N. Y. 327; s. c. 3 Abb. N. C. 401, affirming Sup. Ct., 7 Hun, 239, where the General Rapid Transit Act (chap. 606, L. 1875) was held constitutional. (Same ruling in *Matter of Gilbert Elev. R. Co.*, 70 N. Y. 361, aff'g 9 Hun, 303.) Held also (*Ib.* 354), that the act makes provision for compensating abutting

owners for any property rights they may have in streets. This ruling was approved in *Metrop. Elev. R. Co.*, *In re*, 18 N. Y. Sup. Ct. Rep. 134, where it was further held that the leasing of the road of a railway company does not deprive the lessor of the right of eminent domain, citing *Kip v. N. Y. & H. R. Co.*, 6 Hun (N. Y.), 24; 67 N. Y. 227; and *New York, L. & W. R. Co.*, *In re*, 99 N. Y. 12.

The Rapid Transit Act (chap. 606, L. 1875) and General Railroad Act prohibit any allowance or deduction on account of any real or supposed benefits arising from the construction of the road. *New York, W. S. & B. R. Co. v. Sutherland*, 35 Hun, 260; *New York, L. & W. Ry. Co.*, *In re*, 29 Hun, 1.

Further construction of Rapid Transit Act. See *N. Y. Elev. R. Co.*, *In re*, 70 N. Y. 327; *Gilbert Elev. R. Co.*, *In re*, 70 N. Y. 361; *Kings Co. Elev. R. Co.*, *In re*, 105 N. Y. 97; *N. Y. Cable R. Co.*, *In re*, 109 N. Y. 32; *East River Br. & C. I. S. Transit Co.*, *In re*, 26 Hun, 490; *N. Y. Elev. R. Co.*, *In re*, 41 Hun, 502. *Map of route, &c.* *South Brooklyn R. & T. Co.*, *In re*, 50 Hun, 405. As to duty of commissioners under the Act to specify the particular easements injured for which they awarded com-

Elevated Company's Case,¹ and the *Gilbert Elevated Company Case*,² the Court of Appeals decided that the prior special charters of the companies were, on the facts of those cases, unaffected by the constitutional amendment; and also that the General Rapid Transit Act, as applied to these companies, was constitutional. These judgments, which definitively established in New York the validity of franchises to build, enabled these languishing companies to go forward and to complete their works. In public utility and usefulness, these railways have been thoroughly successful. In respect of rapidity, ease, comfort, and convenience, they reach the highest degree of perfection yet attained in urban travel.

§ 1260 (723 b). **Same Subject.** — In almost numberless prior cases the courts of New York, as well as elsewhere, had considered the respective rights of the abutter and of the public as to the construction and operation of railways on the surface of public streets. In the group of *Elevated Railway Cases* referred to in the note, the court had to deal with like questions as to the use of the streets for steam railways *above the surface*, and particularly with the nature and extent of the abutter's rights in and to the street in front of him, and with the correlative rights of the public therein. The fundamental question was whether the legislative power over the uses of the streets by railways was supreme, or whether it was limited by rights and easements in the abutter which were property rights, and as such were under the protection of the Constitution, and like other property could only be taken or appropriated or invaded on the condition of making compensation to the abutter. The judgments of the Court of Appeals have not only settled the law on this subject in New York, but these judgments, particularly those in the leading cases of *Story*³ and *Lahr*,⁴ have done much towards removing the distressing uncertainty and obscurity in which the subject had been embarrassed and left by the prior course of decision in New York.

§ 1261 (723 c). **Same Subject ; Nature and Extent of Abutter's Rights.** — These judgments and those that follow them rest upon the foundation principle that whether the *fee in the street* is in the abutter

compensation, and practice in such cases, of the abutter's rights were more fully see N. Y. Elev. R. Co., *In re*, 35 Hun, 414. determined in the cases referred to in the next two sections.

¹ N. Y. Elev. R. Co., *In re*, 70 N. Y. 327. ³ *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122.

² *Gilbert Elev. R. Co., In re*, 70 N. Y. 361, and see cases cited in note to § 1264, *post*. ⁴ *Lahr v. Metrop. Elev. R. Co.*, 104 N. Y. 268.

subject to the rights of the public, — that is, to the paramount rights of the public for *street uses proper*, — or whether the fee is in the public in trust for street uses proper, in either case, and equally in both cases, the abutter is entitled to the benefit of the street for all uses except street uses proper, — subject, of course, to legislative and municipal regulation; and that such rights are property or property rights in the abutter, which can only be taken away by the legislature on the condition of making compensation. And the abutting owner's right in the street is not affected by the source from which he derives his title, as whether he claims through mesne conveyances upon a covenant by the city itself, as in the *Story* case, or whether the easement remains in him or his grantor by operation of law after proceedings *in invitum*, as in the *Lahr* case.¹ If the abutter owns the fee of the street, his rights may be said to be legal in their nature. If he does not own the fee, these rights are in the nature of equitable easements in fee, — the soil of the street being the servient, the abutting owner's lot being the dominant tenement. Among the most important of such rights or easements is the *abutter's right to access, to light, and to air*. The court accordingly held that so far as the elevated railway structures interfered with such rights or easements, while the legislature might authorize their erection and use, yet this could only be done as respects the abutter by the exercise of the right of eminent domain, viz., on the condition of making compensation to the abutting owner for the damage which his property actually sustained.² The result of the author's

¹ See next note.

² *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122, by a divided court, *Miller, Earl, and Finch, JJ.*, dissenting. *Story's* case is the leading case. *Story's* title was derived from the city of New York through mesne conveyances, the original grant from the city describing the property by reference to streets and containing a covenant to construct the streets, adding: "Which several streets shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of said city, and all others passing and returning through or by the same, in such manner as the other streets of the same city now are or lawfully ought to be." It was held, —

1. That by virtue of the grant of the city to plaintiff's grantors the plaintiff, as abutting owner, had a right in the street, entitling him to have it kept open and continued as a public street for the

benefit of his abutting property. 2. That this right is an easement in the bed of the street, and is private property, which cannot be taken for public use without compensation under the Constitution. 3. That the structure of the Elevated Railroad is inconsistent with the use of the street as a public street. 4. That plaintiff's property had been taken by the Elevated Company for public use without compensation. 5. That as the acts of the Elevated Company were unlawful, and as its structure is permanent, plaintiff may enjoin its erection and continuance. 6. That by statute the Elevated Company has power to acquire property by exercising the right of eminent domain. 7. That the injunction should not issue until the defendant had reasonable time to acquire the property in a lawful way.

The decision in this case, although by a divided court, was subsequently declared to be definite and final, not only as to questions expressly decided, but as

reflections upon this subject is, that the views of the Court of Appeals are sound and just; sound, because they recognize the paramount

to such as logically come within the principles established by it. *Lahr v. Metrop. Elev. R. Co.*, 104 N. Y. 268; *Glover v. Manhattan R. Co.*, 51 Super. Ct. 1. *Lahr v. Metrop. Elev. R. Co.*, 104 N. Y. 268, is the sequel to *Story's Case*. In this case the street was laid out by the city by proceedings *in invitum*, under the Act of 1813, which provided that the fee should vest in the city in trust, to be "kept open for or as a part of a public street . . . forever, in like manner as the other public streets . . . of the city are or of right ought to be." The owner at the time — from whom plaintiff derived title — was assessed \$425 for benefits over and above the value of the land taken. The parties agreed upon a rule for the assessment of the abutter's damages. The court reaffirmed *Story's Case*, 90 N. Y. 122, holding that it was there "definitely determined," —

1. That an elevated road in the streets of a city, constructed as to form, equipment, and dimensions like the present road, and operated by steam power, &c., is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city nor the legislature can legalize or sanction without providing for compensation for injuries sustained by abutting owners. 2. That abutters claiming title from the city *by grant* with a covenant, as set forth in the *Story Case*, acquire an easement in the bed of the street for ingress and egress, and for the free passage of light and air through and over the street for the benefit of their property. 3. That such easement is an interest in real estate which, under the provision of the Constitution that forbids the appropriation of private property for public use, without compensation, cannot be taken for use of this railroad without compensation. 4. That the erection of an elevated road, such as the one here in question, in a public street, is the taking of an easement and an appropriation of it by the railroad corporation, making it liable to abutters for damages occasioned by the taking.

It was further held in this (*Lahr's*) case, that the rights of abutters in such case is the same, whether they derive title from the city by grant with a covenant, as in the *Story Case*, or through

mesne conveyances from an owner whose property was taken by the city for a public street by proceedings in condemnation under the Act of 1813. Nor is it essential that any land should have been originally taken from him, as his interest is acquired by the judgment of a competent tribunal. It was also held that the railroad company is liable for the injury occasioned by the distribution in the air of gas, smoke, steam, dust, cinders, ashes, and other unwholesome and deleterious substances, from its locomotives and trains, provided it is established that they were destructive of the easements of light, air, and access. The court said: "Any incident of the structure which necessarily increases and aggravates the injury must be subject to the same rule of damages. . . . However the damage may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass, rendering the wrongdoer liable for the consequences of his acts."

In *Fifth National Bank v. N. Y. Elev. R. Co.*, 24 Fed. Rep. 114, *Shipman, J.*, seems to be of the opinion that an elevated railway on a street is not necessarily an additional servitude. He says: —

"An abutting owner holds his easement in the street *subordinate* to the rights of the public in the streets; if the new structures are not inconsistent with or destructive of the uses for which the street was originally taken, he has no cause to complain. Until the streets are burdened with an occupancy which substantially injures them as thoroughfares for travel, and they are permanently subjected by the new structures to a new use which is subversive of the original use, the abutting owner, though he may suffer inconvenience, is not legally injured, because his easement is subject to the controlling right of the public; and if the street continues to be a thoroughfare for ordinary travel, in accordance with the objects for which it was originally laid out, no right of the abutting owner is trenching upon." A new trial was granted (verdict having been for plaintiff) for the reason that the court feared "that the jury were unintentionally led into the opinion that because a new and permanent structure for the purposes of a steam road had been placed over a

nature of the public right to put the street to this new and necessary form of public use; just, because they recognize and declare that the abutter has special *proprietary* rights or easements in the street, which, so far as they are special and individual in their nature, he is not called upon unequally to sacrifice, without compensation, for the public use. In effect the court says the just and true doctrine is "Take, but pay."

The last two sections of the text the author leaves to stand as they appeared in the preceding edition. Still further reflection upon the subject, and observation and experience, have led to grave doubts in his mind whether, in view of the established and necessary supremacy or power of the legislature over all public ways and *their uses*, and in view of the fact that the elevated railways in New York City did not and do not seriously interfere with the free passage of all persons and vehicles upon the surface of the streets, or with the ordinary uses of the streets, and that in the course of time they had, by reason of the growth of the city, become an urgent necessity in order to accommodate travel and transportation, — in view of this situation the author has doubts whether the doctrine of the Court of Appeals is sound, that, notwithstanding the legislature had expressly declared its judgment to be that the elevated roads which it authorized were a proper street use, these roads were, nevertheless, as held by the court, a perversion of the legitimate uses of the street, and therefore deprived the abutters of "property" in the street, or an interest in real estate therein, within the meaning of the word "property" in the eminent-domain clause of the Constitution. Such radical creations and such far-reaching changes in the law belong more properly, if not exclusively, to constitutional conventions or to legislative bodies to deal with. So far, however, as the abutter is concerned, the justice of the decisions of the Court of Appeals giving him compensation for all actual net damages is so manifest that the logical and legal soundness of the reasons upon which the court places its judgment so materially limiting the power of the legislature over streets and their uses, may not undergo the scrutiny to which those reasons ought to be subjected before being adopted into the general or constitutional jurisprudence of this country.

street of one hundred feet in width, therefore they were permitted to find that a new and inconsistent use was imposed upon the street, although travel was not practically impeded, and light in the travelled way was not sensibly diminished, and the street was not actually at that point made inconvenient for the accommodation of persons or vehicles."

§ 1262. **Elevated Railroad Cases; Development of the Law.** —

In the earlier decisions of the New York Court of Appeals, the existence of easements appurtenant to abutting property was deduced from a grant by the city to the abutter of the property to which the easements were appurtenant, containing a covenant by the city that the street should forever thereafter be continued, or because under the charter of New York a part of the abutting property had been taken for the construction of the street, and the abutter had been assessed for the expense of opening the street.¹ But other cases having subsequently come before the Court of Appeals in which it was impossible to deduce the easements of the abutter from any such origin, that court finally declared that these *easements arise by operation of law from contiguity*, like rights for the adjacent and subjacent support of lands, and that their existence is to be presumed.² In all respects these easements are assimilated by the

¹ In *Story v. New York Elev. R. Co.*, 90 N. Y. 122, the abutters upon the street in question claimed title to their premises by a grant from the municipal authorities which contained a covenant that a street to be laid out in front of such property should forever thereafter continue for the free and common passage of, and as streets and highways for the inhabitants of said city, and all others passing and returning through or by the same in like manner as the other streets of the same city then were or lawfully ought to be. It was held that the abutter by reason thereof acquired an easement in the bed of the street for ingress and egress to and from his premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon. In *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268, the abutter acquired title to the property through a series of *mesne* conveyances from the original owner, whose property was taken *in invitum* by the city by proceedings under the statute of 1813, to be held as prescribed by that statute "in trust nevertheless that the same should be appropriated and kept open and for and as a part of a public street . . . forever in like manner as the other public streets . . . in the city are or of right ought to be." The court held that these proceedings not only created a valid trust in the city which would exclude it from any other use of the land acquired than that expressly described in the statute, but also con-

stituted a contract between the city and the owner which ran with the land and enured to the advantage of each successive grantee thereof; and that by virtue of these proceedings the owner acquired certain incorporeal rights in the nature of easements in the street entitling him to light, air, and access.

² *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; *Kane v. New York Elev. R. Co.*, 125 N. Y. 164; *Williams v. Brooklyn Elev. R. Co.*, 126 N. Y. 96; *Hughes v. Metropolitan Elev. R. Co.*, 130 N. Y. 14, 26; *White v. Manhattan R. Co.*, 139 N. Y. 19, 25; *Egerer v. N. Y. Cent. & H. R. R. Co.*, 130 N. Y. 108, 112.

In *Kane v. New York Elev. R. Co.*, 125 N. Y. 164, it was claimed by the railroad company that Pearl Street, through which its railroad was constructed, had been laid out during the *régime of the Dutch government*, and that under the Civil Law, which was the law of Holland, the sovereign was vested with the absolute right to the soil of all streets and highways within his dominion, and that no private rights or easements existed therein. The court, however, held that irrespective of the origin of the street, the title to it was held by the municipality under the trusts created by the Dongan Charter, "for the public use and service of the mayor, aldermen, and commonalty of the said city, and the inhabitants of Manhattan's Island, and travellers therein," and also under the trust declared by the Act of 1813, which in providing for the taking of lands for the

decisions of the courts of New York to the easements which may exist over private property. In the case of the easements of abutters, the abutting lot is the dominant tenement, and the street is servient tenement, but the fact that these easements are in the nature of an interest in property devoted to public use does not deprive them of their peculiarly private character. They are private property, and may be *destroyed by adverse possession* of the street as against the abutter for the purposes of an elevated railroad erected pursuant to legislative authority. The construction, maintenance, and operation of an elevated railroad in the street under legislative and municipal authority are necessarily hostile and adverse to the property rights of the abutter in the street, and form a sufficient foundation for adverse possession, which will confer a title upon the persons or corporation so erecting or maintaining the structure to so much of the easements of the abutter as is taken or impaired thereby.¹ Being purely private

opening of streets pursuant to that statute declared that they should be "in trust nevertheless, that the same be appropriated and kept open as a part of a public street, avenue, square, or place forever, *in like manner as the other public streets, avenues, squares, and places in the city are and of right ought to be.*" *Andrews, J.*, who delivered the opinion of the court, said, with reference to the origin of these easements: "The plaintiff's easements or rights in the nature of easements are not created by grant or covenant. It is easier to realize the existence of these rights than to trace their origin. They arise, we think, from the situation, the course of legislation, the trust created by the statute, the acting upon the faith of the public pledges, and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street and shall not be diverted to other and inconsistent uses."

In *Hughes v. Metropolitan Elev. R. Co.*, 130 N. Y. 14, 26, *Porter, J.*, who delivered the opinion of the court, said: "These street rights of an abutting owner are not originated by grant in terms of such incidental rights, and their existence need not be established by conveyances in specific terms conveying such right, for there are none; nor by adverse possession by an abutting owner, for the right is incapable of such possession as against the city. The private rights appurtenant to

abutting lots arise by operation of law from contiguity, like rights for the adjacent and subjacent support of land, and their existence is presumed." In an action at law by an abutting owner to recover damages for the trespass, the invasion of the abutting easements by an elevated railroad is a question of law for the court, and is not one of fact for the jury. *Williams v. Brooklyn Elev. R. Co.*, 126 N. Y. 96.

Erection of embankment in the centre of a street for the exclusive use of a steam railroad held to be a taking of the abutter's easements of light, air, and access within the meaning of the elevated railroad decisions. *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 157 (distinguishing *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505); *Egerer v. New York Cent. & H. R. R. Co.*, 130 N. Y. 108, 112. But when the railroad company *owns the land* upon which its tracks are constructed and there is a street on either side thereof, the *elevation of the tracks* within the limits of the land owned by the railroad company in fee is not an invasion of the easements of an abutting proprietor upon the street, and is *damnum absque injuria*. *Bennett v. Long Island R. Co.*, 181 N. Y. 431, *aff'g* 89 N. Y. App. Div. 379.

¹ *American Bank Note Co. v. New York Elev. R. Co.*, 129 N. Y. 252; *Lewis v. New York & H. R. Co.*, 162 N. Y. 202, 223; *Hindley v. Manhattan R. Co.*, 185 N. Y. 335, *rev'g* 103 N. Y. App. Div. 504; *Scallon v. Manhattan*

property in the abutter, the easements may be extinguished or released by any act which would have the effect to extinguish or release any other easement. They may be *abandoned or extinguished by acts* showing an intention to abandon and extinguish them, as by consenting to the construction of the elevated railroad in the street.¹ The abutter's easements are incorporeal in their nature, *necessarily appurtenant to the abutting property*, and they cannot exist severed from and independently of it. Hence, upon a sale of the abutting property, the appurtenant easements or incorporeal rights pass to the grantee by the conveyance, and the right to compensation for the taking of the property vests in the purchaser, although the elevated railroad may have been erected prior to the conveyance without compensating the vendor for the property taken thereby.²

R. Co., 185 N. Y. 359, rev'g 112 N. Y. App. Div. 262; *Bremer v. Manhattan R. Co.*, 191 N. Y. 333, modifying 113 N. Y. App. Div. 905.

Evidence of settlements with other land-owners is not admissible for the purpose of rebutting presumptions of title by prescription, nor are petitions by the railroad company for the reduction of assessments for purposes of taxation, stating that liabilities exist for damages to abutting owners. *Hindley v. Manhattan R. Co.*, 185 N. Y. 335, rev'g 103 N. Y. App. Div. 504. *Disability from infancy* does not interrupt the running of the New York statute when it did not exist at the time the entry was originally made. *Scallon v. Manhattan R. Co.*, 185 N. Y. 359, rev'g 112 N. Y. App. Div. 262.

¹ *White v. Manhattan R. Co.*, 139 N. Y. 19, 26; *Foote v. Metropolitan Elev. R. Co.*, 147 N. Y. 367; *Ward v. Metropolitan Elev. R. Co.*, 152 N. Y. 39, aff'g 82 Hun (N. Y.), 545; *Herzog v. New York Elev. R. Co.*, 76 Hun (N. Y.), 486, aff'g 151 N. Y. 665. The consent of the city to the construction of the railroad operates as a release or abandonment of the easements appurtenant to abutting property owned by the city. *Herzog v. New York Elev. R. Co.*, 76 Hun (N. Y.), 486, aff'd 151 N. Y. 665. *Petition or request by abutters* that railroads be constructed in the centre of the street held not to constitute consent to construction. *Roberts v. New York Elev. R. Co.*, 155 N. Y. 31, modifying 12 N. Y. Misc. 345; *Koehler v. New York Elev. R. Co.*, 159 N. Y. 218, aff'g 9 N. Y. App. Div. 449; *Shaw v. New York Elev. R. Co.*, 187 N. Y. 186, aff'g 110 N. Y.

App. Div. 892. See also *Heimburg v. Manhattan R. Co.*, 19 N. Y. App. Div. 179. Consent *signed in name of co-partnership* only binds the partner signing same when title is held by the partnership as tenants in common, unless his authority to bind his co-partners is established. *White v. Manhattan R. Co.*, 139 N. Y. 19. An *injunction will not be issued* at the suit of an abutter who has consented to the construction of the railroad in the street. See *ante*, § 1232, note.

² *Pappenheim v. Metropolitan Elev. R. Co.*, 128 N. Y. 436; *Pegram v. New York Elev. R. Co.*, 147 N. Y. 135; *Shepard v. Manhattan R. Co.*, 169 N. Y. 160, aff'g 48 N. Y. App. Div. 452; *McKenna v. Brooklyn Un. Elev. R. Co.*, 184 N. Y. 391, rev'g 95 N. Y. App. Div. 226; *Kernochan v. New York Elev. R. Co.*, 128 N. Y. 559, 568; *Sterry v. New York Elev. R. Co.*, 129 N. Y. 619.

Upon a sale of the premises pending the suit the *vendor's right to an injunction* against the elevated railroad terminates notwithstanding a reservation in the conveyance of the right to the damages past or future caused by the maintenance of the railroad. *Pegram v. New York Elev. R. Co.*, 147 N. Y. 135. Upon the death of the owner the right to damages accruing thereafter *passes to his heir or devisee*, and not to his personal representative. *Kernochan v. New York Elev. R. Co.*, 128 N. Y. 559. See also *Mitchell v. Metropolitan Elev. R. Co.*, 134 N. Y. 11; *Ford v. Livingston*, 140 N. Y. 162. If the premises be conveyed with a *reservation of the right to any damages* for past or future injuries which may

But if the *easements have been extinguished or released* before the conveyance of the property, they do not pass to the purchaser, and the fact that the elevated railroad has been constructed and is operated in the street in front of the premises at the time when the contract of sale is made, is *notice to the purchaser* of the claim of the elevated railroad company to the easements by virtue of a release or abandonment, if any exists, although no instrument releasing or abandoning the easements may have been recorded.¹ Where the abutting property has been demised by a lease made *after* the construction of the elevated railroad, the property is regarded as having been demised in the condition in which it is at the time of the making of the lease, the injury resulting from the maintenance and operation of the railroad is regarded as affecting the inheritance, and the lessor is entitled to recover compensation and damages although he has yielded the possession of the property to the tenant.² But when the lease *antedates* the construction of the elevated railroad, *the lessee has a right of action* against the company for past damages resulting from the trespass and to enjoin the continued maintenance of the structure, unless the permanent damages to the premises during the remainder of the term are paid to him.³

be recovered, the title to the appurtenant easements passes to and vests in the purchaser, but the purchaser becomes a trustee under a resulting trust for his grantor as to any moneys recovered by him on account of such operation and maintenance. *Pegram v. New York Elev. R. Co.*, 147 N. Y. 135; *Shepard v. Manhattan R. Co.*, 169 N. Y. 160; *Western Union Tel. Co. v. Shepard*, 169 N. Y. 170; *McKenna v. Brooklyn Union Elev. R. Co.*, 184 N. Y. 391, rev'g 95 N. Y. App. Div. 226. Such *reservation* does not create any *lien* upon the easements in favor of the grantor as against the company, and in the absence of fraud or collusion between the grantee and the company a settlement by the company with the grantee is conclusive as to the amount, and there is no liability on the part of the company in respect thereof. *McKenna v. Brooklyn Union Elev. R. Co.*, 184 N. Y. 391, rev'g 95 N. Y. App. Div. 226.

¹ *Ward v. Metropolitan Elev. R. Co.*, 152 N. Y. 39; *Bacharach v. Von Eiff*, 74 Hun (N. Y.), 533; *Webster v. Kings County Trust Co.*, 80 Hun (N. Y.), 420, aff'd 145 N. Y. 275. But if the title to the property is acquired before the construction of the railroad, *an unre-*

corded release or consent of the previous owner does not bind a purchaser without notice. *Shaw v. New York Elev. R. Co.*, 187 N. Y. 186.

² *Kernochan v. New York Elev. R. Co.*, 128 N. Y. 559; *Hine v. New York Elev. R. Co.*, 128 N. Y. 571; *Mortimer v. Manhattan R. Co.*, 129 N. Y. 81; *Sterry v. New York Elev. R. Co.*, 129 N. Y. 619; *Bischoff v. New York Elev. R. Co.*, 138 N. Y. 257. The trespass resulting from the maintenance of the elevated railroad being an *injury to the inheritance*, a person seized of an *estate in remainder* in premises abutting on the street may maintain an action for an injunction against the elevated railroad "founded upon an injury done to the inheritance, notwithstanding an intervening estate for life" under the provisions of the New York Code of Civil Procedure, and in that action the judgment may provide that an injunction shall issue unless the defendant pay the plaintiff the sum fixed by the court as the depreciation in value of the estate by reason of the continued maintenance of the railroad. *Thompson v. Manhattan R. Co.*, 130 N. Y. 360.

³ *Kearney v. Metropolitan Elev. R. Co.*, 129 N. Y. 76; *Witmark v. New*

§ 1263. **Measure of Damages; Benefits.** — As the courts of New York have created and recognized the existence of the easements as property in the abutter which is protected by the Constitution, an abutting owner whose easements are taken or impaired by the construction and operation of an elevated railroad pursuant to legislative authority is entitled, in proceedings to acquire his property right, to *compensation* not only for the *property* taken, but also for the *damages to the remainder* of the tract, *i. e.*, he is entitled to compensation for the value of the easements *per se* and also for the actual damages sustained by the abutting property by reason of the taking or impairment of the abutter's easements of light, air, and access.¹ But the abutter's easement, in the view of the New York courts, is a purely *intangible* thing, an incorporeal right appurtenant to the abutting property, which, in itself and considered separately from the abutting property, has only a *nominal value*, and hence the inquiry is directed to the value which that easement has in connection with the abutting property, and that value is to be measured and determined by the damage which the abutting property actually sustains by the taking or impairment of the easements.² The inquiry,

York Elev. R. Co., 149 N. Y. 393, aff'g 76 Hun (N. Y.), 302; *Storms v. Manhattan R. Co.*, 178 N. Y. 493, aff'g 77 N. Y. App. Div. 94. Where the leasehold estate is *held under a lease which is a renewal* made after the construction of the elevated railroad of a leasehold term commencing prior to the elevated railroad, and the renewal is made pursuant to a covenant in the first lease giving the lessor the right thereto, the estate of the lessee is regarded as commencing *prior* to the construction of the elevated railroad. *Kearney v. Metropolitan Elev. R. Co.*, 129 N. Y. 76; *Witmark v. New York Elev. R. Co.*, 149 N. Y. 393, aff'g 76 Hun (N. Y.), 302. But in *Kernochan v. Manhattan R. Co.*, 161 N. Y. 339, the court held that the owner of a *reversion*, subject to an unexpired ground lease, may recover for damage to rental value from an elevated railroad constructed after the commencement of the term, for the interval between a subsequent readjustment of rent by arbitrators pursuant to a provision of the lease which required them to fix a reasonably yearly rent for an ensuing portion of the term, and the date of the trial, in the absence of any evidence to overcome the presumption that the arbitrators considered the existence and probable continuance of the road in

fixing the rent; and also that fee damages in lieu of an injunction against the maintenance and operation of the railroad might be allowed to the owner of the reversion.

¹ In *Bohm v. Metropolitan Elev. R. Co.*, 129 N. Y. 576, 587, *Peckham, J.*, now of the Supreme Court of the United States, reviewed the earlier decisions of the court, and clearly summed up the result as follows: "It was held that the defendants, by the erection of their structure and the operation of their trains, interfered with the beneficial enjoyment of these easements by the adjacent landowner and in law took a portion of them. By this mode of reasoning, the difficulty of regarding the whole damage done to the adjacent owner as *consequential only* (because none of his property was taken), and, therefore, not collectible from the defendants, was overcome. The interference with these easements became a *taking* of them *pro tanto*, and the value was to be paid for, and in addition the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which the owners sustained from the building and operation of the defendants' road."

² In *Bohm v. Metropolitan Elev. R. Co.*, 129 N. Y. 576, 588, *Peckham, J.*,

therefore, in proceedings to acquire the property right of the abutter, is to be directed to *the difference in value* resulting from the construction and maintenance of the elevated railroad. In this inquiry the consequences flowing from the maintenance and operation of the elevated railroad are to be taken as an entirety, and beneficial effects, both general and special, cannot be severed from the prejudicial results. It is *the net result* of the maintenance and operation of the elevated railroad upon the value of the property which is to be the subject of compensation to the abutter for the taking of his property; and to arrive at the net result *it is necessary to consider the general and special benefits* therefrom as well as the damages. Hence each case involves a consideration of the benefits, both general and special, if any, and evidence tending to show that the elevated railroad has benefited instead of damaging the property is in all cases admissible.¹ This is a just and equitable doctrine. In determining the

said: "The mere injury (if any) suffered by the landowner in any particular case, lies in the effect produced upon his abutting land by the wrongful interference of defendants with these easements of light, air, and access to such land. And where they are interfered with, and in legal effect taken, to any extent, it is not possible to think of them as of any value in and of themselves, separated from the adjoining land, but their value is to be measured by the injury which such taking *inflicts upon the land* which is left, and to which they are appurtenant."

¹ *Bohm v. Metropolitan Elev. R. Co.*, 129 N. Y. 576; *Newman v. Metropolitan Elev. R. Co.*, 118 N. Y. 618; *Sutro v. Manhattan R. Co.*, 137 N. Y. 592; *Sperb v. Metropolitan Elev. R. Co.*, 137 N. Y. 596; *Roberts v. New York Elev. R. Co.*, 155 N. Y. 31; *Bookman v. New York Elev. R. Co.*, 147 N. Y. 298; *Malcolm v. New York Elev. R. Co.*, 147 N. Y. 308; *Powers v. Brooklyn Elev. R. Co.*, 89 Hun (N. Y.), 288; *Odell v. New York Elev. R. Co.*, 130 N. Y. 690; *Saxton v. New York Elev. R. Co.*, 139 N. Y. 320; *Israel v. Manhattan R. Co.*, 158 N. Y. 624; *Bischoff v. New York Elev. R. Co.*, 138 N. Y. 257.

Where an elevated railroad enters a vacant and unimproved locality which normal growth has not yet effectively reached, which improvement has not seriously touched, which remains to be developed, and which has no element of value except such as lies in hope and expectation, and thereupon and thereby

population and growth tending elsewhere are diverted to the new line of rapid transit, and build up the vacant locality, creating a demand for lots and a steady and persistent increase in values, both directly on the line and in the side streets near by, the only reasonable inference is, that the increased values are the sole and substantial product of the newly opened line which has brought prosperity to a neglected locality. *Bookman v. New York Elev. R. Co.*, 147 N. Y. 298. Property in the neighborhood may be generally increased in value by the advent of an elevated railroad, while other property in the same locality, by reason of the close proximity of the structure, may in certain cases be damaged. *Powers v. Brooklyn Elev. R. Co.*, 157 N. Y. 105, rev'g 89 Hun (N. Y.), 288. See also *Israel v. Manhattan R. Co.*, 158 N. Y. 624. To entitle an abutting owner to recover damages for injuries to his real estate arising from the building and maintenance of an elevated railroad in the street, he must prove that his property has either decreased in value by reason of the railroad, or that its value has not increased as much as it would have done if the railroad had not been built. While the mere fact that appreciation of the land in the street through which the road runs has not been as great in proportion as in the side streets, is not sufficient to show damage, as the increase in both may have been caused by the railroad, evidence of such fact is admissible and may be considered in connection with

value of the property taken the railroad is to be regarded as a lawful structure operated by authority of law, and the compensation is to be limited to those injuries which flow from the taking of the easements of light, air, and access. Hence, in determining the value of the property taken, *consequential injuries resulting from the noise of operation of the trains,*¹ *interference with the privacy of the premises,*² and the *obstructing of the view of the premises by the*

other evidence upon the question whether the land of the owner has increased to the same extent that it would have done but for the presence of the road. *Becker v. Metropolitan Elev. R. Co.*, 131 N. Y. 509; *Storck v. Metropolitan Elev. R. Co.*, 131 N. Y. 514.

In *Storck v. Metropolitan Elev. R. Co.*, 131 N. Y. 514, 521, *Gray, J.*, said: "If there is proof that benefits have resulted in a general appreciation of property values in the locality, it is quite competent for the complainant to show in evidence that these benefits have not been invariable, and that, in his particular case, they were insufficient, as compared with other property similarly situated, or in the neighborhood; and that the insufficiency is due to the mode, manner, or extent of the defendants' occupation of the street. He is entitled to prove that his property has not equally, or proportionably, shared in the general rise in values in the locality, and that fact, with the other facts in evidence tending to prove damage, may properly be considered in determining whether he has been adequately compensated for the deprivation of his easements." When land, with an elevated railroad structure in front of it, falls below the value which it had prior to construction, and the rents also fall below the rental prior to construction, and both fail to make up the loss during a period of several years after construction, while property on adjoining streets in the immediate neighborhood, with no railroad in front of it, advances rapidly, both in fee and rental values, in the absence of any explanation, the inference is that the presence and operation of the railroad kept the value of the abutting property down. *Israel v. Manhattan R. Co.*, 158 N. Y. 624.

A *separate and distinct building which is situated upon a different street, and whose light, air, and access are not obstructed*, is not damaged by the construction of the elevated railroad, and

there can be no recovery therefor, although the property has been acquired and held by a single title describing the premises as one lot only. *Keene v. Metropolitan Elev. R. Co.*, 79 Hun (N. Y.), 451; *Welde v. New York & H. R. Co.*, 28 N. Y. App. Div. 379. But if the building be in fact single, the fact that it extends through to another street where there is no railroad and that the land covered was acquired in separate lots, does not affect the right of the court to treat it as an entirety in awarding damages. *Bischoff v. New York Elev. R. Co.*, 138 N. Y. 257; *Stevens v. New York Elev. R. Co.*, 130 N. Y. 95.

Opinion evidence as to cause of decrease in value is not admissible. *McGean v. Manhattan R. Co.*, 117 N. Y. 219. Nor is it admissible as to *value of property without the railroad.* *Roberts v. New York Elev. R. Co.*, 128 N. Y. 455; *Doyle v. Manhattan R. Co.*, 128 N. Y. 488; *Jefferson v. New York Elev. R. Co.*, 132 N. Y. 483. Nor is it admissible as to the *best use to which the property could have been put had there been no elevated railroad there.* *Doyle v. Manhattan R. Co.*, 128 N. Y. 488; *Gray v. Manhattan R. Co.*, 128 N. Y. 499. Evidence as to *specific rents and sales of other properties not admissible to prove damages.* *Jamieson v. Kings County Elev. R. Co.*, 147 N. Y. 322; *Robinson v. New York Elev. R. Co.*, 175 N. Y. 219. *Offers to purchase premises not admissible.* *Hine v. Manhattan R. Co.*, 132 N. Y. 477.

¹ *American Bank Note Co. v. New York Elev. R. Co.*, 129 N. Y. 252, 269; *Bischoff v. New York Elev. R. Co.*, 138 N. Y. 257, 262; *Conabeer v. New York Cent. & H. R. Co.*, 156 N. Y. 474, 489; *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 316; *Matter of Seaside & B. B. Elev. R. Co.*, 83 Hun (N. Y.), 143; *Kiep v. Metropolitan Elev. R. Co.*, 17 N. Y. Supp. 804.

² *Messenger v. Manhattan R. Co.*, 129 N. Y. 502; *Bischoff v. New York Elev. R. Co.*, 138 N. Y. 259, 262.

existence of the structure in the street,¹ are to be regarded as purely consequential and forming no part of the compensation to be paid as for property taken.²

§ 1264 (723). **Remedies of Abutters at Law and in Equity: Right to Injunction.** — As a necessary result of the principles established, it follows that under the decisions of the New York courts the construction of an elevated steam railroad over a street is as to the abutter a *trespass* and in legal contemplation a *continuing nuisance*, if constructed without the abutter's consent, or without having acquired from him by purchase, or by condemnation and payment, the right to do so. The abutter may sue in a common law action for the damages; but in such action he can in the New York view only recover such damages as he has sustained *down to the time* of the commencement of the action. He is not entitled to damages measured by the permanent diminution in value of his property upon the assumption that the wrong is permanent and irremediable.³ When

¹ *Messenger v. Manhattan R. Co.*, 129 N. Y. 502. See also *Wormser v. Brown*, 149 N. Y. 163.

² In determining the damages as an alternative to an injunction, the railroad structure is not alone to be considered, but the company is bound to make compensation for the incidental injuries caused by the running of trains upon that structure. The street and its uses may not be separated in considering the effect upon the complaining property owner. *Sperb v. Metropolitan Elev. R. Co.*, 137 N. Y. 155.

³ *Pond v. Metropolitan Elev. R. Co.*, 112 N. Y. 186; *Ottenot v. New York, L. & W. R. Co.*, 119 N. Y. 603; *Tallman v. Metropolitan Elev. R. Co.*, 121 N. Y. 119; *Pappenheim v. Metropolitan Elev. R. Co.*, 128 N. Y. 436, 444. As to the rule in some jurisdictions which gives a recovery once for all for damages past, present, and future, see *ante*, § 1252, note, and §§ 1253, 1257. When the property is *unimproved and vacant* and there is no evidence that it has any rental or usable value, the plaintiff can only recover nominal damages for past trespasses. *Tallman v. Metropolitan Elev. R. Co.*, 121 N. Y. 119. The trespasses are *successive from day to day* and create separate and successive causes of action. *Pappenheim v. Metropolitan Elev. R. Co.*, 128 N. Y. 436. "A recovery of judgment for damages for a

trespass, or the invasion of an easement, does not operate to transfer the title of the property to the defendant, either before or after satisfaction, nor does it extinguish the easements. By the ordinary rule it is an indemnity for a past wrong, leaving unaffected the plaintiff's right to his property." *Per Andrews, J.*, in *Pond v. Metropolitan Elev. R. Co.*, 112 N. Y. 186, distinguishing *Lahr v. Metropolitan Elev. R. Co.*, 104 N. Y. 268, where the parties had at the trial acquiesced in the assessment by the jury of the damages on the basis of the permanent diminution in value. *Exemplary or punitive damages* cannot be recovered in an action at law for damages for the trespass. *Powers v. Manhattan R. Co.*, 120 N. Y. 178.

Rule as to damages. *Uline v. N. Y. Central & H. R. R. Co.*, 101 N. Y. 98. This is the leading case in New York upon the measure of damages for surface steam railways in trespass by abutting owner. It was held: 1. The private rights or interests of individuals in streets, or in the soil thereof, must be lawfully acquired in order to authorize the construction of a railroad upon or over the same; if constructed without having acquired them, the company constructing it is a trespasser, and as such liable for all damages sustained by the owners of such rights and property. As to them the railroad is a *continuing nuisance*. 2. If these rights are duly

the railroad company is sued in an action at law to recover damages for past trespasses, it is to be regarded as a *wrong-doer*, and all the

acquired and the railroad constructed with proper care and skill, the railroad company is not liable for damages necessarily resulting from the construction and operation of its line. 3. Where a railroad is unlawfully constructed in a street, an owner of adjacent property in an action for damages can recover only such as were sustained up to the time when suit was commenced; for those sustained subsequently he may recover in successive actions until the nuisance is abated. *Referring to remedies which adjacent owners may resort to*, the court said (page 123): "He may sue and recover his damages as often as he chooses, — once a year or once in six years, — and have successive recoveries for damages. He may enjoin the operation of the railroad and compel the abatement of the nuisance by an action in equity; and when his premises have been exclusively appropriated, or where a highway, in the soil of which he has title, has been exclusively appropriated by a railroad, he may undoubtedly maintain an action of ejectment."

This rule as to damages has been followed in later cases. See *Wheelock v. Noonan*, 108 N. Y. 179; *N. Y. Nat. Exch. Bank v. Metrop. Elev. R. Co.*, 108 N. Y. 660; *Reed v. State*, 108 N. Y. 407; and approved in *Pond v. Metrop. Elev. R. Co.*, 112 N. Y. 186. In this last case the Court of Appeals holds that the doctrine of *Uline's Case* applies to actions against the *Elevated Railway companies*. The sole question was whether, in a common-law action, "the abutting owner could recover complete damages once for all as for a final and complete destruction *pro tanto* of the easement invaded by the defendant, or is confined to a recovery of such temporary damages as have accrued up to the commencement of the action." The court, *Andrews, J.*, reviews the prior cases and says: "These cases have settled the rule that permanent depreciation cannot be recovered in an action like this. . . . When he comes to the court for equitable relief the court may mould it to suit the circumstances, as was done in *Henderson's Case* (78 N. Y. 423)." In *Drucker v. Manhattan R. Co.*, 106 N. Y. 157, aff'g 51 Super. Ct. 429, it was held, that in estimating damages the nature

and extent of the general injury to the street — as the decrease in volume of the current of custom, and the change in its character — are necessarily to be considered; but defendant may show that a part or all of such decrease and change is due to other causes. The court says: "*Smoke and gases, ashes and cinders* affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water, and possibly the frequent columns, interfere with convenience of access. These are elements of damage, even though the necessary concomitants of the construction and operation of the road, and not the product of negligence, for they abridge the land-owner's easement, and to that extent, at least, are subjects for redress in an action for damages."

N. Y. Supreme Court Cases. Proper measure of damages held to be, the difference in value of the property with the full and unobstructed use of the easement and the value without it. *Pond v. Metrop. Elev. R. Co.*, 42 Hun, 567, citing *N. Y. West Shore & B. R. Co. v. Sutherland*, 35 Hun, 260; *N. Y. Lack. & W. R. Co., In re*, 29 Hun, 1; and *N. Y. Cent. & H. R. R. Co., In re*, 15 Hun, 63, 67, 69. See also *Meyer v. Metrop. Elev. R. Co., N. Y. Daily Reg.*, April 1, 1886, and *N. Y. Elev. R. R. Co., In re*, 36 Hun, 427.

N. Y. Common Pleas Cases. *Peyser v. Metrop. Elev. R. Co.*, 13 Daly, 122.

Abutting owners are entitled to compensation for a permanent diminution of their easement of light, air, and access from the street, caused by the construction and operation of an elevated road. Noise held to be *not* an element of damage. (Otherwise held by Superior Court). *Rule of Damages stated*: "The damage recoverable is the loss occasioned by the permanent diminution of value of the plaintiff's property caused by the loss or obstruction of light, air, and access resulting directly from the defendant's structure and its uses." *Per J. F. Daly, J.*, *Meyer v. Metrop. Elev. R. Co., N. Y. Daily Reg.*, April 1, 1886, *per Allen, J.*: "Does this railroad take any of the light and air which the plaintiff would otherwise receive, or obstruct the access which he would otherwise have to his premises,

consequences of its acts affecting the property of the abutter prejudicially are to be taken into consideration, including such damages as flow from noise, loss of privacy, interruption of the view of the abutter's premises, and the like,¹ although as we have seen,²

if the railroad was not there? If it does, what is the value of what has been taken? This is the question here, — not the loss plaintiff has sustained because an elevated railroad has been put in the street and the character of the street has been changed, and noise and bustle have succeeded peace and quiet. The question is, how much of that property in the street which he, in common with the abutting owners, owned, has he been deprived of, and what the value of that property is."

N. Y. Superior Court Cases. *Caro v. Metrop. R. Co.*, 46 Super. Ct. 138. Equitable action for injunction, alleging defendant's inability to make reparation. Demurrer sustained by trial court; but overruled by General Term, which held, that polluting the air of a dwelling with smells, rendering the enjoyment of the premises uncomfortable, is to that extent a taking of property. Legislative authority to construct and operate an elevated road does not authorize it to pollute the air by such smells. In *Ireland v. Metrop. Elev. R. Co.*, 52 Super. Ct. 450, the action was to recover the total damage to the fee. Held, maintainable if plaintiff offers to convey the easement appropriated by the railway, as was substantially done in this case. The verdict assessed the total damage to the property, and an additional sum (under the charge of the court) as compensation for loss of rents. Held, error, and new trial ordered. Noise made in constructing and operating the road held to be an element of damage. Same ruling on this point, in *Taylor v. Metrop. Elev. R. Co.*, 55 Super. Ct. 555. See *Seventh Ward Nat. Bank v. N. Y. Elev. R. Co.*, 53 Super. Ct. 412; *Taylor v. Metrop. Elev. R. Co.*, 50 Super. Ct. 311; s. c. 55 Super. Ct. 555, where it was held: That, as a general rule, the appropriation of property by a railroad should be concurrent with the payment or deposit of money in payment therefor; but if no proceedings to condemn have been instituted, the statutes impose no greater liability upon them for the taking than what would otherwise

have been incurred; that such liability is only for the property actually taken, and the diminution in value of remaining property directly affected by the taking; that the appropriation of an easement in the street is a taking of private property only in so far as the structure and operation of the road are inconsistent with and in excess of the ordinary lawful use of the street; that only to the extent of such taking of the easement is compensation to be made to an abutting owner; that the proper measure of damages, in actions brought by lessees of abutting property, is the diminution of the rental value of the whole property, caused by the taking; that damages for loss of business cannot be allowed, being too remote. (On this point see generally *Fritz v. Hobson*, L. R. 14 Ch. Div. 542, and cases cited; *Ricket v. Metrop. R. Co.*, L. R. 2 H. L. 175.) A lessee cannot recover for damages sustained after the expiration of the lease under which he had possession at the time the easement was appropriated. In same case, 55 Super. Ct. 555, noise was held to be an element of damage. *N. Y. Nat. Exch. Bank v. Metrop. Elev. R. Co.*, 53 Super. Ct. 511, affirmed without opinion, 108 N. Y. 660. Plaintiff was the owner of a leasehold interest in abutting property on the corner of Chambers Street and College Place. Judgment for specified sum (over \$500), for damages sustained up to commencement of suit, and operation of road enjoined after a future day named, with a proviso that defendants might purchase so much of plaintiff's easement as had been taken by the road for \$8,000, for which plaintiff should make a proper conveyance. In such case injunction should not issue. The provision enabling defendants to purchase, being in the nature of a privilege, was not error.

¹ *Kane v. New York Elev. R. Co.*, 125 N. Y. 164; *Messenger v. Manhattan R. Co.*, 129 N. Y. 502; *American Bank Note Co. v. New York Elev. R. Co.*, 129 N. Y. 252; *Moore v. New York Elev. R. Co.*, 130 N. Y. 523; *Bischoff v. New York Elev. R. Co.*, 138 N. Y. 257;

² *Ante*, § 1263.

these elements do not constitute a *taking* of the abutter's property. But in New York, an abutting owner *may maintain an action in equity for an injunction* in which he may obtain a decree which indirectly gives him *once for all* the value of the property taken or the permanent injury or damages to the fee as well as a judgment for the damages to the use resulting from illegal trespass. Under the practice of New York the abutter cannot commence, or compel the commencement of, a proceeding to assess the value of the property taken as in a condemnation proceeding. He may, however, ask for an injunction restraining the continued operation and maintenance of the elevated railroad, and in such an action a judgment will be rendered against the railroad company enjoining the continued maintenance and operation of the railroad, but providing that the injunction shall not become operative if the railroad company shall within the time fixed by the court tender and pay to the owner of the property in exchange for a conveyance or release of the easements taken or impaired the sum which is judicially fixed by the court as the value of the property taken by the railroad, or, as it is popularly known, *the fee damage*.¹ This action for an in-

Church of Holy Apostles v. New York Elev. R. Co., 21 N. Y. App. Div. 47; Golden v. Metropolitan Elev. R. Co., 1 N. Y. Misc. 142; Diehl v. Metropolitan Elev. R. Co., 11 N. Y. Misc. 14; Ode v. Manhattan R. Co., 56 Hun (N. Y.), 199; Kiep v. Metropolitan R. Co., 17 N. Y. Supp. 804; Ottinger v. New York Elev. R. Co., 17 N. Y. Supp. 912.

¹ Pappenheim v. Metropolitan Elev. R. Co., 128 N. Y. 436; American Bank Note Co. v. New York Elev. R. Co., 129 N. Y. 252, 270; Bohm v. Metropolitan Elev. R. Co., 129 N. Y. 576. In Pappenheim v. Metropolitan Elev. R. Co., 128 N. Y. 436, 444, Peckham, J., said: "The owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that, upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides that,

if the conveyance is made, and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues. It may be that, in the case of a railroad actually running its cars upon or through property of another, it would not be justified in refusing to pay on the delivery of the conveyance, and, instead thereof, submitting to an injunction. Public interests might have a right to be heard in that respect. But it is enough to say that, in the cases where permanent damage is to be paid, there is a condition that a conveyance shall be made, and the defendant thus secures title to the property used. In cases where the owner wishes to actually stop the further trespass and where the defendant has no legal right to acquire the property, such condition would not be inserted, and an injunction would issue upon the right of the owner being determined."

In American Bank Note Co. v. New York Elev. R. Co., 129 N. Y. 252, 270, Finch, J., said: "The injunction of a court of equity and its alternative damages are to be deemed a substitute for the ordinary proceeding of condemnation with the practical difference only that in the one case the company is the moving party and in the other the owner. For this court does not in the

junction is governed by the general principles of equity jurisprudence, and no injunction will issue unless the plaintiff shows that he has sustained damages which are substantial, and not merely nominal in their nature.¹ The right to relief in equity is founded upon the avoidance of a multiplicity of actions at law, and upon the absence of an adequate remedy for the continued appropriation of the abutter's property without making just compensation; and when the court has obtained jurisdiction of an action in equity to enjoin the continued maintenance and operation of the elevated railroad, it may retain it to do complete justice between the parties, and may ascertain and award damages for past trespasses to the date of the judgment as incidental to the main relief sought.²

least degree assent to the doctrine which has sometimes been advocated that the alternative damages are wholly in the unlimited discretion of the court, and so the elevated roads entirely at their mercy. We had supposed that every trace of a boundless and arbitrary discretion in a court of equity had wholly disappeared. There is no difficulty in assuming that the alternative damages are awarded to the same extent and for the same elements as the compensation given in a special proceeding for the condemnation of land under the law of eminent domain. Such a process in each case ends in the same substantial redress. The form is different, but the result is identical. It follows, therefore, that the alternative damages of equity must be such and such only as would be given in a proceeding for the condemnation of lands for a railroad use, due regard being had to the different characteristics of the property to be taken." Where the railroad company had without authority of law maintained a third track upon its elevated structure in the street in front of plaintiff's premises, but it appeared that the track had been constructed in good faith and in reliance upon certain statutes thereafter held unconstitutional, and that the third track was of great public utility and benefit, and the injury suffered by the plaintiff, if any, was small compared with the injury and inconvenience to the defendant company and the public if the defendant should be compelled to remove the same, it was held that the trial court in the exercise of its discretion properly denied a mandatory injunction compelling the removal of the unau-

thorized track and properly gave an injunction to the plaintiff conditioned upon the payment to him of just compensation which upon all the facts would be a remedy as adequate as the removal of the track. *Knoth v. Manhattan R. Co.*, 187 N. Y. 243, aff'g 109 N. Y. App. Div. 802. See also *Auchincloss v. Metropolitan Elev. R. Co.*, 69 N. Y. App. Div. 63. But the question whether the court will permit the continued existence of the unlawful structure by refusing a mandatory injunction is one addressed to the discretion of the court, and on appeal from a judgment refusing to exercise the discretion in favor of the railroad company, the determination of the trial court is final and cannot be reviewed. *Bremer v. Manhattan R. Co.*, 191 N. Y. 333, modifying 113 N. Y. App. Div. 905.

Laches and acquiescence do not constitute a defence to an action by an abutter in the absence of elements of estoppel. *Galway v. Metropolitan Elev. R. Co.*, 128 N. Y. 132.

¹ *Gray v. Manhattan R. Co.*, 128 N. Y. 499; *Adler v. Metropolitan Elev. R. Co.*, 138 N. Y. 173; *O'Reilly v. New York Elev. R. Co.*, 148 N. Y. 347. Even if a portion of a station projects beyond the line of the street in which the railroad is authorized to erect its structure and is, therefore, without authority of law, the maintenance of this unauthorized portion of the structure cannot be enjoined by an abutter if he does not show that he is specially damaged by reason thereof. *Adler v. Metropolitan Elev. R. Co.*, 138 N. Y. 173.

² *Lynch v. Metropolitan Elev. R. Co.*, 129 N. Y. 274. The determination

§ 1265. **Duration of Franchise; Rights in Perpetuity.** — When the statute or ordinance granting the franchise does not attach any fixed term of years to its duration, divergent views have arisen as to the effect of the grant and the time during which it continues. No rule has yet been reached which is generally accepted by the courts, but several distinct and somewhat inconsistent doctrines have been enunciated in different jurisdictions. The Court of Appeals of New York in an important case held under the legislation and facts that a franchise to operate a street surface railway in Broadway in the city of New York, not containing any provision for its termination or any express provision as to its duration, conferred a *perpetual right or interest* on the grantee *in that street*. In that case,¹ the facts were as follows: By an amendment to the Constitution, adopted in 1875, it was declared that no law should authorize the construction or operation of a street railroad except upon condition that the consent of the owners of one-half in value of the property bounded on and the consent also of the local authorities having the control of that portion of a street or highway upon which it was proposed to construct or operate such railroad, be first obtained, or in case the consent of such property owners could not be obtained, the general term of the Supreme Court might, upon application, appoint commissioners who should determine whether such railroad ought to be constructed and operated, and their determination, confirmed by the court, should be taken in lieu of the consent of the property owners. The Broadway Surface Railroad Company was incorporated under a statute² which authorized any company organized under it to construct, maintain, and operate a railroad on the streets and highways of municipalities, provided the consent in writing of the property owners and the consent also of the local authorities be first obtained. The company applied to the municipality of New York for authority to lay tracks and run cars over Broadway, and

by a court of equity of past damages for the trespass as an incident to equitable relief against the continued maintenance and operation of the railroad, does not violate the provision of the New York Constitution guaranteeing the right to a trial by jury in all cases in which it has hitherto been had. *Lynch v. Metropolitan Elev. R. Co.*, 129 N. Y. 274.

¹ *People v. O'Brien*, 111 N. Y. 1. In this case the New York Court of Appeals considered the decision of the Supreme Court of the United States in *St. Clair County Turnpike Co. v. Illi-*

nois, 96 U. S. 63, aff'g 82 Ill. 174, referred to *post*, § 1268, where it was held that the franchise was limited to the duration of the corporate life, and the application of that doctrine to the facts of the case before the court was rejected. See also as to the perpetual character of a grant of this nature, *Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379, 392; *Mobile v. Louisville & N. R. Co.*, 84 Ala. 115; *Des Moines City R. Co. v. Des Moines*, 151 Fed. Rep. 854.

² Laws of 1884, Ch. 252.

the consent of the city was given upon terms and conditions prescribed in the resolution granting it, among which was the annual payment of a considerable sum of money to the municipality. The company subsequently obtained the favorable report of a commission duly appointed by the Supreme Court in lieu of the consent of abutting property owners, and an order of the court confirming the action of the commissioners. It thereupon proceeded to construct and operate its railroad, and under statute authority mortgaged its property *and franchises*, made contracts with other street railroads for the use of its tracks, and otherwise exercised its corporate powers. In 1886 a statute was passed repealing the charter of the corporation and annulling and dissolving the corporation itself.¹ A further statute was also passed in the same year,² which provided for the appointment of a receiver for corporations annulled and dissolved by legislative enactment. Under this legislation, a receiver of the corporation was appointed by the court, and an action was brought by the attorney-general in the name of the State against the city, the receiver, and numerous other corporations and persons alleged to have an interest in the dissolved corporation, either as stockholders, mortgagees, creditors, or contractors, for the purpose of obtaining a judgment declaring the rights and liabilities of the respective parties. The court said that the material question for consideration was *whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation*. Among other claims advanced by the State it was contended that the stated term of one thousand years prescribed in its charter for the duration of the company constituted a limitation upon the estate granted, that therefore the corporation took a qualified estate only in its franchise, and that the franchise was a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the State. The court, however, ruled upon each of these claims adversely to the contention of the State. It held that a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use.³ The court further held that the grant in question, although not for any definite term, vested the grantee with an interest in the street in perpetuity to the extent necessary for the construction and operation of a street railroad.⁴ The court further held that whilst the annulling act was

¹ Laws of 1886, Ch. 268.

² Laws of 1886, Ch. 310.

³ *Nicoll v. New York & E. R. Co.*, 12 N. Y. 121; *Miner v. New York Cent. & H. R. Co.*, 123 N. Y. 242. See also to the same effect, *Detroit Citizens'*

St. R. Co. v. Detroit, 64 Fed. Rep. 628; *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 395; *New York City v. Bryan*, 130 N. Y. App. Div. 658.

⁴ *People v. Sturtevant*, 9 N. Y. 263; *New York City v. Second Ave. R. Co.*,

constitutional and valid, its only effect *was to destroy the corporate life*; that the *reservation of power to alter, amend, and repeal charters* only applied to and affected the corporate life of the corporation and did *not apply to or affect its property rights*, although they might be founded upon legislative grant and be in the nature of franchises to use the city streets; and that therefore, upon the dissolution of the corporation its directors or trustees then in office became vested under the statutes of the State of New York with the title to its property as trustees for its creditors and stockholders; and that so much of the statutes of 1886 above referred to as provided for the taking away from the company of its street franchises and for the winding up of its affairs by suit brought by the attorney-general and the appointment of a receiver therein, were unconstitutional and void.

It is to be observed of this case that the franchise or right granted to the Broadway Surface Railroad Company did not in its nature and terms differ materially from the innumerable indeterminate franchises which have been granted to public service corporations in other States, nor do the laws of New York giving these franchises and rights the attributes of property appear to differ materially from those to be found in other jurisdictions. An important consideration among others inducing the court to hold that the estate was granted in perpetuity, was that the legislation of the State had made such interests taxable, inheritable, alienable, and subject to condemnation

32 N. Y. 261; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330.

In *Milbau v. Sharp*, 27 N. Y. 611, 620, where the court held that the common council of New York could not, without legislative authority therefor, authorize the construction of a street railway in Broadway, *Selden, J.*, said, in speaking of the nature of the right claimed: "It was something more than a mere executory contract between the parties. It amounted also to an immediate grant of an interest, and, it would seem, of a freehold in the soil of the street to the defendants. The rails, when laid, would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. I say *perpetually*, because there is *no limitation in point of time* to the continuance of the franchise, and *no direct power is reserved* to the corporation to terminate it. . . . The title to the rails when

permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are therefore granted to the defendants by the resolution." In *Davis v. New York*, 14 N. Y. 506, 532, where an attempted grant by the city of the right to lay a railroad in Broadway was also held to be illegal, *Comstock, J.*, said: "As the consideration for constructing the road, the ordinance clearly contemplates that it is to become the private property of the associates. They alone will be entitled to place their cars upon it, and within a maximum limit they can charge what they please for the carriage of passengers. *These rights are in effect granted in perpetuity*, because the only provision for their termination is in case the associates after ten years shall decline to pay such license fee as the corporation, with the permission of the legislature, shall prescribe."

under the exercise of the right of eminent domain, and had vested them with the attributes of property generally. The legislative enactments from which these attributes were deduced were statutory enactments authorizing contracts with other corporations for a qualified transfer of such franchises for terms unlimited except by agreement of the parties, the conveyance of the franchises by way of mortgage as security for loans, the consolidation of the corporation grantees with other companies owning connecting and continuous lines of railroad with the right to continue the use of the franchise under the names of their successors. There were also statutory enactments giving authority to mortgagees and others to purchase such *franchises* upon mortgage sale and otherwise, and to organize so as to enjoy their use thereafter. In addition, the municipality was authorized to *sell* such franchises to parties proposing to build street railroads within the municipal limits. Provision was made permitting corporations to lease or transfer their rights and franchises to other street railroad corporations.¹ From these attributes of property created by statute and to be found wherever similar franchises exist, the legislative intention to create a permanent and perpetual franchise was deduced. The rules laid down in the decision are of great and lasting importance, both to the public and to investors, and seem to the author to be founded upon principles of justice and right. The grant to the railway company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held under the legislation and facts that the right created by the grant of the franchise was perpetual, and not for a limited term only. No

¹ In *People v. O'Brien*, 111 N. Y. 1, 42, *Ruger*, C. J., who delivered the opinion of the court, added: "It is matter of public history that one-half of the railroads of the State are now operated by organizations other than those to whom the franchises were originally granted, notwithstanding their dissolution, through transfers effected by the foreclosures of mortgages and otherwise." This language would seem accurately to describe con-

ditions to be found very generally throughout the United States, and not peculiar to the State of New York.

The Charter of Greater New York, 1897, limits the duration of municipal grants of the right to use streets to a period of twenty-five years, and under this restriction a grant of a perpetual right is void and is not good for the twenty-five years. *Blaschko v. Wurster*, 156 N. Y. 437.

other view is consistent with the long line of decisions to the effect that such rights are property rights which cannot be destroyed or impaired by legislative enactment. These decisions have been rendered upon the assumption that when the grant has been made by legislative authority and accepted and acted on, it is beyond recall, and except as it is subject to the exercise of the police power, cannot thereafter be impaired by legislative enactment.

§ 1266. **Duration of Franchise; Right limited by Life of Public Easement.** — Where the fee of the street or highway is not vested in the municipality, and where the public right therein is limited to a mere easement or right to use the street for purposes of travel, and other purposes incidental thereto, the view has been adopted in some jurisdictions making the *duration of revocable franchises commensurate with the existence of the public easement*, and terminating therewith upon the vacation of the street. Thus in Massachusetts it is held that where the title to the fee of the street or highway is vested in the original owner or in the abutting proprietor, a *revocable franchise* or privilege of using the street for a street railroad or other public service is carved out of the public easement or right to use the street for purposes of travel and other purposes incidental thereto, and terminates with the termination of the public easement in such street or highway. The grantee of a revocable franchise or privilege in the street is not entitled to compensation upon the vacation of the street by legislative authority because no property is taken by such vacation, and therefore is not entitled to invoke the constitutional guarantees against the deprivation of property without due process of law and just compensation and against the impairment of the obligation of contracts.¹

¹ See Index, *Vacation of Streets*.

In *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397, 399, a street was *vacated* to permit the construction of a terminal railroad station. In the street so vacated were *conduits for telegraph, telephone, and electric light wires* placed in the street under *revocable licenses* or *revocable franchises*. The corporations owning these wires presented to the court a petition for the assessment of damages to their property, claiming that it had been taken by the vacating of the streets and the construction therein of a terminal station. The court, however, held that these corporations were not entitled to compensation. *Knowlton*, C. J., said: "In this common-

wealth, on the laying out and construction of a highway or public street, the fee of the land remains in the landowner, and the public acquire an easement in the street for travel. This easement is held to include every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street. It includes the use of all kinds of vehicles which can be introduced with a reasonable regard for the safety and convenience of the public, and every reasonable means of transportation, transmission, and movement beneath the surface of the ground as well as upon or above it. Accordingly, it has been held that the public easement which is

§ 1267. **Duration of Franchise; Term limited by Life of Municipality.** — The Supreme Court of Illinois holds a doctrine which

paid for in assessing damages to the owner includes the use of the street for horse cars and electric cars, for wires, for telegraph, telephone, and electric lighting companies, and for water pipes, gas pipes, sewers, and such other similar arrangements for communication as further invention may make desirable. All these agencies have a share in the use of the streets under the rights of the public. A person who walks or drives through a public street does it as one of the public and not in the exercise of a private right of way. The permanent structures above referred to are permitted because they are used by the public, or a part of the public, or are held and used in private ownership for the benefit of the public. The rights in the streets which are so exercised or enjoyed are not private rights of property, but are a part of the public rights which are shared in common, although used and enjoyed in different ways by the different members of the public who pass through a street, or whose property is carried through it. These public rights are primarily subject to the regulation and control of the legislature which represents the public. This regulation and control is usually delegated to the local authorities by general laws, and sometimes by special laws. . . . All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in the public streets and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey rights of property. Most of them expressly state the limitations upon the authority given, and make the petitioners subject to possible future proceedings terminating or modifying their rights. But where there is no such express provision the result is the same. Their rights in common with the rights of others of the public are subject to reasonable regulation, or even to termination at any time, if the supreme authority acting in the public interest shall so determine. It follows that they have no rights of property in the street, and their structures that were built therein were personal property which they had

a right to remove, and which could not be subjects for the assessment of damages under statutes of this kind. Looking at the cases from a little different point of view, these public rights, being subject to the control of the legislature, were determined by the St. 1896, c. 516, which provided for the discontinuance of the streets, and a taking by the respondent. When these places ceased to be public streets, all rights of the public in them came to an end, and they became subject to the different kind of use to which they were appropriated by the statute. It is a familiar rule that the discontinuance of a public way terminates the right of travel of the public in it and leaves it for other uses. The action taken by the respondent under the statute first worked a discontinuance of the streets, and then appropriated them to the public use for a terminal station. The damages to be assessed were only for rights of property in the real estate at the time of the taking. The petitioners had no such rights." See also to the same effect, *Boston Electric Lt. Co. v. Boston Terminal Co.*, 184 Mass. 566. This last case refers to *New England Tel. & Tel. Co. v. Boston Terminal Company*, 182 Mass. 399, *supra*, and states more fully the statute authority and ordinances under which the conduits for the telegraph, telephone, and electric light wires of the plaintiff were laid in the public streets, showing that the privileges of the plaintiff company were held *subject to revocation* by the legislature, and, therefore, the statute discontinuing portions of said streets and providing for a terminal station in Boston on portions of the vacated streets containing the conduits of the electric light company did not violate the obligation of any contract or property rights held by the electric companies. After showing that the plaintiff's franchises or licenses were revocable, the learned Chief Justice *Knowlton* says: "Though private corporations have sometimes been granted franchises by special acts of the legislature which give them permanent rights of property in public streets, the provisions of these laws are not applicable to the plaintiff in this action."

In *Attorney-General v. Metro-*

operates as a limitation upon the term of a franchise which might otherwise be perpetual. According to the views of that court, if the corporate authorities of the municipality have granted rights to a public service corporation under certain restrictions and conditions to occupy the streets with its structures and no time has been fixed when such rights shall cease, the right did not exist in perpetuity, but was *commensurate only with the life of the municipality itself*. Hence that court has held that when the municipality granting the right in question in that case was annexed to, merged in, or consolidated with a city or other municipality, the franchise or right so granted was thereby terminated.¹ These views were accepted and

politan R. Co., 125 Mass. 515, 517, *Colt, J.*, in discussing the nature in *Massachusetts* of a franchise for a street railroad, declared that "The peculiar privilege given is the right, not to acquire land, or an easement in land, but only the right, so long as permitted by certain municipal authorities, to lay tracks in streets already appropriated to the uses of public travel, for the purpose of facilitating such travel; to modify the public use, and change, to some extent, the law of the road." In *Natick Gas Light Co. v. Natick*, 175 Mass. 246, 248, it is said that the *right of a gas company* to maintain its pipes in a public street, whatever be its nature, must be "regarded as subordinate to the general purposes for which the land was taken, to wit, public travel, and must yield to the necessities of that purpose." See also to the same effect *Lorain Steel Co. v. Norfolk & B. St. R. Co.*, 187 Mass. 500, 503, 504.

In *Taylor v. Portsmouth, K. & Y. St. R. Co.*, 91 Me. 193, where the court held that the construction and maintenance of an *electric street railway* was not the imposition of an additional servitude upon the fee of a highway, and there was no question as to the termination of the franchise or privilege before the court, *Haskell, J., arguendo*, said: "The servitude complained of in this case is a public servitude, and lawful, so long as it does not infringe the laws of the State regulating the use of ways. It gains no hold upon the soil itself, but is allowed a share of the public use. Should that use be extinguished, its rights would be extinguished also. It must exist or fall with the servitude of the public; otherwise, the doctrines

of this opinion would be illogical. If it gained any vested right in the soil that the public could not extinguish, then manifestly it has created an additional servitude, and taken land without compensation to the owner. . . . Now it may be said that the location of a street railway, by authority of the legislature, should give it a vested right to remain after the discontinuance of the way. But it must be remembered the legislature only gave a right to share the public easement, and, when that shall be extinguished, all the granted right will be extinguished. It may be that the act of the legislature granting a share in the easement gives a vested right therein, that can only be extinguished by authority of the legislature granting it. Of this we have no occasion to decide." See also *Milbridge & C. Elect. R. Co., In re*, 96 Me. 110; *Readfield Tel. & Tel. Co. v. Cyr*, 95 Me. 287; *Portland v. New England Tel. & Tel. Co.*, 103 Me. 240.

¹ In *People v. Chicago Tel. Co.*, 220 Ill. 238, the action was in the nature of *quo warranto* to test the right of the defendant to exercise its corporate franchises and to use the city streets for telephone purposes. A forfeiture was claimed on behalf of the people on the ground that the defendant had abused and misused its powers, and had exacted illegal rates and charges from patrons and customers. The defendant telephone company was given the privilege of using the streets of the city of Chicago by certain ordinances enacted in 1889, subject to certain restrictions as to the rates to be charged. It also acquired from adjoining towns and villages the right to use the streets thereof without restriction as to

applied by the Supreme Court of the United States in a case from Illinois.¹

rates. These adjoining towns and villages having been annexed to the city of Chicago, the court held that from the time of such annexation the restriction contained in the ordinances of Chicago upon the rates or charges to be exacted by the defendant applied to services furnished to patrons and customers in the annexed territory. In so holding, the court expressed the opinion that the life of the franchise not being for a definite term or expressly limited by grant, ceased when the corporate life of the adjoining villages and towns terminated by annexation to the city. *Cartwright*, C. J., who delivered the opinion of the court, said on this subject: "The ground of defendant's claim that the ordinance does not limit its charges in the annexed territory is, that before the annexation the minor municipalities had granted to it the right to occupy the streets therein for its business without any limit as to time. If the grants had been for terms of years under legislative authority authorizing them, and the terms had extended beyond the existence of the corporations granting the privileges, there might be ground for saying that the grants were binding upon the city because they had become binding contracts under which the defendants had vested contract rights for such terms. But they were not for definite periods, and the grants were in consideration of furnishing something to the town or village, such as telephone service to the town or village hall or the village authorities free or for some reduced rate. Such grants cannot be construed to be perpetual and at most cannot extend beyond the lives of the corporations granting them. Upon annexation there ceased to be any town or village authorities entitled to the benefits of the contract or entitled to demand or receive them, and it could not have been understood that the grant should continue discharged of the obligation annexed to it."

In *Venner v. Chicago City R. Co.*, 236 Ill. 349, 357, this decision is referred to by *Hand*, J., thus: "In *People v. Chicago Telephone Co.*, 220 Ill. 238, it was held that where the corporate authorities of towns or

villages had granted rights to public service corporations to occupy their streets and no time was fixed when such rights should cease, such rights did not exist in perpetuity, but that they would cease to exist when the municipalities granting such rights ceased to exist, as the village of Hyde Park and the town of Lake ceased to exist by annexation to the city of Chicago."

¹ In *Blair v. Chicago*, 201 U. S. 400, 488, Mr. Justice *Day*, who delivered the opinion of the court, said: "The question remains as to the term for which the rights granted by the trustees and the municipality of Lake View were to be held. The ordinances making these grants required the company to perform certain duties to the municipalities, such as the laying of pavement subject to the approval of the trustees. On April 16, 1887, the incorporated town of Lake View became incorporated as the city of Lake View under the Cities and Villages Act of 1872. On July 15, 1889, the territory included in the city of Lake View was annexed to the city of Chicago. We think in such case that the terms granted would not extend beyond the life of the corporation conferring them where there was no attempt to confer a definite term, assuming, without deciding, that it was within the authority of the municipality to grant a perpetuity." He then referred to the views expressed by the Supreme Court of Illinois in *People v. Chicago Tel. Co.*, 220 Ill. 238, *supra*, and added: "This seems to us a reasonable view, and being the construction of the highest court of the State of Illinois, we are willing to accept it."

Some considerations suggest doubts of the soundness of any general proposition that franchises in streets are necessarily limited by the life of the municipality itself. We have elsewhere shown that the paramount control over the streets and highways of a municipality is vested, not in the municipality itself, but in the State, and that the municipality in making a grant of a franchise only exercises authority which is delegated to it by the State. The franchise proceeds from the State, and not from the municipality, and no just reason

§ 1268. **Duration of Franchise; Term limited by Corporate Life of Grantee.** — Another view as to the duration of a grant of a franchise which contains no express declaration of its term is that when a grant is made to a corporation whose corporate term is limited, and there is no express declaration of perpetuity in the grant, the grant creates only an estate or interest in the franchise *during the corporate life of the grantee*. This view appears to have been first announced by the Supreme Court of the United States in a case which involved the right to charge tolls for the use of a turnpike road. The corporate life of the turnpike company to which the right was granted was limited to a term of twenty-five years, and it was held that the grant of the franchise to charge tolls did not extend beyond the term of years for which the corporation was created.¹ It is to be observed

in support of the view adopted can be deduced from a mere change in the form of the municipal organization. The views expressed assume that by annexation the corporate life of the annexed territory is destroyed instead of being merged in and continued as a part of the corporate life of the municipality to which it is annexed. They ignore the fact that by the great weight of authority, including the Supreme Court of the United States, the obligations of the annexed locality devolve upon the consolidated municipality or upon the corporate body succeeding to the original organization, and they also leave out of consideration the fact that the body corporate or members of a municipal corporation are not the mayor and council and other local officers, but are the citizens and inhabitants within the territorial limits, and that although the form of the corporate organization may change, such change does not effect a change in the members of the corporation. Annexation to or consolidation with a city or other municipality is either a legislative act or the result of legislative authority, depending upon the form in which it is effected, and to give to annexation or consolidation the effect of destroying or impairing a property right which would otherwise continue, seems to the author to be unjust and not the necessary result of legal principles. The cases above referred to must, we think, be viewed in relation to their particular facts and limited accordingly.

It is to be observed that the view adopted by the Supreme Court of

Illinois and approved by the Supreme Court of the United States making the grant in question in that case continue only during the life of the municipality granting it, is inconsistent with the reasoning of the decisions in other courts. Thus, in *People v. Deehan*, 153 N. Y. 528, rev'g 11 N. Y. App. Div. 175, where the local authorities of a town had granted to a gas light company a franchise or privilege of conducting gas in and through the public streets and highways of the town, and a portion of the town was afterwards incorporated into a village, the court held that the franchise of the gas light company was not affected by the change from town to village government, and that, *even as to streets opened by the village after incorporation*, the company was entitled to lay its conductors under the grant from the town. It is to be observed of this decision that the court did not discuss any questions as to the title to the fee of the street and that the particular *locus* in question, although near New York City, was yet outside its then limits, and was in a locality where, as a general rule, the fee is not vested in the municipality.

¹ *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, aff'g 82 Ill. 174. This case is followed and applied in *Snell v. Chicago*, 133 Ill. 413, 432; *Rock Island v. Central Union Tel. Co.*, 132 Ill. App. 248, 255. But see *supra*, § 1265. In *People v. Central Union Tel. Co.*, 232 Ill. 260, it was held that, as under the authority of *St. Clair County Turnpike Co. v. Illinois*, *supra*, a grant of the right to use the city streets was limited by the corporate

that the *rationale* of the rule adopted by the Supreme Court of the United States in the case referred to is a technicality of common-law conveyancing. The court expressly declared that it based its decision upon analogy to the rule of the common law that a grant to a natural person without words of inheritance creates only an estate for life. With all due respect, however, it may be said that the reason assigned for the rule lacks weight in view of the fact that the arbitrary and technical rule of the common law limiting the estate granted to an estate for life where words of inheritance are absent from the grant, has been changed by statute in many, and probably in a great majority, of the States. At best, the rule of the common law upon which the decision is founded is only a technicality, and is repugnant to the more enlightened and liberal spirit of modern times. Hence the author submits, that the term of an indefinite franchise is not necessarily limited by the corporate life of the grantee, but should be determined by the legislative intent as deduced from the statute fairly construed, or the intent of the contracting parties where the franchise results from a contract, express or implied, with a municipality. The decision of the United States Supreme Court might also be differentiated upon the ground that its application is properly limited to the right to charge tolls for the use of a highway for purposes of ordinary travel,¹ but cases are to be found which apply the rule to electric light and other public service corporations, exercising an indefinite franchise in the streets and highways.²

life of the grantee, a grant, indefinite in terms, to a telephone company of such right was not an irrevocable grant of special privileges and immunity in violation of art. ii, § 14, of the Illinois Constitution, when the municipality retained the right to grant similar uses of the streets to others. The same rule was also adopted by the Supreme Court of Colorado in *Virginia Canon Toll Road Co. v. People*, 22 Colo. 429. In that case a toll road corporation whose corporate life was limited to twenty years sold and conveyed its toll road shortly before the expiration of its corporate life to a newly organized toll-road corporation, which claimed the right to collect tolls after the term of the corporate life of its grantor had expired. It was held that the right to collect tolls expired with the corporate life of the first corporation." *Campbell, J.*, said: "This right to collect tolls not belonging to the corporation, either as a matter of common right or for an indefinite time,

as a grant from the legislature, but for such length of time as the corporation itself is permitted to do business, remains the property of the company only until its dissolution or expiration of its charter, and, after that, is neither the property of the corporation nor of its stockholders, but reverts to the State." To the same effect, *State v. Scott County M. R. Co.*, 207 Mo. 54; *State v. Cape Girardeau & J. G. R. Co.*, 207 Mo. 85.

¹ See *supra*, § 1265, and notes. That this distinction is substantial and important is apparent from the fact that in many, if not in most cases, the right of a toll road or turnpike company in the highway is only an easement, and on the expiration of the right to exact tolls and maintain toll-gates, the highway is discharged from the easement of the turnpike or toll-road company and becomes a free public highway.

² In *Wyandotte Elect. L. Co. v. Wyandotte*, 124 Mich. 43, 47, the

§ 1269. **Police Power as affecting Franchise Rights.** — Although a franchise or privilege to use the city streets is, when accepted and acted upon, a contract which cannot be impaired as well as a vested property right which cannot be taken except by the power of eminent domain, these franchises and privileges are not exempt from the exercise of the police power of the State either operating directly by legislative enactment or by delegation to the municipality. It is a general rule that the *right to exercise the police power cannot be alienated, surrendered, or abridged*, either by the legislature or by the municipality acting under legislative authority, by any grant, contract, or delegation, because it constitutes the exercise of a governmental function without which the State would become powerless to protect the public welfare.¹ Hence, when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the *implied condition that it shall be held subject* to the reasonable and necessary exercise of the *police powers* of the State, operating either through legislative enactment or municipal action.² But these franchises are property which cannot be

statute gave to electric light companies authority to lay, construct, and maintain conductors for electricity through the streets, &c., of any city, town, or village with the consent of the municipal authorities thereof, and conferred upon these companies power to make all necessary contracts. *Grant, J.*, said: "An incorporation under this act, a petition to the city to erect poles and wires, or for a franchise for that purpose, and the grant of the same by the city, would make a contract binding for the life of the corporation. It would be immaterial that no time for the existence of the right or the franchise was specified. The grant in such case would be limited to the period of existence fixed by the charter. If a railroad company were organized for a period of thirty years, and a party, natural or corporate, should grant it a right of way without specifying the time of user, the grant would be for the lifetime of the corporation. The law would imply that both parties contracted with reference to its period of existence. The same rule is applicable here." Citing *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, 68. See also *Rockwith v. State Road Bridge Co.*, 145 Mich. 455, 458, and compare *supra*, § 1265.

In *Mercantile Trust Co. v. Denver*, 161 Fed. Rep. 769, the principle re-

ferred to in the text was alluded to for the purpose of establishing that the franchise of a street railroad had not terminated, the court declaring that its franchise was at least for the corporate life of the grantee, and as that term had not expired it was unnecessary to determine whether the franchise was perpetual or not.

¹ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *State v. Murphy*, 130 Mo. 10, aff'd 170 U. S. 78; *Northern Pac. R. Co. v. Duluth*, 208 U. S. 583; *Carthage v. Garner*, 209 Mo. 688; *People v. Squire*, 107 N. Y. 593, aff'd 145 U. S. 175; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641; *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, 422.

² *New York v. Squire*, 145 U. S. 175; s. c. 107 N. Y. 593; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; 149 U. S. 465; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78; s. c. 130 Mo. 10; *Missouri v. Murphy*, 170 U. S. 78, aff'd 130 Mo. 10; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 16; *National Water Works Co. v. Kansas City*, 28 Fed. Rep. 921; *Stein v. Bienville Water Supply Co.*, 34 Fed. Rep. 145; *State v. Herod*, 29 Iowa, 123; *Wyandotte v. Corrigan*, 35 Kan.

destroyed or *taken from* the grantee or *rendered useless by the arbitrary act* of the municipal authorities in preventing the grantee from using the city streets for the purposes of the grant, although the municipality may seek to justify such act as an exercise of the police power.¹ Therefore, any regulations adopted by virtue of the exercise of the police power must be such as are called for by a fair consideration of the public welfare, *must be reasonable* in their character, and *must not* be such as to *defeat* the purpose of the grant.² The

21; *Wichita v. Missouri & K. Tel. Co.*, 70 Kan. 441; *Louisville City R. Co. v. Louisville*, 4 Bush (Ky.), 478; *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 111 La. 838; *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 352; *Saginaw v. Electric Light Co.*, 113 Mich. 660; *Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502; *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512; *Traverse City Gas Co. v. Traverse City*, 130 Mich. 17; *Westport v. Mulholland*, 159 Mo. 88; *Carthage v. Garner*, 209 Mo. 688; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641; *Rochester v. Bell Tel. Co.*, 52 N. Y. App. Div. 6; *People v. Geneva*, W. S. F. & C. L. T. Co., 112 N. Y. App. Div. 581, *aff'd* 186 N. Y. 516; *Frankford & P. Pass. R. Co. v. Philadelphia*, 58 Pa. 119; *Ridley Park v. Citizens' Elect. L. & P. Co.*, 9 Pa. Super. Ct. 615; *Kiskiminetas v. Conemaugh Gas Co.*, 14 Pa. Super. Ct. 67; *West Philadelphia Passenger R. Co. v. Philadelphia*, 10 Phila. 70; *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418; *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604.

In sustaining as valid and reasonable an ordinance *controlling a street railway in trimming shade trees in the street*, *Lippincott, J.*, said in *Consolidated Traction Co. v. East Orange*, 61 N. J. L. 202: "Nearly all kinds of reasonable regulations can be imposed upon street railways in the use of the streets by the municipality under the authority granted by the legislature to pass ordinances to regulate the use of the streets, and such resolutions are never declared unlawful on the ground that they impair the franchises of the company. Even direct legislative authority to a street railway company to carry passengers over the streets of a city does not exempt the corporation from municipal or police control. . . . A grant to a corporation of the

right to own property and to transact business affairs confers no immunity from police control to which the citizen would be subjected, and reasonable regulation of the franchise is not a denial of the right, or an invasion of the franchise, nor a deprivation of its property, or interference with the business of the corporation. The company is presumed to know that the business of operating a city street railway must be conducted under such reasonable rules and regulations as the municipality may impose, and subject it to its share of the burdens incident to the conducting of the municipal government."

¹ *Dobbins v. Los Angeles*, 195 U. S. 223, *rev'g* 139 Cal. 179; *Stevens v. Muskegon*, 111 Mich. 72; *People v. Deehan*, 153 N. Y. 528; *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510; *People v. Keating*, 166 N. Y. 601, *aff'g* 55 N. Y. App. Div. 555; *Rochester & L. O. Water Co. v. Rochester*, 176 N. Y. 36; *State v. Sheboygan*, 111 Wis. 23.

A municipal ordinance was adopted *fixing limits within which gas works might be erected* and a permit was granted for the erection of a gas plant. Construction of the plant was begun, but a month later another ordinance was adopted excluding the place where it was situated from the territory within which these works might be erected. It was held that as the erection of the plant had been begun and lands had been purchased in reliance on the former ordinance, the later ordinance was void as against the holder of the permit for the erection of the works as an *arbitrary exercise of the police power*, amounting to a taking of property without due process of law. *Dobbins v. Los Angeles*, 195 U. S. 223.

² *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107; *Burlington v. Burlington St. R. Co.*, 49 Iowa,

franchise or privilege being founded upon a grant from the State, the municipal authorities cannot by virtue of the police power impose any conditions upon the exercise of the right granted which are inconsistent with the franchise or privilege granted.¹ For example, if the charter or legislative grant of the franchise does not contain any condition that the permission of the municipality shall be given to the use or occupation of the city streets, the municipality cannot impose conditions which have the effect of making its consent to the occupation of the streets a prerequisite to the exercise of the powers conferred.²

144; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502; *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512; *Nebraska Tel. Co. v. Fremont*, 72 Neb. 25; *Plattsmouth v. Nebraska Tel. Co.*, 80 Neb. 460; *Atlantic City Water Works Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427; *Harrisburg City P. R. Co. v. Harrisburg*, 149 Pa. 465; *Woonsocket St. R. Co. v. Woonsocket*, 22 R. I. 64; *Texarkana v. Southwestern T. & T. Co.*, 48 Tex. Civ. App. 16; 106 S. W. Rep. 915; *State v. Sheboygan*, 111 Wis. 23, 37; *Eastern Wisconsin R. & L. Co. v. Hackett*, 135 Wis. 464. As to reasonableness of ordinances generally see *ante*, chapter on Ordinances.

¹ *In re Johnston*, 137 Cal. 115; *Louisville v. Louisville Water Co.*, 105 Ky. 754; *Consolidated Gas Co. v. Baltimore County*, 98 Md. 689; *Cambridge v. Cambridge Water Co.*, 99 Md. 501; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502; *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512; *Hodges v. Western Union Tel. Co.*, 72 Miss. 910; *State v. Flad*, 23 Mo. App. 185; *Appeal of Pittsburgh*, 115 Pa. 4; *Millvale v. Evergreen R. Co.*, 131 Pa. 1; *Harrisburg City P. R. Co. v. Harrisburg*, 149 Pa. 465; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32. But see *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654.

² *Louisville v. Louisville Water Co.*, 105 Ky. 754; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502; *Michigan Tel. Co. v. Benton Harbor*, 121 Mich. 512.

The charter of a gas company authorized it to use the streets of a city for laying its pipes, &c., therein with the proviso that the public thoroughfare should at no time be unreasonably interrupted or impeded by the laying down or erection thereof,

and should not be injured but should be left in as good condition as they were before the laying down of the pipes. The city having passed an ordinance requiring any person who desired to excavate any street for the purpose of laying gas pipes, or for any other purpose, to procure a written permission therefor from the city engineer, the gas company obtained an injunction against any interference with it on the part of the city authorities in laying its pipes in the streets; and it was held on appeal that the company was entitled to the injunction, the Supreme Court of Georgia saying: "The permission of the city of Atlanta was not required to enable the complainant to exercise its franchise. It certainly was not made a condition by its charter. This was not the contract into which it entered with the State, and it would appear anomalous if a subordinate power could impose terms which the superior did not see proper to impose." *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106. By statute, any telephone company was authorized to use the public roads and highways for erecting poles, wires, and other fixtures, upon first obtaining the consent of the owner of the soil, with the proviso that the use of the public streets in incorporated cities and towns should be subject to such regulations and restrictions as might be imposed by the corporate authorities of such cities and towns. The authorities of a town passed an ordinance that no wires should be stretched across any public street without the permission of the township committee. In an action to restrain a telephone company from stretching its wires across certain streets of the township, the court held that the ordinance was not a

§ 1270. **Police Power; Reasonable Regulations.** — The basis of the exercise of the police power is the protection of human life and

regulation or restriction authorized by the statute and was invalid, saying: "The right to prevent the use of the streets, for suspending wires, unless previous consent is obtained, if such a right be lawfully conferred, authorizes a refusal to consent at discretion and confers a virtual power of prohibition. The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the proviso annexed to the grant, that the use should be subject to such regulations and restrictions as may be imposed. The restrictions contained in such a proviso must be held to be restrictions which shall not prohibit the use or impose new conditions to the power to exercise the franchise." *Summit v. New York & N. J. Tel. Co.*, 57 N. J. Eq. 123.

When *unrestricted authority* is conferred by the legislature, the permission of the municipality is not necessary to the *privilege of laying gas pipes* through the streets and alleys, and the city cannot impose any conditions upon a corporation availing itself of the statutory right. But the privilege must be exercised with care for the safety and convenience of the public, and the pipes laid in such a way as to do as little damage as possible and impair as little as possible the use of the streets and alleys while the work is in progress; and when the pipes are laid, the streets and alleys should be restored to their former condition. *La Harpe v. Elm Township Gas, &c. Co.*, 69 Kan. 97. In *California*, the Constitution provides for a direct grant from the people to the persons therein designated of rights to lay pipes for water or illuminating gas, and specifies the conditions and requirements under which the grant shall be exercised. It has been held that the municipality has no other power of regulation than that expressly conferred by the Constitution, and that an ordinance requiring an application for the consent of, or permission from the superintendent of streets as a condition precedent to the exercise of the powers granted, is not a proper exercise of the police

power and is invalid. *In re Johnston*, 137 Cal. 115.

There is a clear *distinction between the consent of the municipal authorities* to the exercise of a franchise or right to use the city streets and the *permit of a municipal officer* to excavate the streets for the erection of poles and the laying of pipes, rails, &c. The former is a legislative and discretionary act; the latter is executive and mandatory when the proposed excavation is within the powers granted. The municipality cannot, by virtue of the police power, require its consent to be obtained in the legislative and discretionary sense, although, as will be seen hereafter, it may, by virtue thereof, require a permit to excavate. The cases referred to above when construed and applied in the light of this distinction are clearly correct. See *infra*, § 1273. Where a *street railway company* has constructed its line upon a highway in the country and the highway is thereafter brought within the limits of a city, the use of the highway by the street railway company is subject to the governmental control of the city, and the company may by ordinance be compelled to move its tracks in the same way as any other street railway. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118 Iowa, 287. In *Kansas*, cities of the first class have power to *require railroads to erect viaducts* over their tracks at street crossings, and they may be compelled by *mandamus* to erect them. *State v. Missouri Pac. R. Co.*, 33 Kan. 176. Statutory authority for the construction of "*bridges*" held to cover the construction of a *viaduct over a railroad company's tracks* within the city. *Argentine v. Atchison, T. & S. F. R. Co.*, 55 Kan. 730; *State v. Gorham*, 37 Me. 451.

In *Illinois* the authority of a city over its streets implies the power to require the elevation of railroad tracks in public streets and alleys, and this power carries with it the authority to vacate, close, or permanently obstruct such streets and alleys. The basis of the power is the protection of human life and the promotion of the public welfare. It does not rest upon and cannot be exercised solely for the benefit of the railway company.

the promotion of public convenience and welfare. Municipal regulations not having a fair relation to these objects are unreasonable, but when they fairly tend to promote these objects they are generally sustained.¹ Thus, the legislature, or the city acting under delegated authority, may require a *railroad company to light* such portion of the railroad as is within a city or incorporated place.² By virtue of its power to control and regulate the streets it has been held that the municipality *may exclude the poles and wires* of a public service corporation entirely from a particular street, if it does not appear that the use of such street is necessary to reach persons desiring its ser-

Summerfield v. Chicago, 197 Ill. 270; People v. Atchison, T. & S. F. R. Co., 217 Ill. 594; Weage v. Chicago & W. I. R. Co., 227 Ill. 421, 425. By construction of the statute in *Massachusetts*, a railroad corporation is primarily liable to third persons for damages caused to their estates by raising a street of a city so that its railroad may pass under the same; and this primary liability is not changed or affected by the fact that the city takes from the railroad company a bond of indemnity. Gardiner v. Boston & W. R. Co., 9 Cush. (Mass.) 1. General authority to construct a railroad across a street does not authorize the company to occupy the street with *piers and abutments of a bridge* to such an extent as to cause *inconvenience and detriment* to the public. Delaware, L. & W. R. Co. v. Buffalo, 158 N. Y. 266, 478, aff'g 4 N. Y. App. Div. 562; Lake Shore & M. S. R. Co. v. Elyria, 69 Ohio St. 41.

The method provided by the *New York Railroad Crossing Act* for the *removal of grade crossings* is exclusive of all others. People v. New York Central & H. R. R. Co., 158 N. Y. 410, aff'g 31 N. Y. App. Div. 334. That statute applies to and regulates the obligation to maintain the different portions of bridges constructed as well before as after its enactment. Yonkers v. New York Cent. & H. R. R. Co., 165 N. Y. 142. Review of determination of common council under provisions of statute. Matter of Delevan Ave., 167 N. Y. 256, aff'g 54 N. Y. App. Div. 629.

¹ Weage v. Chicago & W. I. R. Co., 227 Ill. 421, 425; Commonwealth v. Warwick, 185 Pa. 623; Commonwealth v. Philadelphia, H. & P. R. Co., 23 Pa. Super Ct. 205; State v. Janesville St. R. Co., 87 Wis. 74. It has been held that by virtue of the police power

an ordinance granting the right to lay double tracks in a street may be repealed and the grantee confined to a single track when the public safety and the proper regulation of the use of the streets so require. Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352. A city may require a steam railroad to change the location of its tracks in the street by shifting them a few feet. Atlantic & B. R. Co. v. Cordele, 128 Ga. 293. A city may by ordinance require that when the wires of any street railway company cross the line of any existing light, power, telegraph, or telephone company, the company making the crossing shall erect all necessary safeguards. State v. Janesville St. R. Co., 87 Wis. 72.

² Pittsburg, C., C. & St. L. R. Co. v. Hartford City, 170 Ind. 674; Cincinnati, H. & D. R. Co. v. Sullivan, 32 Ohio St. 152. The provision of the *Ohio* statute authorizing city and village councils by ordinance to *require railroad corporations to light their roads, &c.*, and, on default, the lighting to be done at their expense, is constitutional. On such default, the expense of such lighting may be assessed or declared a lien on any of the real estate of the corporation within the municipality. The expense of lighting is not a tax or assessment in the nature of a tax for local improvements, and cannot be summarily placed upon the county duplicate; it must be collected by suit in the name of the municipality, as prescribed in the statute. Cincinnati, H. & D. R. Co. v. Sullivan, 32 Ohio St. 152. Followed in Cincinnati, H. & D. R. Co. v. Bowling Green, 57 Ohio St., 336, in which it was held that a city or village has authority in such case to *prescribe the kind of light* that shall be employed for that purpose.

vice who would otherwise be cut off therefrom,¹ and by virtue of the same power a city may adopt reasonable rules and regulations *controlling the manner* in which a public service corporation shall exercise its right to construct its utilities or erect its poles and wires.²

§ 1271. **Franchise subject to Paramount Municipal Duty to maintain and improve Streets.**—Pipes, conduits, rails, and structures erected or constructed in the city streets under a general grant of authority to use the streets therefor *are subject to the paramount power and duty of the city* to repair, alter, and improve the streets as the city in its discretion may deem proper, and to construct therein sewers and other improvements for the public benefit. This paramount power and duty of the city is clearly governmental in its nature, and, in many cases at least, forms a part of the police power of the municipality. The decisions hold that the grantee of the franchise has no cause of action for any damage which it may sustain by acts of the city in reasonably performing its duty in these respects.³

¹ *Jonesville v. Southern Michigan Tel. Co.*, 155 Mich. 86; 118 N. W. Rep. 736. *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604. The fact that the route designated by the municipality is longer and less convenient and involves a larger expenditure by the company does not affect the power of the municipality to exclude the company from a street. *Jonesville v. Southern Michigan Tel. Co.*, 155 Mich. 86; 118 N. W. Rep. 736.

² *Wyandotte Elect. L. Co. v. Wyandotte*, 124 Mich. 43; *Kalamazoo v. Kalamazoo H. L. & P. Co.*, 124 Mich. 74; *New Castle City v. Central Dist. & Ptg. Tel. Co.*, 207 Pa. 371; *State v. Sheboygan*, 111 Wis. 23. The city may provide by ordinance *that the location of all poles* shall be subject to the approval of the proper city authorities, and that the further occupation of the streets shall be upon a plan to be approved by the council. *State v. Sheboygan*, 111 Wis. 23. A city may from time to time *compel a telephone company* to adopt all reasonable and generally accepted improvements tending to decrease the obstruction of the streets or increase the convenience to the public in their use. *Commonwealth v. Warwick*, 185 Pa. 623. But the city cannot by virtue of the police power *fix telephone rates or exact financial benefits* from a telephone company.

State v. Sheboygan, 111 Wis. 23. See *ante*, chapter on Ordinances. The court will not control the reasonable exercise by the local authorities of the power to regulate the manner of placing poles in the city streets. *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604.

³ *Anderson v. Tuttle*, 51 Fla. 380; *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.), 415; *Kirby v. Citizens' R. Co.*, 48 Md. 168 (sewers); *Detroit v. Ft. Wayne & E. R. Co.*, 90 Mich. 646 (adjusting ties to permit construction of concrete bed for paving); *San Antonio v. San Antonio St. R. Co.*, 15 Tex. Civ. App. 1. But it has been held that a street railway company cannot be compelled to remove its track to permit the laying of a sewer when the sewer can just as well be laid on one side of the street, thereby avoiding great loss and damage to the company. *Des Moines City R. Co. v. Des Moines*, 90 Iowa, 770. The general council cannot by contract deprive itself of the power to regulate the reconstruction of railways made necessary by the changes in the character of pavement used upon the streets of the city. *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.), 415.

Pipes of a water company laid in the streets under a contract with the city are subject to the paramount and inalienable right of the city to construct sewers therein whenever and wherever

§ 1272 (713). **Municipal Control; Police Authority; Rate of Speed of Railway Trains; Obstructions.** — Resulting from the power over

in its judgment the public interest may demand, and the water company has no cause of action if, in consequence of the exercise of this right, it is compelled to relay its pipes, in the absence of any unreasonable or malicious act on the part of the city. *National Water Works Co. v. Kansas City*, 28 Fed. Rep. 921. *Water gates* placed in the streets of a city under a contract with the city are subject to the right of the city to make such changes in the surface of the street and the alignment of the sidewalk as may be necessary to render the street safe and convenient for public travel, and the city is not liable for the expense incurred by the company in changing the location of the water boxes rendered necessary by the required repairs or improvements in the streets. *Belfast Water Co. v. Belfast*, 92 Me. 52. Where, in repairing a city street, the city uncovered a pipe of a water company laid under a charter provision, authorizing it to lay its pipes in the city streets "in such manner as not to obstruct or impede travel thereon," and the pipe was thereby exposed to frost, the city incurred no liability in the absence of any improper method in so doing. *Rockland Water Co. v. Rockland*, 83 Me. 267. But in *Moore v. New Orleans Waterworks Co.*, 114 Fed. Rep. 380, it was held that so far as it may be found necessary in prosecuting the drainage and sewerage of a city to take or damage the property of a water-works company, including the removal and replacing of its water works, mains, and pipes for the purpose of enabling drains and sewers to be constructed, the city can only lawfully proceed by previously making just and adequate compensation for the damage done, as required by the Constitution of *Louisiana*, Article 167, which ordains that private property shall not be taken, or damaged for public purposes without just compensation being first made.

In *New Orleans Gas Light Co. v. New Orleans Drainage Commission*, 197 U. S. 453, aff'd 111 La. 838, the gas company had, by statute, the right or franchise to lay pipes and conduits in the streets and alleys of the city at its own expense, in such manner as to least inconvenience the city and its inhabitants, and the company was

required afterwards to repair with the least possible delay the streets it had broken. There was nothing in the grant of the franchise which gave the company the right to any particular location in the streets. It was held that the construction of a system of drainage in the interests of public health and welfare was one of the most important purposes for which the police power can be exercised, and that the changing of the location of the gas pipes at the expense of the gas company to accommodate the system, did not amount to a deprivation of property without due process of law. Mr. Justice Day, who delivered the opinion of the court, said: "It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes, it was ever intended to surrender or impair the public right to discharge the duty of preserving the public health. The gas company did not acquire any specific location in the streets. It was content with the general right to use them, and when it located its pipes, it was at the risk that they might be, at some future time, disturbed, when the State might require for a necessary public use that changes in location be made. The gas company by its grant from the city acquired no exclusive right to the location of its pipes in the street as opened by it under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them in the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken and the injury sustained is *damnum absque injuria*."

When necessary for the improvement of a street, a street railway company may be required to remove its tracks and make them conform to the altered grade of the street. *People v. Geneva, W. S. F. & C. L. T. Co.*, 112 N. Y. App. Div. 581, aff'd 186 N. Y. 516. A municipality may require a

streets, and to protect the safety of citizens and their property, municipal corporations, in the absence of legislative restriction, *may control the mode of propelling cars within their limits, may prohibit the use of steam power, and regulate the rate of speed.*¹ Although a railway passing through the streets of a city under legislative authority is not a nuisance, yet if it is so operated as to

company to move its gas and water pipes for the purpose of enabling it to make a change of grade in order to do away with a grade railway crossing, and the company has no right to damages therefor. *Scranton Gas & Water Co. v. Scranton*, 214 Pa. 586. A city may, when necessary, lay a water pipe in the location occupied by a gas main of a gas company, and for that purpose it may remove the gas pipe to another part of the street without incurring any liability to the gas company for damages or compensation. *Pittsburg v. Consolidated Gas Co.*, 34 Pa. Super. Ct. 374.

¹ *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521; *Chicago, R. I. & P. R. Co. v. Reidy*, 66 Ill. 43; *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113; *North Chicago City R. Co. v. Lake View*, 105 Ill. 183; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207; *Whitson v. Franklin*, 34 Ind. 392; *Meyers v. Chicago, R. I. & P. R. Co.*, 57 Iowa, 555; *Donnaher v. State*, 16 Miss. 649; *Robertson v. Wabash, St. L. & P. R. Co.*, 84 Mo. 119; *Merz v. Missouri Pac. R. Co.*, 88 Mo. 672; *Buffalo v. New York, L. E. & W. R. Co.*, 152 N. Y. 276; *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill (N. Y.), 209. See further as to ordinances regulating the speed of trains and the operation of railroads, *ante*, §§ 716, 717.

An ordinance regulating the rate of speed of railroad trains in a city is not limited to such parts of it as are used by the public; it applies to switchyards. *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Iowa, 658. Where an ordinance required that when an engine was used in the city, a man should ride in front of it when going forward and on the tender within twelve inches of the roadbed when going backward, it was held that its spirit and intent should be observed though a literal compliance was too dangerous for the man's safety. *Baltimore & O. R. Co. v. Mali*, 66 Md. 53. A person about to cross a railroad track upon a public street of a city, which has an ordinance

limiting the speed of railroad trains, has a right to presume, until the contrary is made apparent, that the company will not run its trains in violation of such ordinance. The running of a railroad train within city limits at a prohibited rate of speed constitutes negligence *per se*. Where the statute imposes a duty, the failure to discharge this duty constitutes negligence; following *Dodge v. B. C. R. & M. R. R. Co.*, 34 Iowa, 276; *Correll v. B. C. R. & M. R. Co.*, 38 Iowa, 120; *Bergman v. St. Louis, I. M. & S. R. Co.*, 88 Mo. 678; *Mahan v. Union Depot, & Co.*, 34 Minn. 29; *Faber v. St. Paul, M. & M. R. Co.*, 29 Minn. 465; *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141. In order to justify a court in declaring void an ordinance regulating the rate of speed of railway trains in a city, as being in restraint of trade, "its unreasonableness or want of necessity as a measure for the protection of life and property should be clear, manifest, undoubted, so as to amount, not to a fair exercise, but to an abuse of discretion, or mere arbitrary exercise of the power of the council." *Gilfillan, C. J.*, in *Knobloch v. Chicago, M. & St. P. R. Co.*, 31 Minn. 402.

A municipal regulation requiring street railroads to report quarterly the number of passengers carried is neither unreasonable nor in restraint of trade. *St. Louis v. St. Louis R. Co.*, 89 Mo. 44.

A grant, by a municipal corporation to a railroad, of the right of way through land, made by an ordinance which requires the company to fence in its road and maintain gates at street crossings, is an exercise of the right of legislation, having the force of law within the city limits, and not merely a contract. *Hayes v. Michigan Central R. Co.*, 111 U. S. 228. (In this case the general law under which the city was incorporated conferred upon cities power to require railroad companies to keep flagmen at crossings, and to "provide protection against injury to persons and property.")

be dangerous to private property it may become a nuisance, and the company may be indicted, or otherwise proceeded against, accordingly.¹ A municipal corporation, by virtue of its police authority and power over its streets, may enact an ordinance to prohibit cars from obstructing the crossing of its streets; and the court expressed the opinion that trains could be so made up, and the road so operated, as to make it unnecessary to block up the streets.²

§ 1273. **Police Power; Permits to open Streets.**—The requirement of a *permit* from an executive officer to *open the city streets* for any purpose connected with the exercise of a franchise therein is a proper exercise of the police power. It is merely a means of securing notice to the municipality of the intended operations of the grantee of the franchise to the end that the municipality may take proper means to protect persons using the street from injury and to compel the grantee of the franchise to perform its duty to pro-

¹ *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646; *State v. Tupper*, Dudley L. (S. Car.) 135. See also *Redfield on Railways* (6th ed.), § 226, and authorities there cited; *Pierce on Railways*, 245–248. Such an ordinance held to operate throughout entire limits of city, including portions not platted into lots. *Whitson v. Franklin*, 34 Ind. 392. Construction of *special charter* on the subject. *State v. Jersey City*, 29 N. J. L. 170. See *ante*, § 684, and notes. *Indictment*, *post*, §§ 1527, note, 1597, 1599.

² *Illinois Cent. R. Co. v. Galena*, 40 Ill. 344; *Toledo, P. & W. R. Co. v. Chenoa*, 43 Ill. 209; *St. Louis, A. & T. H. R. Co. v. Belleville*, 122 Ill. 376. See also *Pittsburg, C. & St. L. R. Co. v. Hood*, 94 Fed. Rep. 618, 624, citing text.

An ordinance forbidding “any kind of obstruction” in the streets was deemed comprehensive enough to embrace the *obstruction of a street by a railroad company with its cars*. Ill. *Central R. Co. v. Galena*, 40 Ill. 344; *Great Western R. Co. v. Decatur*, 33 Ill. 381; *Gahagan v. Boston & L. R. Co.*, 1 Allen (Mass.), 187. An ordinance passed by virtue of the police power and the general right to control streets, requiring a railroad company to keep a *flagman at a street crossing*, where there was but a single track and which was not an unusually dangerous crossing, was held to be unreasonable and void. *Toledo, W. & W. R. Co. v. Jacksonville*,

67 Ill. 37. But a regulation *requiring a railroad company to place a flagman at such places where danger to the public safety, in the judgment of prudent persons, might be apprehended at any time, would be a reasonable one, and could unquestionably be enforced*. *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37. It is a reasonable exercise of the police power of a borough to pass an ordinance requiring a railroad company to keep a *watchman at its own expense at a dangerous crossing within the borough limits*, but where the crossing is practically in the open country, and there is no evidence to show to what extent it is frequented, such an ordinance cannot be sustained as reasonable. *Commonwealth v. Philadelphia, H. & P. R. Co.*, 23 Pa. Super. Ct. 205.

As to duty of a railroad company to keep in repair new and substituted crossing in lieu of old and abandoned one, see *People v. Chicago & A. R. Co.*, 67 Ill. 118. The relative powers, duties, and liabilities of municipal corporation and railroad company in respect to railway crossings over streets, under the legislation of *Connecticut*, are very fully considered, and former cases commented on, in *Burritt v. New Haven*, 42 Conn. 174. Railroads have no right to erect fences across platted streets or alleys though they are not in use nor in condition to be used by the public. *Lathrop v. Central Iowa R. Co.*, 69 Iowa, 105.

tect the excavations and restore the street to its former condition. Hence, the city may, by virtue of its general control over the city streets and its duty to maintain the same in a safe condition, require by ordinance that such a permit shall be obtained.¹ But the granting of such permit is a purely administrative duty, and the grantee of the franchise is entitled to the permit upon complying with the terms and conditions of its franchise and of the statute or ordinance imposing the requirement, and *the permit cannot be arbitrarily refused by the officer to whom the power to issue it is delegated.*²

§ 1274. **Police Power; Removal of Overhead Wires.** — Statutory enactments and ordinances adopted pursuant to statutory authority which *require overhead wires and electrical conductors to be removed and placed underground* are generally recognized as a proper exercise of the police power, and do not annul or violate the contract rights of companies holding franchises to use the streets for the purpose of maintaining such wires. Such statutes and ordinances are simply a regulation of the exercise of the franchise or privilege granted to the end that it shall be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.³

¹ *Missouri v. Murphy*, 170 U. S. 78, aff'g 130 Mo. 10; *Westport v. Mulholland*, 159 Mo. 86; *Carthage v. Garner*, 209 Mo. 688; *Beaver Val. Water Co. v. Conway*, 213 Pa. 225; see *supra*, § 1269. An ordinance requiring the payment of a license fee of \$3 by every person opening a macadamized public street sustained. *Pottsville v. Pottsville Gas Co.*, 33 Pa. Super. Ct. 480. See Index, *Licenses; Taxation.*

² *Westport v. Mulholland*, 159 Mo. 86; *Carthage v. Garner*, 209 Mo. 688. When a telephone company has *statutory authority* to use the streets and the power of the municipality is limited to designating by ordinance where the poles shall be placed, an ordinance conferring power on an administrative officer to determine the necessity of opening the streets is *ultra vires* and void. *Texarkana v. Southwestern T. & T. Co.*, 48 Tex. Civ. App. 16; 106 S. W. Rep. 915. It has been held that in an application for *mandamus* to compel the city to grant permission to a gas company to excavate and lay its pipes in the streets, the question whether the city may refuse permission may be determined, and that *a suit in equity for an injunction is not the proper remedy to obtain a determination of the ques-*

tion whether the refusal of the permit is lawful. *Wilmington v. Addicks*, 8 Del. Ch. 310.

³ *New York v. Squire*, 145 U. S. 175, aff'g 107 N. Y. 593; *Missouri v. Murphy*, 170 U. S. 78, aff'g 130 Mo. 10; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140; *American R. Tel. Co. v. Hess*, 125 N. Y. 641; *United Lines Tel. Co. v. Grant*, 137 N. Y. 7; *People v. Ellison*, 188 N. Y. 523, aff'g 115 N. Y. App. Div. 254; *Rochester v. Bell Tel. Co.*, 52 N. Y. App. Div. 6; *Kiskiminetas v. Conemaugh Gas Co.*, 14 Pa. Super. Ct. 67. See also *Western Un. Tel. Co. v. New York*, 38 Fed. Rep. 552.

A telephone company applied for a peremptory *mandamus* to compel the commissioner of public works to grant a permit authorizing it to excavate the city streets to lay conduits for electric wires and conductors. The application was denied because the company had not filed with the board of electric commissioners its maps and plans as required by the statute providing therefor or obtained from the commissioners the approval of such maps and plans. The statute directed that the costs and expenses of the board of commissioners appointed to provide for an underground construction of

But while the authority to require electrical conductors to be removed and placed underground may be *delegated to cities* and vil-

electric wires should be assessed upon the companies operating electrical conductors in the city. The company claimed that the law was unconstitutional because it imposed a tax, but the court held that no tax was imposed within the meaning of the Constitution; that the act imposed the duty upon the company to remove and cause to be laid underground all such wires and cables as were required in its business, and that there was no reason why such company should not be subjected to the payment of all expenses incurred in the construction of works required to carry on their business, and that the statute was not unconstitutional as impairing the obligation of any contract. *People v. Squire*, 107 N. Y. 593. *Ruger, C. J.*, said, "These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requiring all such wires to be placed underground in such cities, and be subject to the control and supervision of local officers, who could reconcile and harmonize the claims of conflicting companies, and obviate, in some degree, the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible. . . . The claim made by the relator would authorize it to tear up the street of the city at such times, in such places, and under such circumstances as it might itself determine, regardless of the public convenience and welfare and the rights of other claimants to the occupation thereof and place it beyond the reach of all power by the legislature to regulate the mode and manner of the enjoyment of its rights." Affirmed *sub nom.*, *New York v. Squire*, 145 U. S. 175.

In the Circuit Court of the United States, Southern District of New York,

Wallace, C. J., decided that an act of the State legislature requiring all electric wires in any city having a population of half a million or more to be placed *under the surface of the streets*, was valid as a police regulation, even as respects a telegraph company which had accepted the provisions of the act of Congress of July 24, 1866, heretofore referred to, *ante*, §§ 1220, 1221. *Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552. As to *Connecticut* statute authorizing municipalities to compel the removal of overhead electrical conductors, see *Appeal of New York, N. H. & H. R. Co.*, 80 Conn. 623. But a grant of authority to erect telephone wires *over, and through* the streets of a city does not include permission to lay the wires *under* the streets. *Commonwealth v. Warwick*, 185 Pa. 623. Where the *statute* authorizes a telephone company to erect its poles and wires in the city streets, general control of the streets conferred upon the city by charter does not authorize the city to limit the telephone company to the construction of conduits. *State v. Red Lodge*, 30 Mont. 338. In *State v. St. Louis*, 145 Mo. 551 (overruling *State v. Murphy*, 134 Mo. 548), it was held that under the *Missouri statutes* and the *freeholders' charter of St. Louis*, that city has power to permit *telegraph and telephone companies to construct underground conduits* for their wires, and has authority to enter into contracts with them specifying the conditions upon which its consent to the construction of the conduits is given. By its charter the city of St. Louis had general power and control over the city streets, and its authority for this purpose was sustained largely on authority of the decision of the Supreme Court of the United States in *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *s. c.* on rehearing, 149 U. S. 465. See *post*, § 1275. The Supreme Court of Missouri in so holding, further expressed the opinion that in giving this permission to telegraph and telephone companies and in contracting with them, the city acted in its proprietary rather than its governmental capacity, and in pursuance of the powers conferred on it in that capacity by its charter. By *statute a subway company* obtaining permission to construct con-

lages, such surrender of authority by the legislature is not to be implied, but must rest on legislation containing a clear grant of the power.¹ In providing for the *removal of overhead wires*, the legis-

duits was authorized to *charge other companies* rent for the use of its facilities, and it was held that such right was a franchise right derived from the State alone, with which the city had no concern; but the court also expressed the opinion that, as the use of the streets of the city was a public use and as a telegraph or telephone company, while not a common carrier, in many respects performs duties and is subject to obligations similar to those of common carriers, the city might by ordinance require it to permit any other company engaged in a similar business to lay its wires in the conduits or subways, and on the other hand, such companies might be authorized to condemn the right to use the conduits for their purposes. See also to the same effect *Missouri Edison El. Co. v. Weber*, 102 Mo. App. 95. It has been held that a city may, pursuant to statutory authority, grant the privilege to an electric light company to use the streets for the construction of conduits, although the wires intended to be placed therein *are to be used for private lighting*. *Strohmeyer v. Consumers' El. Co.*, 111 La. 506.

In *Indiana*, where the fee of the street was in the abutting owner subject to the easement of the public to make such uses of the street as were reasonably contemplated in the dedication, grant, or condemnation, the court held that the use of the street for *conduits for a telephone company* was not the imposition of an additional servitude, although the entry was effected by a telephone company and not by the municipality. *Coburn v. New Tel. Co.*, 156 Ind. 90, 95. After referring to the decisions, *Hadley, J.*, who delivered the opinion of the court, said: "The general doctrine of these cases is that in locating, marking, and dedicating streets in plats of land for urban residences, the purpose of the dedication, in the absence of controlling language, is conclusively presumed to be for the accommodation of the *public travel, traffic, and communication*. Anything which reasonably facilitates these ends is therefore consistent with the dedication. In sparsely settled towns and cities public necessities require but little of the servient owner beyond

the right of unobstructed passage over the street. But as cities become populous and the streets crowded with travelling footmen and vehicles, public necessity increases with the population, and whenever the necessity exists any use of the street by reasonable structures and devices above or below the surface which will *enable the citizens to communicate without actual travel* upon the street, and which does not *materially obstruct* the ingress and egress and light and air to abutting property, is within the contemplated purpose of the dedication and not a new burden on the fee."

Whether *underground conduits* for telegraph or telephone wires will be regarded as additional servitudes or burdens in other jurisdictions will depend on the course of decision in the particular State. On the general question whether the use of city streets for telegraph and telephone poles and wires is an *additional servitude* or burden entitling the abutter to compensation, see *ante*, § 1221, where the authorities are collated and the conflicting decisions noted.

¹ *Carthage v. Central N. Y. Tel. & Tel. Co.*, 185 N. Y. 448, rev'g 110 N. Y. App. Div. 625. Where the only authority conferred upon the municipality, is power to regulate the *erection* of the poles and wires of telephone and telegraph companies and no other authority or duty is imposed upon the municipality with reference to granting the franchise or right to use the streets, the municipality is not empowered to require the wires to be placed underground. The power conferred is fully exercised by fixing the location of the poles and streets to be occupied. *Carthage v. Central N. Y. Tel. & Tel. Co.*, 185 N. Y. 448, rev'g 110 N. Y. App. Div. 625. In *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, it was said that the city could only exercise statutory authority conferred upon it to require telegraph and telephone wires to be placed in conduits when the reasonable convenience and the good government of the municipality so required. The city cannot act arbitrarily in making the requirement.

lature may, by virtue of the police power, authorize the construction, and *the city may* by virtue of the power so conferred, *build conduits* in which *all* companies having the franchise or right to use the streets for electrical conductors *shall be required to place their wires*, and these companies may be denied the right to build independent conduits under their own charters, although the charters may be prior in point of time to the statutes or ordinances requiring the placing of the wires underground.¹ And it is also within the legislative power to *provide that the expense of constructing the conduits* as well as the *expenses of a commission* appointed to carry out the provisions of the statute, *shall be borne by the companies* whose wires are to be placed in the conduits. Such a statutory provision is not the exaction of a tax, but is merely a regulation in the public interests of the manner in which the companies shall meet the expense of the necessary changes.²

§ 1275. Rental Charges: Charges for Inspection and Supervision.

—If the municipal corporation be vested with control of public property and property devoted to public uses within its territorial limits, including therein the streets and highways, and is authorized to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds, and if the right of a corporation, *e. g.*, a telegraph company, to use the city streets is only in the nature of a permission or license and is not an irrevocable grant or franchise, it is within the authority of a municipality, having, for example, the powers of the city of St. Louis under its constitutional freeholders' charter, to impose upon the company a *reasonable* charge, which the court, *arguendo*, regarded as in the nature of *rental* for the exclusive use of the parts of the street occupied by its poles, &c.³ Similar charges by municipalities under

¹ *People v. Ellison*, 188 N. Y. 523, aff'g 115 N. Y. App. Div. 254; *Rochester v. Bell Tel. Co.*, 52 N. Y. App. Div. 6. Where, pursuant to statute and by arrangement with the municipal authorities, the construction of electrical subways has been undertaken by a corporation which agrees to furnish space to any corporation entitled thereto, an *applicant for space may compel the subway company* to furnish space by *mandamus*, and it is not necessary that the consent of the municipal officers to placing its conductors in the subway should precede the application for *mandamus*. *Matter of Long Acre El. L. & P. Co.*, 188 N. Y. 361.

² *People v. Squire*, 107 N. Y. 593, aff'd 145 U. S. 175; *United Lines Tel. Co. v. Grant*, 137 N. Y. 7.

³ *St. Louis v. Western Un. Tel. Co.*, 148 U. S. 92; s. c. on rehearing, 149 U. S. 465, 470, rev'g 39 Fed. Rep. 59; s. c. on retrial, 63 Fed. Rep. 68; *Postal Tel. Cable Co. v. Baltimore*, 156 U. S. 210; *Memphis v. Postal Tel. Cable Co.*, 145 Fed. Rep. 602. In *St. Louis v. Western Un. Tel. Co.*, 148 U. S. 92, s. c. 149 U. S. 465, the court regarded a *charge of five dollars per annum for each and every telegraph or telephone pole erected or used in the streets, alleys, and public places in the city as, under the circumstances of the case,*

delegated authority may be imposed upon public service corporations occupying the streets of a city, not by way of rental, but in the exer-

a regulation of the use of the street. In so deciding, it held that at the time when the charge was imposed, the telegraph company, although it had erected its poles and wires previously thereto, had only a permission or license which might be revoked at any time (149 U. S. 470), and this feature seems to have been a material element in the power of the city to impose the charge. Thus Mr. Justice *Brewer*, who delivered the opinion of the court on rehearing, said (149 U. S. 469): "If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they should be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use of vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of the use when the city grants to the telegraph company the right to use exclusively a portion of the street on condition of contributing something towards the expense it has been to in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the power to regulate the use." The learned justice then referred to the statutes of *Missouri* authorizing the telegraph company to occupy the streets and highways, and pointed out that at the time when the ordinance in question was enacted, the company had only a permission or license and had not received an irrevocable grant of authority to occupy the streets.

On the question of the character of the charge which was imposed in this case, Mr. Justice *Brewer* said in the opinion on the original hearing (148 U. S. 97): "Clearly this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of

the property belonging to the city, — that which may properly be called rental. . . . The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. . . . The use which the defendant makes of the streets is an exclusive and permanent one and not one temporary, shifting, and in common with the general public. . . . The use made by the telegraph company is in respect to so much of the space as it occupies with the poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of the companies and for the transportation of messages. . . . While permission to a telegraph company to occupy the street is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental."

But the doubt may be suggested whether the pole tax in question in this case must not rest for its validity upon the police power or upon some ground other than that the city under its general powers over or concerning streets had the right, under the legislation of the State and of Congress involved in the case, to exact this pole tax or charge as a return or compensation for the use of the streets of the city. We think the court did not hold or intend to hold, as between the city and the State, that the dominion of the State over streets and public places and their uses was not supreme and paramount, or that as respects the State the city had any ownership of the streets or private or proprietary rights therein which were

cise of the police power. In the exercise of the police power and to enable the municipality without cost to itself to discharge the duty it owes to the public of exercising proper and reasonable supervision and inspection in respect to the manner in which the company is exercising its privileges and constructing and maintaining its poles, wires, pipes, and mains, the municipality may, under delegated authority, impose a license fee upon the poles, wires, pipes, or mains of public service corporations in the city streets. This *license fee is not a tax* on the property of the company or on the transmission of messages, gas, or electricity, or on its receipts from such transmission or on its occupation or business, but is a charge in the enforcement of local government supervision.¹ But a license fee

beyond legislative regulation and control.

In *Mississippi*, it was held that where the *statute* granted to a telegraph company "the right to construct, operate, and maintain telegraph lines on, across, or along all streets," &c., without prescribing that any compensation therefor should be made to any city or town, it is *not within the power of a city*, by virtue of its charter authority and control over the streets, *to exact a charge or rental* from the telegraph company for the use of the streets. *Meridian v. Western Un. Tel. Co.*, 72 Miss. 910. It is to be noted that in this case the ordinance attempting to impose the charge was copied from the ordinance of the city of St. Louis which was before the Supreme Court of the United States in *St. Louis v. Western Un. Tel. Co.*, 148 U. S. 92; 149 U. S. 465. The *Mississippi* court, however, distinguished the decision in the later case on the ground that the decision of the United States Supreme Court was limited and controlled by the peculiar powers and authority conferred upon St. Louis by its freeholders' charter.

In *New Orleans v. Great Southern Tel. & Tel. Co.*, 40 La. An. 41, it was held that where a city has already granted to a telegraph company the right to use the streets for its lines, without limitation as to time and without consideration other than the furnishing of certain free traffic facilities to the city, and the company has established its system at great expense, *a charge of five dollars per pole* is not an exercise of the police power, and is a violation of the contract between the city and the company. In *Wisconsin Tel. Co. v. Milwaukee*, 126

Wis. 1, the court held that when the *statute* confers upon a telephone company the right to erect poles, &c., in the city streets, the city has *no power to exact a license fee* for the privilege of so doing. In *Sunset Tel. & Tel. Co. v. Medford*, 115 Fed. Rep. 202, an ordinance of a city in California provided that no telephone company should occupy the streets without paying an *annual license fee of \$100*. The telephone company had previously obtained the right to use the streets of the city. The fee was manifestly more than necessary to defray the expenses of issuing the license and maintaining the regulation. The court held that it was a *revenue provision* and was not authorized by a charter provision that the council might license telephone companies using the city streets and fix the compensation they should annually pay for such license. It was also held that the license fee was a new condition for the use of the streets and could not be imposed. Distinction between power to "license" and power to "tax," see *Index, Licenses; Ordinances; Police Power; Taxation*.

¹ *Western Un. Tel. Co. v. New Hope*, 187 U. S. 419; *Atlantic & Pac. Tel. Co. v. Philadelphia*, 190 U. S. 160; *Postal Tel. Cable Co. v. New Hope*, 192 U. S. 55; *Postal Tel. Cable Co. v. Taylor*, 192 U. S. 64; *Saginaw v. Swift El. L. Co.*, 113 Mich. 660; *Chester City v. Western Un. Tel. Co.*, 154 Pa. 464; *Taylor Borough v. Postal Tel. Cable Co.*, 202 Pa. 583; *Kittanning v. Consolidated Nat. Gas Co.*, 219 Pa. 250; *Ridley Park v. Citizens' El. L. & P. Co.*, 9 Pa. Super. Ct. 615; *Kittanning v. Garretts Run Gas Co.*, 35 Pa. Super. Ct.

imposed upon a telegraph or telephone, electric, or gas light company, or other public service corporation, by ordinance of a municipality for purposes of inspection and supervision, is unreasonable and invalid if it is so far in excess of the expense of inspection and supervision that it is plain that it was adopted, not to repay such expenses, but as a means of raising revenue.¹ But while the license fee is to be fixed in relation to the cost of inspection and other similar elements, yet inasmuch as it is not ordinarily possible to establish in advance the exact cost of inspection that should be the limit of the fee, the municipality is at liberty to make the *charge large enough to cover any reasonable expenses*. It is authorized to fix such charge in advance and need not wait until the end of the period for which the license is granted. In so doing it may not act arbitrarily or unreasonably, but the risk may rightfully be cast upon the licensee, and the charge cannot be avoided merely because

167; *Kittanning v. Armstrong Water Co.*, 35 Pa. Super. Ct. 174.

But in *Wisconsin*, it is held that a city cannot, without statutory authority therefor, impose a *license tax* upon a telephone company for each pole erected and maintained by it, as a means of raising revenue. The ordinance before the court required telephone and telegraph companies to apply annually for a license to maintain for the ensuing year the poles and cross arms then erected, and to pay one dollar for each pole, including one cross arm, and ten cents for each additional cross arm. It was also provided that all revenue so derived should become a part of the general city fund, and penalties were imposed upon the companies for the violation of the ordinance, the unlicensed erection or maintenance of any single pole or cross arm being declared to be a distinct and separate offence. It was held that this ordinance was a revenue measure, and was not a mere police regulation. *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1.

¹ *Postal Tel. Cable Co. v. New Hope*, 192 U. S. 55; *Postal Tel. Cable Co. v. Taylor*, 192 U. S. 64; *Philadelphia v. Western Un. Tel. Co.*, 40 Fed. Rep. 615; *Saginaw v. Swift El. L. Co.*, 113 Mich. 660; *Fort Pitt Gas Co. v. Sewickley*, 198 Pa. 201.

A city may by virtue of its police power and as a police regulation supervise and control by ordinance the erection upon its streets of telegraph poles and the stringing of wires thereon, and,

as incidental to this power, it was held by the Supreme Court of Pennsylvania that a license fee — in this case a license fee of five dollars for each telegraph pole, and a yearly license fee of one dollar per pole and two dollars and fifty cents per mile of wire — could be sustained as a police regulation, although it would not be valid if considered as a tax. *Western Union Tel. Co. v. Philadelphia*, 22 Weekly N. C. (Pa.) 39; 21 Am. & Eng. Corp. Cases, 40. And see note to that case for citation of authorities on the subject of the relative rights and duties of municipalities and telegraph and telephone companies, and the power to charge license fees. In *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59, United States Circuit Court, Missouri, *Thayer*, C. J., held a similar ordinance to be void, regarding it as a privilege or license tax, and one not authorized by the city's power "to regulate telegraph companies." See *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *post*, §§ 1356, 1364, and notes.

A charge of fifty cents per pole per annum imposed upon an electric light company when the cost of inspection was only five cents per pole, held to be unreasonable. *Saginaw v. Swift El. L. Co.*, 113 Mich. 660. If the amount of the license fee fixed by ordinance is excessive and unreasonable, the ordinance is void, and neither the court nor the jury can fix any other amount. *Postal Tel. Cable Co., v. New Hope*, 192 U. S. 55.

it subsequently appears that it was somewhat in excess of the actual expense of supervision, nor can the licensee then recover the difference between the amount of the license and such cost.¹

§ 1276. **Railroads: Obligation to restore Street: Paving and Repaving.**— When a *railroad company* has the power, by general grant of authority, to construct its tracks across or along a street, it is under the *implied obligation to restore the street or highway*, as nearly as possible, to its *former condition*, and so to construct and maintain its tracks that by reasonable care and diligence no danger will be occasioned to the public in the use of the street or highway, due regard being had to the necessity, and the right under the legislative authority, of the rails being there.² It has been said that there

¹ *Atlantic & Pac. Tel. Co. v. Philadelphia*, 190 U. S. 160, 164. The fact that the telegraph company is engaged in interstate commerce does not exempt it from municipal supervision and the payment of necessary and reasonable municipal license fees to defray the cost of supervision. *Atlantic & Pac. Tel. Co. v. Philadelphia*, 190 U. S. 160. The burden of proving that a license fee is unreasonable in amount, and excessive in view of the cost of inspection and supervision, rests upon the company, which claims that the charge is excessive. *Kittanning v. Armstrong Water Co.*, 35 Pa. Super. Ct. 174.

In *Chester City v. Western Un. Tel. Co.*, 154 Pa. St. 644, in which it was averred in the affidavit of defence that the rates charged were at least five times the amount of the expense involved in the supervision exercised by the municipality, the court said: "For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is, it does not go far enough. It refers only to the usual, ordinary, or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually

expended by the city for a particular year, to the particular purposes specified in the affidavit." It may be observed that the cases on this subject since decided by the Supreme Court of the United States, and cited *supra* in the notes to this section, define with more precision the nature and extent of the power of municipalities in this respect, and limit the broad language used in some of the cases in the courts of the States. In *Taylor Borough v. Postal Tel. Cable Co.*, 202 Pa. St. 583, the court said: "Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation, and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. . . . Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and the expense of the same." And see *Philadelphia v. Western Union Tel. Co.*, 89 Fed. Rep. 454, and cases cited *supra*, in the notes to this section.

² *Kyne v. Wilmington & N. R. Co.*, 8 Houst. (Del.) 185; *Palatka & I. R.*

is *no common law or implied obligation* upon the railroad company to keep in repair or maintain the portion of the street occupied by its tracks, and that this duty, if it exists, must be imposed by statute

R. Co. v. State, 23 Fla. 546; People v. Chicago & A. R. Co., 67 Ill. 118; Chicago Union Traction Co. v. Case, 129 Ill. App. 451; Evansville & T. H. R. Co. v. Carvener, 113 Ind. 51; Whitby v. Baltimore, C. & A. R. Co., 96 Md. 700; Maltby v. Chicago & W. M. R. Co., 52 Mich. 108, 110; Schild v. Central Park, N. & E. R. R. Co., 133 N. Y. 446; State v. Dayton & S. E. R. Co., 36 Ohio St. 434; Zanesville v. Fannan, 53 Ohio St. 605, 615; Moundsville v. Ohio Riv. R. Co., 37 W. Va. 92; Mason v. Ohio Riv. Co., 51 W. Va. 183; Roberts v. Chicago & N. W. R. Co., 35 Wis. 679.

In Schild v. Central Park, N. & E. R. R. Co., 133 N. Y. 446, 449, Gray, J., said: "The defendant was authorized and had the right to put down its rails in and upon the street, and was under no liability, by reason of anything in the grant from the common council, to keep the street pavement between its tracks in repair. But it was under an obligation, which is necessarily implied as to every use of a highway, so to construct and to maintain its tracks as that, by the exercise of a reasonable care and supervision with respect to them, no danger might be occasioned to the public in its use of the highway. From the case of Rex v. Kerrison, 3 Maule & S. 526, upon which the decision in Oliver v. North Eastern R. Co., L. R. 9 Q. B. 409, was rested, the principle may be deemed to have been established that a railroad corporation having its rails in a public highway must lay and keep them so as to cause as little injury as possible. The highway, or street, used for the rails must be maintained, as nearly as possible, as fit for the use of the public, who travel on foot or in vehicles, as it was before, having due regard to the necessity for the rails being there. Whether the rails are so laid as to constitute on its part a neglect of proper conditions for the public safety is a question of fact for the jury, and not one of law for the court to pass upon. It was the province of the jury to decide, in such a case, whether the defendant was negligent. It is not a question of the right of the defendant to be there with its rails in the street; there was only one question

whether, in the way, or in the condition in which it suffered its rails to remain, it was not neglectful of the right of the public to as safe and unobstructed a use of the street as was reasonably possible under the circumstances."

The views of the Supreme Court of *Minnesota*, expressed by an able judge, seem to us to be sound and reasonable.

"The common-law rule is that where a person or corporation is given the right to build a railroad, or make a canal, across a public highway, this gives them *no right to destroy it as a thoroughfare, but they are bound to restore or unite the highway at their own expense*, by some reasonably safe and convenient means of passage, although the statute contains no express provision to that effect. . . . This duty is founded upon the equitable principle that it was their act, done in pursuit of their own advantage, which rendered this work necessary, and therefore they, and not the public, should be burdened with its expense." *Mitchell, J.*, in *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131. In this case the court also construed a clause in the charter of the railroad company which required it to put a street used by it "*in such condition and state of repair as not to impair or interfere with its free and proper use*," saying: "It is also clear, upon both reason and authority, that this duty is a *continuing* one. It is not fulfilled by simply putting the street, at the time the railroad is built, in such condition as not to impair or interfere with its free and proper use at that time, nor even by maintaining it in such condition as would have accomplished that end had the circumstances and conditions originally existing continued."

In *Illinois* cities are empowered to enforce police regulations as to the running of trains to secure protection to persons and property, and to *compel railroad companies to raise or lower their tracks* so as to conform to any grade which may at any time be established, and when such tracks run lengthwise of any street, alley, or highway to keep the same on a level with the street surface. *Cairo & V. R. Co. v. People*, 92 Ill. 777; *Olney v. Wharf*, 115 Ill. 519.

or by the terms of its grant,¹ but the decisions are not uniform in so holding.² In any event, the common law or implied obligation is now of relatively small importance. By express enactment in statutes incorporating railroad companies and authorizing them to exercise their powers, by conditions attached to grants of franchises by municipalities or to consents of city councils, and by general statutory enactments, the obligations of railroad companies in this respect have been so fully declared that the common law or implied obligation has but a limited application. The scope and effect of these express provisions is almost entirely a question of construction depending upon the particular language used.³ When the require-

¹ Chicago Union Traction Co. v. Case, 129 Ill. App. 451; Western Pav. & Supply Co. v. Citizens' St. R. Co., 128 Ind. 525.

² See Maltby v. Chicago & W. M. R. Co., 52 Mich. 108. In Memphis, P. P. & B. R. Co. v. State, 87 Tenn. 746, it is held that a *street railway company* is bound to keep its *entire roadbed* to the end of its ties and its crossings in repair so as not to obstruct travel across its road or longitudinally upon it, and this duty is a *continuing one* whether the charter so expressly requires or not.

³ The enactment of a statute requiring street surface railway companies to *pay the cost of paving between the tracks* is an exercise of the *taxing power* of the legislature. Rochester v. Rochester R. Co., 182 N. Y. 99, rev'g 98 N. Y. App. Div. 521. An *exemption from the obligation to pave between tracks* of a street railroad company is *not available to a lessee or grantee* of the company to which the exemption is granted in the absence of a statute expressly providing for the transfer of the exemption. Rochester v. Rochester R. Co., 182 N. Y. 99, rev'g 98 N. Y. App. Div. 521. Applicability of statutory requirement that street surface railroad company shall keep the pavement between its track in good repair, to *extension of railroad* constructed under subsequent statute, see New York City v. Harlem Bridge, M. & F. R. Co., 186 N. Y. 304, aff'g 100 N. Y. App. Div. 257. A railroad company which has constructed its track upon a highway *does not fulfil its statutory duty of restoration* of the highway by merely laying out a new way of the same width and grade and in the same general direction as the original one, but it must take all reasonable pre-

cautions to make the new highway safe with reference to all the new surroundings and circumstances. Allen v. Buffalo, R. & P. R. Co., 151 N. Y. 434, aff'g 81 Hun (N. Y.), 615. A railroad company constructing over crossings under statutory authority is under a duty to the public to keep the highway in *safe condition for travel while the work is in progress*, and this duty continues although it may have let the work to an independent contractor, if the unsafe condition of the highway results from the work itself and not merely from the manner in which the contractor performs the work. Deming v. Terminal R. Co., 169 N. Y. 1, aff'g 49 N. Y. App. Div. 493. Construction of statutory obligation to construct and maintain *approaches to railroad crossings*, see Bloomington v. Illinois Cent. R. Co., 154 Ill. 539.

A requirement in a street railway charter to "keep the surface of the street inside the rails, and for two feet four inches outside thereof, in good repair," — Held, to mean two feet four inches on each side of the track. People v. Fort St. R. Co., 41 Mich. 413.

In *Pennsylvania*, an express obligation to pave or repair so much of the street as is occupied by the tracks has been construed to apply to the *full width of the street*, in the absence of any language restricting the obligation to so much of the width as is occupied by the rails and ties. Philadelphia v. Ridge Ave. P. R. Co., 143 Pa. 444; Philadelphia v. Thirteenth & F. Sts. P. R. Co., 169 Pa. 269. Where the ordinance giving the consent of the municipality to the construction of a street railway contained a condition that the street should be kept "in perpetual good order and repair from curb to curb its whole length," it was

ment of the statute, or of the condition of the franchise, *is merely that the company shall repair* the street, there is no obligation upon the company to do more than make such repairs as are required to keep the street in a safe condition for public travel, and *the company cannot be compelled to pave* the street, or to bear the cost thereof.¹ But when the company is required not merely to repair, but to keep the portion of the street occupied by its tracks in as good repair and condition as the remainder thereof, the courts have, in some instances at least, construed this obligation *as requiring the company to pave the street* whenever paving is necessary to bring the portion occupied by its track into as good a condition as the rest of the street.² And when the company is under the legal obligation

held that the railroad company was bound to keep the street *cleansed from dirt and filth* necessarily or casually accumulating thereon from its ordinary use as a public thoroughfare. *Pittsburg & B. P. R. Co. v. Birmingham*, 51 Pa. 41. The charter of a street railway company required the company to keep so much of the streets "from curb to curb, as may be used by them, in perpetual good repair." The ordinance giving the consent of the municipality also required that the street be kept in a good and sufficient state of repair and "in a reasonable sanitary condition." It was held that the railway company was bound to remove the *debris washed from an adjoining hillside by an extraordinary rain* and deposited on the track to the depth of eight or ten feet and for a length of a hundred feet. *Pittsburg & B. P. R. Co. v. Pittsburg*, 80 Pa. 72. A statutory provision that "the city council may from time to time, by ordinance, establish such regulations in regard to said railway as may be required, for paving, repaving, grading, culverting of, and laying gas and water pipes in and along said streets, and to prevent obstruction thereon," was construed *not to impose* any obligation upon the company *to pave or repave, &c.*, and was held only to require that it should not obstruct the city in making the improvements enumerated. *Philadelphia v. Hestonville, M. & F. R. Co.*, 177 Pa. 371.

¹ *Western Pav. & Supply Co. v. Citizens' St. R. Co.*, 128 Ind. 525; *Columbus St. R. Co. v. Columbus*, 43 Ind. App. 265; 86 N. E. Rep. 83; *Baltimore v. Scharf*, 54 Md. 499; *State v. Corrigan Consol. St. R. Co.*,

85 Mo. 263; *Kansas City v. Corrigan*, 86 Mo. 67; *Hurley v. Trenton*, 66 N. J. L. 538; *Norristown v. Norristown P. R. Co.*, 148 Pa. 87; *Philadelphia v. Hestonville, M. & F. P. R. Co.*, 177 Pa. 371 (limiting and explaining *Philadelphia v. Ridge Ave. P. R. Co.*, 143 Pa. 444, and *Philadelphia v. Thirteenth & F. Sts. R. Co.*, 169 Pa. 269); *Williamsport v. Williamsport Pass. R. Co.*, 203 Pa. 1; *Williamsport v. Williamsport Pass. R. Co.*, 206 Pa. 65. Where a borough ordinance provided that the railway company should "reconstruct" the streets upon which its tracks were laid with the same kind of material used by the borough authorities in the remaining portions of these streets and keep the same in good order and repair, it was held that the company was obliged, after laying its tracks, to "reconstruct" the street once, and thereafter to keep it in good order, but was *not obliged to put down a new and improved pavement* on the demand of the borough authorities. *Norristown v. Norristown P. R. Co.*, 148 Pa. 87.

² *State v. Jacksonville St. R. Co.*, 29 Fla. 590; *Columbus St. R. Co. v. Columbus*, 43 Ind. App. 265; 86 N. E. Rep. 83; *New York City v. Harlem Bridge, M. & F. R. Co.*, 186 N. Y. 304. A condition in a grant of a franchise to a street railway company that the street between the tracks should be paved "when and as the street may be paved," requires the *railway company to pave* the space between its tracks when the street is paved. *Cambridge Iron Co. v. Union Trust Co.*, 154 Ind. 291.

When a statute under which a street surface railroad company is in-

to pave, or repave, or to bear the cost thereof, the necessity for the paving or repaving, and the material therefor, rest in the discretion and judgment of the municipal authorities.¹ The *obligation to repair* imposed by statute or contained in a condition of the franchise or of the consent of the municipal authorities, *is a continuing obligation*; it is incident to the franchise, and it passes and attaches to the successors of the corporation by which the street or highway was originally appropriated.² When the obligation of the rail-

corporated contains a provision requiring the company to "keep the surface of the street inside the rails and for one foot outside thereof *in good and proper order and repair*," the question of what shall constitute keeping the pavement in good order and repair should be determined to some extent at least with reference to existing and surrounding conditions; and where a municipality has, for sufficient reason, decided to pave a street with *new and better pavement*, it is the duty of the railroad company to coöperate with the city and put its part of the street in the same condition as the remainder thereof, even though that necessitates the laying a new pavement as distinguished from repairing an old one. *New York City v. Harlem Bridge, M. & F. R. Co.*, 186 N. Y. 304, aff'g 100 N. Y. App. Div. 257. The mandatory duty imposed by statute upon a street surface railroad company to "have and keep in permanent repair that portion of the street between the rails of its tracks and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe," *includes repaving with a new material*. *Conway v. Rochester*, 157 N. Y. 33, rev'g 24 N. Y. App. Div. 489. If after notice requiring it to *repave* as directed the railroad company neglects to repave beyond the time prescribed by the statute, the city can then proceed with the work by the repaving of the portion of the street required by the statute to be kept in repair by the railroad company, *but it must be at the expense of the company* and cannot be charged upon either the abutting owners or the municipality at large. *Conway v. Rochester*, 157 N. Y. 33, rev'g 24 N. Y. App. Div. 489.

Where an ordinance provided that companies thereafter constructing

street railways should bear the cost of "maintaining, paving, repaving, and repairing that may be necessary" upon any street, &c., occupied by them, it was held that the city could direct the use of *a new material for paving*, e. g., *Belgian block*, and that the companies must bear the expense thereof. *Philadelphia v. Ridge Ave. P. R. Co.*, 143 Pa. 444. See also *Philadelphia v. Spring Garden F. M. Co.*, 161 Pa. 522; *Philadelphia v. Thirteenth & F. Sts. P. R. Co.*, 169 Pa. 269; *Reading v. United Traction Co.*, 202 Pa. 571.

¹ *State v. Michigan City*, 138 Ind. 455; *Conway v. Rochester*, 157 N. Y. 33, rev'g 24 N. Y. App. Div. 489; *Philadelphia v. Ridge Ave. P. R. Co.*, 143 Pa. 444. An ordinance authorizing a street railway company to use streets, and providing that when the city should pave the streets the company should pave and keep *in repair the space between the tracks*, held to be a contract; a subsequent legislative act empowering the city to require the company to *pave an additional space* on each side of the track, declared void as impairing the obligation of a contract. *Coast Line R. Co. v. Savannah*, 30 Fed. Rep. 646.

² *Southern R. Co. v. Morris*, 143 Ala. 628; *Burritt v. New Haven*, 42 Conn. 174; *People v. Chicago & A. R. Co.*, 67 Ill. 118; *State v. Michigan City*, 138 Ind. 455; *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291; *Maltby v. Chicago & W. M. R. Co.*, 52 Mich. 108; *Thayer v. Flint & P. M. R. Co.*, 93 Mich. 150; *Jeffrey v. Detroit, L. & N. R. Co.*, 108 Mich. 221; *Attorney-General v. Fort St. Union Depot Co.*, 117 Mich. 609; *Wellcome v. Leeds*, 51 Me. 313; *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302; *Allen v. Buffalo, R. & P. R. Co.*, 151 N. Y. 434, aff'g 81 Hun (N. Y.), 615; *Philadelphia v. Hestonville, M. & F. R. Co.*, 177 Pa. 371, 377; *Memphis, P. P. & B. R. Co. v. State*, 87 Tenn.

road company is dependent upon an express statutory enactment, it continues, of course, until the repeal of the enactment; and as we have already seen, under some circumstances at least, it is within the power of the legislature to abrogate a condition attached to a municipal consent which requires the railroad company to pave between the tracks.¹ Whilst the obligation to pave the street continues, and whether it be founded upon a statute or upon a condition in the grant of the franchise, or in the municipal consent, it is not within the power of the municipality to impose upon abutting owners by special assessment that portion of the cost of the paving the street which the company is bound to bear.² But when the company has been lawfully relieved from its obligation to pave or re-pave the street, the abutting owners are thereafter liable to assessment for the cost of paving.³ Where a street railway company, upon obtaining from the city authorities permis-

746; *Moundsville v. Ohio Riv. R. Co.*, 37 W. Va. 92. See also *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131.

Where railroad alters a highway it is bound, by effect of the legislation in *Massachusetts* and *Connecticut*, to restore the highway to a safe condition, and this obligation is a continuing one and the railroad company cannot protect itself against the liability to indemnify the town on the ground that the statute of limitations would bar an action against the railroad company for the original construction of the nuisance. The town may look to the railroad company which constructed the nuisance; and it is no defence, it seems, that at the time of the accident the road is in the hands of another company as lessee. *Hamden v. New Haven & N. R. Co.*, 27 Conn. 158; approving *Lowell v. Boston & L. R. Co.*, 23 Pick. (Mass.) 24; *Wellcome v. Leeds*, 51 Me. 313; *Veazie v. Mayo*, 45 Me. 560. A provision in a general statute requiring any railroad company crossing a highway to place it "in such condition as not to impair its former usefulness" is a condition attached to the railroad company's franchise, and may be enforced so long as the franchise is exercised. *State v. Dayton & S. E. R. Co.*, 36 Ohio St. 434.

¹ See ante, § 1228. See also *Philadelphia v. Spring Garden F. M. Co.*, 161 Pa. 522. City ordinances declaring that all street railroad companies thereafter constructing tracks upon the

city streets should be obliged to pave and repave the portion of the streets occupied by them, held not to impose a fixed, but only a shifting duty, *subject to alteration or repeal* by future ordinances. *Philadelphia v. Evans*, 139 Pa. 483. A contract by the city with a contractor to repave a city street and to maintain it in good condition for a term of five years, one quarter of the cost thereof being assessed upon the street railway company, relieves the company from its charter obligation to maintain the street pavement in repair. *Binninger v. New York City*, 177 N. Y. 199.

² *Sawyer v. Chicago*, 183 Ill. 57; *McFarlane v. Chicago*, 185 Ill. 242; *Chicago v. Nodeck*, 202 Ill. 257; *American Hide & Leather Co. v. Chicago*, 203 Ill. 451; *Chicago v. Newberry Library*, 224 Ill. 330; *Conway v. Rochester*, 157 N. Y. 33, rev'g 24 N. Y. App. Div. 489; *Philadelphia v. Spring Garden F. M. Co.*, 161 Pa. 522. But compare *People v. Brooklyn*, 65 N. Y. 349. As to the power of the city council under legislative authority to impose a tax or special assessment upon a street railway company for the cost of paving over and above its statutory obligation to pave or bear the cost of paving a part of the street, see *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, aff'g 78 Iowa, 367.

³ *Philadelphia v. Evans*, 139 Pa. 483, 491; *Philadelphia v. Bowman*, 175 Pa. 91. Compare *West Chester v. West Chester St. R. Co.*, 203 Pa. 201.

sion to lay down tracks upon the streets, covenanted in a bond executed to the city that it would *keep the pavement of the streets within the tracks*, and for a specified distance on each side thereof, *in repair*, this is binding upon it; and if the covenant is broken, and the party injured recovers of the city, it has its remedy over against the railway company upon the contract for the full amount it has been adjudged to pay.¹ Under its police power and authority over streets a city may require street railway companies to *keep their tracks watered*, so as to be free from dust.² A street railway company authorized by the legislature to lay down its track upon the streets of a city, subject to such restrictions as the city council might impose, constructed its track under the direction of the city engineer, but in such a manner in crossing a gutter as to *cause surface waters to overflow and injure the property of an adjoining proprietor*, and it was held that the company was liable for the damages resulting from the improper construction of its track.³ *Mandamus* lies to enforce the duty of the railroad company to *restore the street or highway* to its former condition of usefulness, and to maintain and repair the same.⁴

¹ Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475; People v. Brooklyn, 65 N. Y. 349; Bloomfield & R. N. Gasl. Co. v. Calkins, 62 N. Y. 386.

By a city charter the common council had full power over the streets and sidewalks, and authority to keep them in repair; and the street commissioners were authorized to make all necessary repairs therein. A railroad company, after constructing its road through certain of the streets, neglected, though requested by the commissioners, to restore such streets and the sidewalks thereon to their former condition of usefulness, as the statute required; and the commissioners procured the necessary repairs to be made, for which payment was made by the city. Held, that the city could recover from the company all reasonable expenses so incurred. Oconto v. Chicago & N. W. R. Co., 44 Wis. 231. Provisions of the charter establishing the general policy of repairing streets and sidewalks under the direction of the street commissioners, at the expense of the adjoining lots, held inapplicable to the repairs in question. *Ibid.* The railroad company, whose neglect of its own legal duty compelled the city to make the repairs, is not in a position to question, on technical grounds, the authority of the council to appropriate city funds to pay for the same. *Ibid.*

² City and Suburban R. Co. v. Savannah, 77 Ga. 731.

³ Alton & U. A. H. R. Co. v. Deitz, 50 Ill. 210; Lewis, Em. Dom. § 89.

⁴ State v. Jacksonville St. R. Co., 29 Fla. 510; Indianapolis & C. R. Co. v. State, 37 Ind. 489; State v. St. Paul, M. & M. R. Co., 35 Minn. 131; People v. Dutchess & C. R. Co., 58 N. Y. 152; Moundsville v. Ohio Riv. R. Co., 37 W. Va. 92; Mason v. Ohio Riv. R. Co., 51 W. Va. 183; Armstrong v. Taylor County Ct., 54 W. Va. 502. See also New Orleans C. & L. R. Co. v. Louisiana, 157 U. S. 219. Index, *Mandamus*. In some cases the obligation of the railroad company to restore and repair has been enforced by *mandatory injunction*. See State v. Dayton & S. E. R. Co., 36 Ohio St. 434; Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 534. Index, *Equity, Injunction*. Respective rights of railroad company, the municipal corporation, and lot-owners, growing out of the crossing of streets and highways by railroads: see, generally, Hughes v. Providence & W. R. Co., 2 R. I. 493; Great Western R. Co. v. Decatur, 33 Ill. 381; Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534; Karst v. St. Paul, S. & T. F. R. Co. (change of grade damages), 22 Minn. 118; Nicholson v. N. Y. & N. H. R. Co., 22 Conn. 74; *post*, § 1730.

§ 1277 (724). **Conclusions as to Railways in Streets summed up.**—In this section and the three following the author sums up the conclusions at which he has arrived, after an examination of all the reported cases upon the subject of railways in streets.

1. As respects ordinary railways, operated by steam, and street railways, operated by animal or mechanical power, *legislative authority is necessary* to warrant them to be placed in the streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads which connect different towns, whose tracks are constructed in the usual manner, and whose trains are propelled by steam. But it is otherwise as respects horse or electric street railways; these are for local travel, and the ordinary powers of municipal corporations are often ample enough, in the absence of express or other legislation on the subject indicating a different intent, to authorize them to permit or refuse to permit the use of streets within their limits for such purposes.¹ But they cannot, by an implied power, confer corporate franchises or authorize the taking of tolls. This must come from the legislature.²

§ 1278 (725). 2. The weight of judicial authority undoubtedly is that where *the public have only an easement in streets, and the fee is retained by the adjacent owner*, the legislature cannot, under the constitutional guarantee of private property, authorize an *ordinary steam railroad* to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude. As to *street railroads* constructed in the usual manner and operated under municipal regulation so as not to exclude the

¹ Text quoted, *Detroit Citizens' Street Railway Co. v. Detroit*, 22 U. S. App. 570, 184.

² Text quoted with approval in *State v. Corrigan Consol. St. R. Co.*, 85 Mo. 263, citing also *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; and *Jersey City & B. R. Co. v. Jersey City & H. R. Co.*, 20 N. J. Eq. 61; *Baltimore Trust, &c. Co. v. Baltimore*, 64 Fed. Rep. 153, citing text. "The consent of the city council to occupy the street is a mere license, and until the company has availed itself of the license no contractual obligation or relation

arises which requires a judicial declaration of forfeiture. Until the license is accepted and used, no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires, the license lapses, and no revocation is needed to terminate the same. The railway company or licensee cannot thereafter occupy the street or build its road thereon without a new permission from the city authorities." *Johnston, J., Atchison St. R. Co. v. Nave*, 38 Kan. 744. Compare *Atlantic & Pac. R. Co. v. St. Louis*, 66 Mo. 228,

free passage of persons and of ordinary vehicles, the almost general, and in the author's judgment, the sound judicial view is, that they do not create a new burden upon the land, and hence the legislature, no matter whether the fee is in the abutter or in the public, is not bound to, although it may, provide for compensation to the adjoining proprietor for any consequential damage to him.¹

§ 1279 (726). 3. Where the *fee* of the street is in the municipality in trust for the public, or in the public, the weight of authority, at least until recently, has been that *the control of the legislature is supreme*, and it may authorize, or delegate to municipal bodies the power to authorize, *either class of railways to occupy streets*, without providing for compensation either to the municipality or to the adjoining lot-owners. As elsewhere shown in this chapter, the distinction made in so many of the cases, and especially of the earlier cases, as to the extent of the rights of the public and of the abutter depending upon whether the fee (unless it is an absolute and unconditional fee) is in the one or in the other, is seriously impaired, and it seems not improbable that it will ultimately come to be regarded as inconsiderate and unsound.

§ 1280 (727). 4. As legislative authority is necessary to enable a company to construct and operate a passenger railway in the streets, the effect of such authority, when obtained and acted upon, is to give the company *a property in the franchise and road*, and hence no rival company has the right to use the track of the company which laid it down. Nor can an individual or another company, at pleasure and without legislative authority, construct a rival line in the same highway.² But a legislative grant of authority to construct a street railway *is not exclusive* unless so declared in terms or by plain or necessary implication, and therefore the legislature may, at will and without compensation to the first company, *authorize a second railway* on the same streets or line, unless it has disabled itself by making the first grant irrepealable and exclusive.³

¹ Chicago, B. & Q. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 266, quoting text.

² It is held in *Texas* that the consent of a city to a street railway company to use a street is a mere license, which may be revoked and bestowed upon another company before the licensee has availed itself of the privilege; and that if it abandons the street after

having used it, the act of giving consent to another company to use the street is *per se* a revocation of the first consent. Gulf City R. Co. v. Gulf City St. R. Co., 63 Tex. 529.

³ Gulf City St. R. Co. v. Galveston City R. Co., 65 Tex. 502; Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. Rep. 306 (citing text).

Whether it can effectually disable itself in this manner of its control over highways is a question of a nature elsewhere referred to, and which it is not necessary to discuss in this place. But whatever may be the extent of legislative power in this respect, it is clear that the legislature cannot, without compensation to the first company, authorize *the second company to take or use the track of the first*, although with compensation this might be done under the power of eminent domain, if, in its judgment, the public good required it. The extent of municipal, police, and other regulation and control over railways in streets depends, of course, upon the municipal charter, and the Constitution and legislation of the State touching the subject.¹

§ 1281 (734 c). **Concluding Observations.** — Whoever shall read with attention the imperfect outline here presented of the law concerning Streets in Cities will be struck with the seeming uncertainty of the line which defines the respective rights therein, of the public and of the abutting owners. Nor is this merely a seeming uncertainty; it is real and substantial: At first view it would appear to be an extraordinary phenomenon that, concerning a subject and relation so universal, so important and so old, the law should be in many essential respects yet unsettled, and in a state of transition and development. Reflection, however, readily supplies the explanation. Only a very small and circumscribed space can be lighted up by the wisdom of the most enlightened legislators, jurists, and judges. It is not within the limited capacity of the human intellect to formulate, in advance and with the requisite precision, a comprehensive system of legal rules and doctrines exactly adapted to new, changing, and untried conditions. To walk in safety it is necessary to keep within the light of experience, and not venture much beyond it. The uses of highways and even of streets were originally almost confined to the mere right of public passage in the ordinary modes. Accordingly the courts asserted that this right was in the public, but that all other rights in ordinary highways, and all other rights in streets in cities except for known and accustomed street uses proper, were in

¹ Since the above was written, the author is gratified to learn that his views are coincident with those expressed by Chancellor *Zabriskie* in his able opinion in *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61; and with those of other courts. *State v. Corrigan Consol. St. R. Co.*, 85 Mo. 263; *Gulf City R. Co. v. Galveston City St. R. Co.*, 65 Tex. 502; *Jackson Co. Horse R. Co. v. Interstate Rapid Transit Co.*, 24 Fed. Rep. 306; *Eichels v. Evansville St. Ry. Co.*, 78 Ind. 261; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109; *Logansport R. Co. v. Logansport*, 114 Fed. Rep. 688. *Ante*, §§ 1232 *et seq.*

the abutting owner. This relation was comparatively a simple one. In the course of time, however, came railways of different classes, — those operated by animal power, and those operated by steam and other mechanical power. These were surface railways. Later came the elevated and sub-surface railways, and also telegraph and telephone lines. With these new situations came the question of the power of the legislature, limited as it was by the ordinary eminent domain clause in our Constitutions, to authorize the construction, erection, and operation of such works on highways and streets without the consent of the abutter or without compensation to him. Great and valuable interests, public and private, were thus affected. This gave rise successively to more and more searching scrutiny of the respective public and private rights involved. Early adjudications as to the scope of legislative power, which made it almost as omnipotent as that of Parliament; early definitions of "property," which, as against legislative grants to such companies to use the streets and highways, practically confined the owner's property right within his exterior lines; and early decisions that private property was not, within the meaning of the Constitution, "taken" for public use, so long as it was not physically invaded, — all necessarily underwent further and closer study, with the result that they have been revised and modified by legislative enactment, by constitutional provisions, and by judicial reconsideration. As respects these positive provisions, they are still so recent as to be yet in the stage of interpretation; and hence the existence and the explanation of that uncertainty to which we have referred. And thus the necessity exists, here as elsewhere, of adapting our law to new situations and circumstances, and notably to the changes wrought by sky-scraper buildings and by iron, steam, and electricity in the means of communication and transportation, and in the work of the heating, lighting, and supplying water to our cities. In this "tender and delicate business" we must proceed with care and deliberation, heed the lessons of experience, and be content to go no faster or further than the exigencies of the special cases that arise for judgment shall from time to time require.¹

In conclusion, we may observe that the profound wisdom of Chief Justice *Hale's* observation was never more strikingly exemplified than by the course of decisions on the subject under consideration. "Time," he says, "is the wisest thing under heaven. It is most certain that time and long experience is much more ingenious, subtle, and judicious, than all the wisest and acutest wits, coexisting in the

¹ *Ante*, §§ 1122, 1123, 1155, 1245, 1261.

world, can be. It discovers such varieties of emergencies and cases, and such inconvenience in things, that no man would otherwise have imagined.”¹ The value of our system of law as we now have it is that it embodies the wisdom of time and experience. It is perhaps not too much to say, that not until it was sought to use public streets, not only for surface railways but for elevated and underground railways, and other modern uses, did the exact nature of these respective rights come to be thoroughly considered. Good fruit in the law, as in the natural world, is the product alone of patient cultivation. It ripens slowly, and can be gathered only at the appointed time. The exact state of the law on this subject in any given State can only be understood by a critical study of its special constitutional and legislative provisions, and line of judicial decisions, — a general view of which we have sought to give in this chapter and elsewhere in the present work.

¹ Hargrave's Law Tracts, Amendment and Alteration of Laws.

CHAPTER XXVI

PUBLIC UTILITIES. — TRANSPORTATION, WATER, LIGHT

	Section		Section
Construction, Operation, and Regulation of Public Utilities	1290	Purchase of Works of Company by Municipality	1312
Municipal Trading	1291	Acquisition by Municipality of Works of Public Service Corporation under Power of Eminent Domain	1313
Municipal Trading; Constitutional Questions	1292	Compensation; Elements; Measure of Damages	1314
Municipal Ownership; Public and City Purposes defined	1293	Rights of Municipality and Grantee at Expiration of Franchise	1315
Same; Construction and Ownership of Railways	1294	Contamination of Water Supply	1316
Power of State to prevent Extraterritorial Interference with Waters and Water Supply	1295	Consumers; Duty of Municipality or Corporation to furnish Supply	1317
Power to provide Water and Light	1296	Consumers; Reasonableness of Rates	1318
Public Nature of the Service	1297	Consumers; Rules and Regulations	1319
Power of Municipality to furnish Water and Light for Use of Inhabitants	1298	Consumers; Meters	1320
Power of City to supply Water to other Cities and beyond its Limits	1299	Consumers; Failure to pay for Service	1321
Power to apply Surplus to Private Purposes	1300	Consumers; Clandestine Abstraction of Water	1322
Property acquired by Municipality is held in Trust for Public Purposes	1301	Water Rates; Lien	1323
Power to contract for Public Service of Water and Light	1302	Legislative Regulation of Rates	1324
Capacity in which Municipality acts in furnishing or contracting for Water or Light	1303	Delegation to Municipalities of Power to regulate Rates	1325
Grants of Franchises to Corporations and Individuals	1304	Stipulations as to Rates in Ordinances and Contracts	1326
Sale of Franchises to Highest Bidder	1305	The Province of the Courts as to Rates	1327
Constitutional Prohibition against impairing the Obligation of Contracts	1306	Same Subject; Remedies; General and Federal Jurisdiction in Rate Regulation Cases	1328
Term of Contract	1307	Power of Judiciary to fix or prescribe Rates	1329
Exclusive Franchises and Contract Rights	1308	What are Reasonable Rates? General Considerations	1330
Exclusive Franchises and Contract Rights; Rule in Pennsylvania	1309	What are Reasonable Rates? Elements of Value; Property and Franchises	1331
Agreements by Municipality to satisfy or pay Taxes	1310	What are Reasonable Rates? Cost of Construction	1332
Breach of Conditions by Company; Forfeiture; Specific Performance	1311	What are Reasonable Rates? Cost of Reproduction of Works	1333
		What are Reasonable Rates? Risks and Incidents of Business; Other Sources of Supply	1334

	Section		Section
What are Reasonable Rates?		Liability of Municipality for	
Elements of Value of Prop-		Water and Light furnished;	
erty; Capitalization and		Implied Contracts	1338
Bonded Indebtedness	1335	Ultra Vires; Executed and Ex-	
What are Reasonable Rates?		ecutory Provisions	1339
Cost of Operation; Mainte-		Liability for Property destroyed	
nance; Depreciation	1336	by Fire	1340
What are Reasonable Rates?		Diversion of Sub-surface Waters	
Net Profit or Return to Cor-		by Municipal Water Works . .	1341
poration	1337		

§ 1290. Construction, Operation, and Regulation of Public Utilities.

— One of the questions which has come to the front with increasing force in recent years and which is daily becoming more urgent is the power of the municipality under legislative sanction *to construct, maintain, and operate public utilities*, or, where such utilities are constructed, maintained, and operated by others, *to regulate the operation and to control the rates and charges* for commodities furnished or services rendered to the public. Municipal purposes relate to the needs of the inhabitants of a limited territory, and in the operation of public utilities it is seldom necessary to go beyond the municipal limits. For municipal purposes the territory within each municipality forms a separate unit of organization, and public utilities with which the municipality may concern itself will usually, though not always, be confined to the municipal limits. Being circumscribed in territory, public utilities created or furthered by the act of the municipality have a natural tendency to become monopolistic within the limited area. It has not usually been found profitable or advisable to permit different or independent enterprises for the purpose of rendering similar public service. This fact, with the tendency of all enterprises to consolidate, has made the operation, management, and rates of these public utilities matter of increasing importance to the inhabitants of the municipality, and a constantly increasing body of law on the subject is being evolved by legislation and by the decisions of the courts.

The term "public utility" might, in an extended sense, include the laying out, arranging, and regulating streets and highways, wharves, parks, &c.,¹ but, in the more restricted sense in which it is generally used, its meaning is limited to those enterprises which have for their end the sale of commodities and the rendition of

¹ In *State v. Barnes*, 22 Okla. 191; 97 Pac. Rep. 997, it was held that a *convention hall*, owned and controlled by a city, for the accommodation of public gatherings, and for such other public uses as might be designed by the mayor and council, is a "public utility" within the meaning of the provision of the *Oklahoma Constitution* requiring a vote of the people before incurring any indebtedness for the construction of a "public utility."

service, which to some extent are for the private advantage or convenience of individual inhabitants. Within this restricted meaning of the term are railways, both steam and street, whatever the motor power, telegraphs and telephones, but as these have to do either with transportation along the streets and highways, or with the transmission of intelligence along the public ways, it is not necessary to enter upon a general consideration of them at this place.¹ Water works, gas works, and electric lighting plants and railways in streets are the public utilities with which cities and other municipal organizations have been mostly closely identified in the past, and in this chapter it will only be necessary to consider other public utilities incidentally in connection with these branches of municipal enterprise.

§ 1291. **Municipal Trading.** — Within a recent period municipalities in England, and to some extent on the Continent, have vastly and radically enlarged their ordinary and accustomed functions of local government by extending the scope of their operations into various fields which had theretofore always been exclusively occupied by private enterprise and private capital. This new departure goes in England under the general name of "*municipal trading*." Among other objects it embraces in that country many and varied business and commercial undertakings, such as owning and operating tramways, steamboat lines on the Thames, motor omnibuses, parcels delivery, carrying on fire insurance, pawnbrokers' shops, slaughter houses, lodging houses, brickmaking, the sale of milk and eggs, fuel, bread, &c., supplying workmen's dwellings, and numerous other undertakings in addition to furnishing the municipality and its inhabitants with street transportation, with water, gas, and electricity for light and power.

On sound *principles of political economy and statemanship*, the wisdom of this new departure seems to the author more than questionable, especially if it is to be extended to our American municipalities, where, in general, suffrage is universal and unrestricted. It does not fall within the plan of this work to enter upon this subject at great length. A few considerations only will be noted.

When a municipality engages in the business of lighting, water, or transportation, the understanding or effect is that the municipality has either a legal, or at any rate a *practical monopoly*, for having the power to levy taxes to carry on the business or to recoup losses, and

¹ Railways, telegraphs, and telephones are discussed in chapter xxv, on "Street Franchises," *ante*.

the power to ordain hostile rules and regulations, private persons or capital will not venture to enter into competition with the municipality; and municipal monopolies are as difficult, or even more difficult, to subject to efficient, healthful, necessary regulation and control than are private corporations carrying on the same functions. This policy of municipal trading, if extended to business and commercial undertakings, is a direct invasion of private liberty and an encroachment upon the field of private enterprises which it most seriously tends to injure and often wholly paralyzes. Individual freedom of action and of private enterprise within all lawful limits is one of the main foundations of our prosperity and success. In England until recently, and in this country until the present, we have proceeded upon the policy, regarded as axiomatic, that governmental intervention ought to be limited to doing what private enterprise could not do at all or do as well, and any encroachment by the government upon individual liberty or upon the field of private enterprise ought to be viewed with great jealousy and not allowed except upon the ground of plain necessity or manifest public utility.¹

¹ In a late work, entitled "On Municipal and National Trading," [1906,] by Lord Avebury (formerly Sir John Lubbock), and sometime chairman of the London County Council, the subject of municipal trading in its various aspects, theoretical and practical, is most ably discussed. Questioning the correctness of the accounts kept by municipalities relating to municipal trading, Lord Avebury says, p. 18: "Even, however, if the accounts were right, even if the commercial undertakings of government and municipalities were well managed and profitable, the system would be unwise."

On the general subject John Stuart Mill has well said that—"The true reasons in favor of leaving to voluntary associations all such things as they are competent to perform would exist in equal strength, if it were certain that the work itself would be as well or better done by public officers. These reasons have been already pointed out: the mischief of overloading the chief functionaries of government with demands on their attention, and diverting them from duties which they alone can discharge, to objects which can be sufficiently well attained without them; the danger of unnecessarily swelling the direct power and indirect influence of government, and multiply-

ing occasions of collisions between its agents and private citizens; and the still greater inexpediency of concentrating in a dominant bureaucracy all the skill and experience in the management of large interests, and all the power of organized action existing in the community, a practice which keeps the citizens in a relation to the government like that of children to their guardians, and is a main cause of the inferior capacity for political life which had hitherto characterized the over-governed countries of the Continent, whether with or without the forms of representative government.

"But, although, for these reasons, most things which are likely to be even tolerably done by voluntary associations should, generally speaking, be left to them, it does not follow that the manner in which those associations perform their work should be entirely uncontrolled by the government. . . . This applies to the case of a road, a canal, or a railway. . . . To make the concession for a limited time is generally justifiable, on the principle which justified patents for inventions. . . . It is perhaps necessary to remark that the State may be the proprietor of canals or railways without itself working them, and that they will almost always be better worked by means of a company rent-

The policy of municipal trading must necessarily lead to an *increase of municipal indebtedness*, an increase which can only be measured by the extent to which the policy is carried out; and the proneness of municipalities to contract debts, and especially debts to be met in the future twenty to fifty years distant, presents one of the most serious and alarming problems connected with municipal rule. "The portentous and rapidly growing increase of rates and of municipal debt," says Lord Avebury, speaking of England in 1906, "has roused the anxiety of all thoughtful citizens."¹

Among the most serious objections to municipal trading is that it will be attended with a *vast increase in the number of municipal*

ing the railway or canal for a limited period from the State," (Political Economy, vol. ii, chap. xi, § 11.)

Again, in his work on Liberty (p. 172), Mill says: "The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of their mental expansion and elevation to a little more of administrative skill, or of that semblance of it which practice gives in the details of business; a State which dwarfs its men, in order that they may be more docile instruments in its hands, even for beneficial purposes, — will find that with small men no great thing can really be accomplished, and that the perfection of machinery to which it has sacrificed everything will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly; it has preferred to banish."

It is not to the State, says Herbert Spencer, "The Man versus the State," "that we owe the multitudinous useful inventions from the spade to the telephone; it was not the State which made possible extended navigation by a developed astronomy; it was not the State which made the discoveries in physics, chemistry, and the rest which guide modern manufacturers; it was not the State which devised the machinery for producing fabrics of every kind, for transferring men and things from place to place, and for ministering in a thousand ways to our comforts. The world-wide transactions conducted in merchants' offices, the rush of traffic filling our streets, the retail distributing system which brings everything within easy reach, and delivers the

necessaries of life daily at our doors, are not of governmental origin."

Sir Robert Giffen thus refers to another most important aspect of the subject: "*In local expenditure we have to do with a real disease of local government*; with an expenditure that is partly extravagant and unnecessary, because local authorities are frequently bad managers even where they are not corrupt. They spend money on what is not really wanted; they spend more than they ought on what happens to be necessary; they incur liabilities and burden the future with a light heart. Expenditure is pleasant to those who have a little brief authority, and the increase of the number of urban authorities increases the number of those who may enjoy the pleasure. . . . The growth of expenditure in certain directions is disquieting in no small degree, and adds to the natural anxiety which must be felt at any encroachment that has occurred or is threatened upon the common fund of taxable resources on which both imperial and local expenditure must fall." Lord Farrar, for years at the head of the Board of Trade, in his work, "The State in its Relation to Trade," says: "*To preserve individual liberty in trade*, as in other matters, from the impatient action of philanthropy will probably be one of the great difficulties of the future."

¹ "Municipal and National Trading" by the Right Hon. Lord Avebury, chapters i and iii. Chapter iii gives the facts showing the enormous and alarming increase of municipal debt, and its effect in lowering the price at which municipal securities can be marketed.

employees. It is easy to foresee that in many cases these employees will be so numerous as to control the election of the municipal officials; and, when this is the case, they will demand their reward in the shape of their own retention in place and of the employment of their friends, duplication of officials, padded pay rolls, shorter hours, higher wages, and lower prices for the things or articles furnished or sold by the municipality.¹

Another grave objection to the policy of municipal trading is that it tends to load *the municipality with onerous and complicated duties* which it is unable successfully to bear and discharge. The ordinary and necessary duties of municipal government and administration require all and more than all the time at the disposal of the municipal councillors and officials. To conduct with success a commercial or manufacturing or business undertaking requires special training and long experience; and in this respect municipalities cannot, in the nature of things, compete with private persons or associations whose own money or capital is at stake and who have the ever wakeful *stimulus* of direct personal interest. Marshall Field, the great Chicago merchant, hit the nail squarely on the head when he declared that until the city of Chicago could supply and conduct a decent elevator service in its City Hall he was not in favor of turning over to the city the ownership and operation of the hundreds of miles of street railways within its limits.²

¹ "Mr. Taylor, General Secretary of the Municipal Employees' Association, at a meeting of the local branch of the Association held at East Ham, England, on September 20, 1905, stated that — 'There were, roughly speaking, 70,000 municipal employees in and around London, and if they were organized they would do almost anything. The county council employed 30,000 men, but only a very small proportion belonged to this or any other union.' Mr. P. T. Tevenan, the organizer of the Association, said: 'As municipal employees their numbers were going up to a matter of one million. Municipalization, he held, was a means to an end; the end was to establish a principle of nationalization in the very near future of all the industries of the country.' At the eleventh annual report of this association, Mr. Hardie stated that in England 'there were over 2,000,000 municipal employees, while the total of wage-earners numbered 14,000,000; that in 1903, when there was a reduc-

tion of wages all round, wages of municipal employees had alone increased — he might say, had doubled.' This association offers, as an inducement to municipal servants to join it, the 'wonderful influence at municipal elections' which they would be able to exercise." *Avebury*, p. 43.

² See *Avebury*, p. 143. Lord Farrar, speaking of that ownership and management of railways, concludes that "it certainly appears from our figures that those countries which have given freest scope to private energy have obtained the fullest reward. It is frequently forgotten that in questions of administration government officers are only human beings, after all, and do not differ in kind from other individuals, while the able and original minded among government servants are certainly more hampered — by quite necessary red-tape regulations — in carrying out fresh ideas than are the servants of private enterprise. The danger of this criticism developing into complete control is the rock

The ground on which the policy of municipal trading must rest is that of public utility, that is to say, that such trading can, among other advantages, be *conducted with a profit* which will inure to the benefit of the inhabitants by enabling them to obtain the things dealt in or supplied at a lower price or of better quality than would otherwise be practicable. But municipalities cannot produce or work as economically as private persons or associations, and the cost or price of the articles produced or supplied by the municipality will not be lowered, or, if lowered, the loss will be saddled on the taxpayer and made good out of taxation.¹

§ 1292. **Municipal Trading; Constitutional Questions.** — It has been pointed out by a well-known English author that, prior to the passage of the English Municipal Corporations Act of 1835, municipal corporations in England took little part in trade; they did not in general engage in business which otherwise would have been carried on for profit by private persons or companies. In fact, prior to their reform, the corporations were corrupt and inefficient and shirked the duties which generally belonged to civic authorities; they were the object of deep distrust, and no one dreamed of increasing their sphere of action. But after the passage of the act for their reform, public sentiment grew up in favor of the management of trades, which might concern the public interest, by municipal corporations.² About the middle of the nineteenth century a gradual

ahead, for as soon as government obtains control, private enterprise will wither. The development of railway communication in Great Britain has been such as no government management, however good, could possibly have produced."

Lord Avebury says (p. 143): "No one, indeed, who looks dispassionately into the evidence can doubt that the State management of the railways has been a great misfortune for the Continent; and that our trade and commerce have benefited immensely by the energy and enterprise of our railway companies and their very able officials." Mr. Acworth sums up his inquiry as follows: "A careful study of the evidence has convinced me that in the long run State control ends in keeping down the best to the level of the worst, and that, taking them for all in all, the private railway companies of England and the United States have served the public better than the government railways of the

Continent or of our Australian Colonies, and — which is still more to the point — are likely to serve it better in the future."

¹ Lord Avebury, giving the price of gas in eight cities in England which manufacture their own gas and eight cities where they are supplied by private corporations, thus sums up the result (p. 80): "The figures clearly show that in places supplied by companies, gas is substantially cheaper than where it is in the hands of the municipality." The superior efficiency, economy, and advantages of company management over State management, and the advantages of the American policy of what may be called "free trade" in railway construction, and in public service industries, are subjects well treated by H. R. Meyer in his works, "Government Regulation of Railway Rates," and "Municipal Ownership in Great Britain."

² *Ante*, chap. i, § 10; chap. iii, § 54.

change in public opinion took place, and the extension of municipal trading has progressed in England with a rapidity which increased greatly as the century drew towards its close. The sphere of municipal trading activity in England has included markets, slaughter houses, cold-air stores, ice manufactories, the sale of surplus ice, municipal bathing establishments, municipal water works, municipal gas works, street railroads, electrical works, the erection, furnishing, and management of dwellings and lodging houses, working stone quarries, building street cars, providing buildings for entertainments and for music, laying out race-courses, the undertaking of telephone service, the sale and distribution of milk, and the like.¹

¹ Prof. Dicey, in his *Lectures on The Relation between Law and Public Opinion in England*, says: "As to Municipal Trading.—At the beginning of the nineteenth century English municipal corporations took little part in trade; they did not, in general, engage in business which otherwise would have been carried on for profit by private persons or companies. In truth, the old corporations which were reformed by the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76) were not adapted for entering into trade. As we have seen, they were corrupt and inefficient, and shirked even the duties which generally belonged to civic authorities; they were the object of deep distrust; no one dreamed of increasing their sphere of action. It was not till municipal reform had worked its salutary effects that any popular feeling grew up in favor of the management of trades, which might concern the public interest, by municipal corporations. Nor was municipal trading during the Benthamite era in harmony with the liberalism of the day. A gradual change of public opinion may be dated from about the middle of the century. Since 1850 the extension of municipal trading has progressed with a rapidity which increased greatly as the century drew towards its close; the market rights of private owners have been bought up by municipalities; markets so purchased have often turned out lucrative properties, and we find that the more recent developments (of municipal trading) in connection with municipal markets include slaughter-houses, cold-air stores, ice manufactories, and the sale of surplus ice, and that the right to sell the ice to

the public without restriction has been demanded from Parliament. Municipal bathing establishments have become common, as well as the foundation of municipal waterworks, and since the middle of the century the supply of gas, which up to that date had been wholly in the hands of companies, has in many cases passed under the management of local authorities. Tramways (1868–69) were first constructed and owned, and since a later date (1882–1892) have been worked by municipalities, whilst since 1889 electrical works have been carried on by municipalities, and the fact is now clearly recognized that all or the greater number of tramways will ultimately become municipal property. Before 1890, local authorities had little concern with house building, and the Labouring Classes' Lodging Houses Act, 1851 (14 & 15 Vict. c. 34) remained a dead letter. Under the Housing of the Working Classes Act, 1890, local authorities now possess large powers of buying up insanitary areas, of demolishing insanitary buildings, of letting out land to contractors under conditions as to the rebuilding of dwellings for the poor, and of selling to private persons the buildings thus erected. Municipalities have at the same time received powers to build additional houses on land not previously built upon, and to erect, furnish, and manage dwellings and lodging-houses. They have also entered into various trades. They have employed themselves, *e. g.*, in turning dust into mortar, in working stone quarries, in building tram-cars, in the provision of buildings for entertainments and for music, in laying out race-courses, in the manufacture of

But in America, although there has been a steady tendency to enlarge the scope of the public utilities which may be conducted by municipalities, the *limitations and restrictions placed upon legislative authority by the written Constitutions* of the respective States has hitherto formed an obstacle which has prevented the development of municipal trading to any degree which even tends to approach the extent to which it exists in England. Whether the legislature in the United States can authorize a municipality to carry on a business for the benefit of its inhabitants must be determined by considering whether the carrying on of such business can be regarded as a *public service*. This inquiry underlies every attempt to confer upon a municipality the power to exercise trading functions. If such a business is to be carried on, it must be with money raised by taxation, and it is settled in the United States that the legislature

electrical fittings, in the undertaking of telephone services, in the sale and distribution of milk, and the like. The desires, moreover, of municipalities have outstripped the powers hitherto conceded to them by Parliament. They desire to run omnibuses in connection with tramways; they wish to construct bazaars, aquaria, shops, and winter gardens; they wish to attract visitors to a district by advertising its merits. No one, in short, can seriously question that, for good or bad, the existence of municipal trading is one of the salient facts of the day, and that it has since the middle of the nineteenth century acquired a new character. The trades, if so they are to be called, which were first undertaken by local authorities, were closely connected with the functions of municipal government. At the present day municipal trading is becoming an active competition for business between municipalities supported by the rates, and private traders who can rely only on their own resources. The aim, moreover, of municipal trading is, on the face of it, to use the wealth of the ratepayers in a way which may give to all the inhabitants of a particular locality benefits, *e. g.*, in the way of cheap locomotion, which they could not obtain for themselves. Here we have, in fact, in the most distinct form the effort to equalize advantages. The present state of things, indeed, can in no way be more vividly described than by using the words of an author, who is certainly no opponent of so-

cialism, and who, if he expresses himself with satirical exaggeration, means honestly to depict matters passing before our eyes: 'The practical man, oblivious or contemptuous of any theory of the social organism or general principles of social organization, has been forced, by the necessities of the time, into an ever-deepening collectivist channel. Socialism, of course, he still rejects and despises. The individualist town councillor will walk along the municipal pavement, lit by municipal gas, and cleansed by municipal brooms with municipal water, and seeing, by the municipal clock in the municipal market, that he is too early to meet his children coming from the municipal school, hard by the county lunatic asylum and municipal hospital, will use the national telegraph system to tell them not to walk through the municipal park, but to come by the municipal tramway, to meet him in the municipal reading room, by the municipal art gallery, museum, and library, where he intends to consult some of the national publications in order to prepare his next speech in the municipal town hall, in favor of the nationalization of canals and the increase of government control over the railway system. "Socialism, sir," he will say, "don't waste the time of a practical man by your fantastic absurdities. Self-help, sir, individual self-help, that's what's made our city what it is.'" (Cited as language of Sidney Webb, by George Eastgate, *Times*, Saturday, August 23, 1902, p. 6.)'

can authorize a municipality to tax its inhabitants only for *public* purposes. This is the uniform rule of law in the United States.¹ It is not easy to determine in every instance whether a benefit conferred upon many individuals in a community can be called a "public service" within the meaning of the rule that taxes can be laid only for public purposes. In general, however, it may be said that the promotion by taxation of the private interests of many individuals is not a public service within the meaning of the Constitution.² Constitutional questions concerning the power of taxation necessarily are largely historic questions. The Constitution must be interpreted as any other instrument with reference to the circumstances under which it was framed and adopted, and it has been said that there is nothing in the history of the adoption of the Constitution of Massachusetts that gives any countenance to the theory that *the buying and selling of commodities of general trade, such as coal and wood*, for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established. There are nowhere in that Constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as, at the time when the Constitution was adopted, was usually bought and sold by individuals, no matter how essential the business might be to the welfare of the inhabitants.³ Hence, it has been held

¹ Opinion of the Justices, 155 Mass. 598.

² Opinion of the Justices, 155 Mass. 598.

³ In Opinion of the Justices, 155 Mass. 598, which is distinguished for its research and ability, it is said: "The early usages of the towns undoubtedly did not exhaust the authority which the legislature can confer upon municipalities to levy taxes. Cities and towns, since the adoption of the Constitution, have been authorized to levy taxes for many other purposes than those for which taxes were then levied. Up to the present time, however, none of the purposes for which cities and towns have been authorized to raise money has included anything in the nature of what is commonly called 'trade' or 'commercial business.' Instances can be found of some very curious legislation by towns in the colonial and provincial times, some of which would certainly now be thought to be beyond the powers of towns under the Con-

stitution. Whatever the theory was, towns, in fact, under the colony charter, and for some time under the province charter, often acted as if their powers were limited only by the opinion of the inhabitants as to what was best to be done. This was the result of their peculiar situation and conditions, and the powers of towns or of the general court were not much considered. The exercise of these extraordinary powers, however, gradually died out. The purposes for which, by the province laws, towns were authorized to raise money were for the maintenance of highways, the support of the ministry, schools, and the poor, and for the defraying of other necessary charges arising within the town. The words 'necessary charges' are still retained in the statutes, but they have been strictly construed by the courts. We do not find either in the colony or the province laws any legislation relating to the buying and selling of coal or wood by towns for the use of the inhabitants, or any legisla-

that not only has the *legislature* no authority under the Constitution to pass laws enabling towns by gifts of money or loans of bonds to *assist individuals or corporations* to establish or carry on manufacturing of various kinds within or without the limits of the towns, but also that the towns themselves cannot be empowered under it to *establish manufactories* entirely on their own account, and run them by the ordinary town officers or otherwise.¹ Nor can the legislature *authorize a city to buy coal and wood* and sell and dispose of them to its inhabitants in the absence of special circumstances requiring the intervention of a public agency for the protection of its citizens.² But if *special circumstances exist* arising from a great scarcity of fuel, great difficulty in obtaining it, and the inability of the inhabitants individually to purchase it, the government might constitute itself an agent for the relief of the community by obtain-

tion on any similar subject. It is possible that there may be found in the records of some town a vote or votes showing that the town, in an emergency, was authorized to buy wood or coal for the purpose of supplying its inhabitants with fuel, but we have not found any. Certainly it was not usual for towns to supply their inhabitants with fuel, unless they were paupers. Neither was it usual for towns to supply their inhabitants with grain or other commodities. We know of no instance of this being done except by the town of Boston. In the fall of 1713 there was a scarcity of grain, and the general court prohibited the exportation of it. 1 Prov. Laws (State Ed.), p. 236. The town of Boston, in March, 1713-14, voted to lay in a stock of grain to the amount of 5,000 bushels of corn, and to store it in some convenient place, and it was left to the selectmen to dispose of it as they saw fit. Eighth Report of Record Commissioners, pp. 101, 104. After that, as shown by the records, the town regularly bought and stored grain, and sold it to the inhabitants, as late as 1775, and perhaps later; and it established two granaries, one of which, in the common, remained in use probably as long as the town bought and sold grain. Whether after the Revolution the town continued to buy grain, we are not informed, as the records have not been printed. The amount which could be sold to any one person was often limited to a few bushels at a time. The report

of the committee in 1774 shows that from March, 1769, to March, 1774, the quantity of corn and rye purchased was 5,836 bushels and that the stock on hand was 376 bushels. It is apparent that the original purpose was to provide against a famine, and that it was not the intention of the town to assume the business of buying and selling all the grain which the inhabitants needed, but of keeping such an amount in store as was necessary in order that small quantities might be obtained, particularly by the poorer inhabitants, at what the selectmen, or a committee of the town, or the town itself, deemed reasonable prices. On May 25, 1795, the town voted to sell the granary. This action of the town of Boston was an exception to the usages of towns, and it appears from the reports of committees that before the Revolution it had come to be considered as of doubtful expediency, and during the Revolution, or not long after, it was discontinued."

¹ Opinion of the Justices, 58 Me. 591. See also *Markley v. Mineral City*, 58 Ohio St. 430.

² Opinion of the Justices, 155 Mass. 598; Opinion of the Justices (*In re Municipal Fuel Plants*), 182 Mass. 605; *Baker v. Grand Rapids*, 142 Mich. 687. A city may receive property, real and personal, by devise and bequest for the purpose of prospecting for and developing a coal mine at or near the city. *Delaney v. Salina*, 34 Kan. 532. See *ante*, chap. on Corporate Property.

ing an adequate or reasonable supply of fuel, and money expended for that purpose would be expended for public use.¹ For similar reasons a city has no authority to engage in the business of *buying, selling, or dealing generally in real estate*, either as principal or broker, notwithstanding the fact that it may have power to acquire such real estate as may be necessary for its corporate purposes.² The fact that a city is authorized to maintain water works does not justify it in embarking in a *general plumbing business* of selling supplies and materials to private citizens and doing contract work in placing the same upon their premises.³

¹ Opinion of the Justices, 182 Mass. 605.

² *Haywood v. Red Cliff*, 20 Colo. 33. That general authority to a municipality to purchase and hold property will not be construed to authorize it to do so for speculation or profit, see *ante*, § 977. But it has been held that a purchase of real estate by one of the municipalities of the city of New Orleans with a view to divide it into lots and streets and to resell it for the purpose of improving the cleanliness and salubrity of the city and the convenience of the streets is authorized by statutory authority "to maintain the cleanliness and salubrity of the city and to secure the safety and convenience of passing the streets and squares." But *quære* *Municipality No. 1 v. McDonough*, 2 Rob. (La.) 244.

³ *Keen v. Waycross*, 101 Ga. 588. In this case, *Lumpkin*, P. J., said: "We have no doubt that, under the Act of 1889, upon which the city rests its defence, its board of commissioners have ample power to take such steps as are needful in order to render the waterworks system of the city efficient and beneficial to the public. See Acts 1889, p. 829. But the position of the city that, to bring about this result, it was necessary to engage in the plumbing business, is utterly untenable, because obviously not well founded in fact. It might as reasonably be urged that, in order to satisfy its patrons, it was necessary for the city to embark in the ice business, as an incident to its right to supply good drinking water to its citizens. It was doubtless the intention of the legislature to confer power upon the municipal authorities to do everything essential to the establishment and maintenance of the city's waterworks

system, to provide for proper sanitation, and to promote the general success of the enterprise; but, surely, it was never contemplated that the city should engage in a general plumbing business, and, in the course thereof, sell supplies and materials to private citizens, and do contract work in placing the same upon their premises. As incident to the general powers conferred upon the waterwork commissioners, it was lawful for them to order all work done which was necessary for connecting the city's mains with the pipes of water consumers, or for protecting the city's property from injury or destruction, or for requiring citizens to pay for the water furnished to them; but they could not, without overstepping the bounds of their authority in the premises, engage in a business purely for gain, and the carrying on of which was not essential to the accomplishment of any of the purposes above indicated. The waterworks commissioners also have the power to require that all plumbing connected with the waterworks shall be done in such manner as will effectuate these purposes, and to that end may supervise the plumbing; but it is one thing to devise a plan by which such work shall be done, and quite another thing to do the work itself."

Power to *pave the city streets* confers authority on the city to *purchase a stone quarry* beyond its limits in order to obtain stone for use in paving them. *Schneider v. Menasha*, 118 Wis. 298. But in this case no question arose as to the power of the city to quarry and sell stone to individuals and corporations. A contrary view was adopted by the Supreme Court of Appeals of Virginia, in *Duncan v. Lynchburg*, 2 Va. Dec. 700, 34 S. E. Rep. 964, and in *Donable v. Harrison-*

§ 1293. **Municipal Ownership; Public and City Purposes.**—The politico-economical question of municipal ownership and operation plays an important part in all public utilities, but does not require to be discussed here.¹ The funds of a municipality being derived from the people either by taxation, or by other revenue received for public purposes, there is, of course, the inherent condition attached to all public utilities constructed at the expense or on the credit of a municipality that they shall be public in their character. But in addition, limitations are sometimes to be found in the Constitutions of the States which place express restrictions upon the power of the municipality to embark its capital and credit in a *quasi*-commercial enterprise, even though it be for a public end. Thus, the Constitution of the State of New York declares that no "county, city, town, or village shall be allowed to incur any indebtedness except for county, city, town, or village purposes."² A constitutional provision such as this of necessity circumscribes the scope of municipal effort, and interposes an obstacle to embarking in enterprises which are not local and municipal in their character. It has been said that a "city purpose" is of necessity a public purpose limited or applied to a city.³ But a complete definition of a "city purpose" is not possible

burg, 104 Va. 533, as to the power of a city to purchase and operate a quarry beyond its limits. In *Attorney General v. Detroit*, 150 Mich. 310, it was held that, without an *express* grant of the power, a city cannot embark in the *manufacture of paving brick* for use upon its own streets when suitable brick is purchasable in the open market, and the manufacture thereof is not necessary to the exercise of the city's power to pave its streets.

A complainant in a suit to enjoin the city from illegally engaging in business is not entitled to relief if it appears that he is *in combination with other dealers* in the same line of business in violation of the provisions of the statute of the State for the purpose of enhancing and controlling the price of the commodity; and also if it appears that, although he is also a taxpayer, the city did not suffer any damage by engaging in the business. *Baker v. Grand Rapids*, 142 Mich. 687. The fact that the plaintiff in the suit is engaged in the same line of business and is damaged by the competition of the city therein does not give any standing to obtain relief against the illegal act of the municipality in engaging in such business, but if he is

a citizen and taxpayer, he is, by reason of that fact, entitled in a proper case to an injunction against the municipality. *Keen v. Waycross*, 101 Ga. 588.

¹ *Ante*, chap. i.

² New York Const. 1894, § 10.

³ *Chapman v. New York City*, 168 N. Y. 80, 87. It has also been declared that generally the purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character, and authorized by the legislature. *Sun Publishing Assoc. v. New York City*, 152 N. Y. 257, 264. The construction of a monument under legislative authority within the city in memory of the soldiers and sailors of the city who died in the service of their country in the war for the Union is a legitimate "city purpose." *Parsons v. Van Wyck*, 56 N. Y. App. Div. 329. The construction and operation under legislative sanction of an electric light plant and system by a city for the use of itself and its inhabitants is a "city purpose." *Hequembourg v. Dunkirk*, 49 Hun (N. Y.), 550. See also *Thomson-Houston Electric Co. v. Newton*, 42 Fed. Rep. 723. "County purposes" and "city pur-

in view of the immense variety of objects which have been found to be necessary to the health and welfare of modern municipalities.¹ Each case must depend largely upon its own facts, and the meaning of these words must be evolved as successive cases arise by a process of exclusion and inclusion in judicial construction.² The

poses" distinguished, *Knoxville v. Lewis*, 12 Lea (Tenn.), 180.

¹ *Sun Pub. Assoc. v. New York City*, 152 N. Y. 257. See *New York City, Matter of*, 99 N. Y. 569.

² *People v. Kelly*, 76 N. Y. 475; *Chapman v. New York City*, 168 N. Y. 80. In *People v. Kelly*, 76 N. Y. 475, it was held that the construction of the *Brooklyn Bridge* over the East River was a "city purpose" for which the cities of New York and Brooklyn might be authorized by the legislature to incur indebtedness without violating the constitutional prohibitions. In discussing what are "city purposes," *Earl, J.*, a very able judge, said (p. 487): "It would not be a city purpose for the city of New York to build a railroad from that city to Philadelphia, or to improve the navigation of the Hudson River generally, between that city and Albany, although incidental benefits might flow to the city. Such works have never been regarded as within the legitimate scope of municipal government. On the contrary, it would be a city purpose to purchase a supply of water outside of the city, and convey it into the city, and for such a purpose a city debt could be created. So lands for a park for the health and comfort of the inhabitants of a city could be purchased outside of a city limits, and yet conveniently near thereto. Such improvements are for the common and general benefit of all the citizens, and have always been regarded as within the scope of municipal government; and so too highways or streets leading into a city or village may be improved, provided the improvements be confined within such limits that they may be regarded as for the common benefit and enjoyment of all the citizens. It cannot therefore well be held, as claimed by the learned counsel for the appellants, that what is meant by a city purpose is some work or expenditure within the city limits. There could be no good reason for such a limitation. It could be no worse for a city to incur debt for a city purpose outside of the city limits

than for one within such limits, and there is just as much reason for allowing it to be incurred in the one case as in the other. The cities of New York and Brooklyn are intimately connected in many ways, by business, social, and commercial ties. Thousands who do business in the one city do business in the other. The port of New York includes the whole river at the place where the bridge is to be constructed, and the commerce from all parts of the world which flows into that port is discharged on each side of the river. To bridge such a water separating two such cities must be a city purpose of each city. The bridge will be for the common benefit of all the citizens of both cities, and each citizen will have the same right to use it as every other citizen. It would have been a city purpose if either city had been authorized to build the whole of the bridge, and it is no less so that both are to unite in building it. It has always been the policy of this State for two towns separated by a stream of water to bridge the stream at joint expense and the construction of such a bridge is a town purpose of each town. If the legislature could not authorize these two cities to incur debt for the construction of this bridge, then it could not authorize towns to incur debt for the construction of bridges over streams dividing them. That it was intended by this clause in the Constitution to prohibit towns from incurring debt for such a purpose will not, it is believed, be claimed by any one. Suppose this river had been like the Thames in London, or the Seine in Paris, wholly within the city of New York, it would not be disputed that it would have been a city purpose to bridge it. Can it be any less so that the river divides what would otherwise be one city? Suppose this river had been a small stream, like those usually dividing towns which could be crossed only by a bridge, would not the construction of the bridge have been a city purpose, just as its construction would have been a town purpose if it had

legislature, when legislating in view of a constitutional limitation such as this, must determine in the first instance what is a municipal purpose. Its decision is not, however, final. When its act is questioned as conflicting with this constitutional limitation, the courts must determine whether debt is authorized to be incurred for a purpose not municipal. But as the dividing line between what is a municipal purpose and what is not is in many cases shadowy and uncertain, great weight should be given by the courts to the legislative determination, and its action should not be annulled unless the purpose appears clearly to be one not authorized.¹ While *city purposes* will usually find their development within the municipal limits, such purposes are not necessarily limited to a work or expenditure within the city. It may be a city purpose to purchase lands outside the boundaries of the city, but conveniently situated with reference thereto, for the purpose of *creating a public park* for the benefit of the inhabitants of the city.² Similarly a city may be empowered to purchase lands in adjoining rural territory *for use as cemeteries*,³ or for the preservation of the public health it may purchase land beyond its boundaries *for a hospital or pesthouse*, and so remove the danger of infection.⁴ But when the city goes beyond the city limits, the purpose must be primarily for the benefit, use, or convenience of the city as distinguished from that of the public outside of it, although they may be incidentally benefited, and the work must be of such a character as to show plainly the predominance of that purpose; and the thing to be done must be within the ordinary or proper range of municipal action. If the enterprise is of such a character that it may justly be described as indicating an underlying purpose different from the city's use and convenience, and creates in the impartial mind a conviction that the use and benefit of the city are but pretexts disguising some foreign and ulterior end, the attributes of a city purpose must be denied to it.⁵

§ 1294. **Same; Construction and Ownership of Railways; City Purposes.** — Common highways in this country have always been placed under the special care, supervision, and control of municipal

been between two towns? The size of the river and the magnitude of the work certainly does not strip the bridge of the municipal character which it would otherwise have." See further *ante*, chapter iv., as to what are municipal or corporate powers and purposes.

¹ *People v. Kelly*, 76 N. Y. 475, 489.

² *Matter of New York City*, 99 N. Y.

569. See also *Matter of Flatbush*, 60 N. Y. 398; *Holder v. Yonkers*, 39 N. Y. App. Div. 1.

³ *Matter of New York City*, 99 N. Y. 569, 588.

⁴ *Matter of New York City*, 99 N. Y. 569, 588.

⁵ *Matter of New York City*, 99 N. Y. 569, 590.

or local authorities upon which devolves the duty of keeping them in suitable repair as well as the duty of providing sufficient ways to satisfy the requirements and the convenience of the public. Highways are not only necessary for the welfare and convenience of the people, but are required by them. They are public in character and authorized by the legislature. They have existed from the earliest times. In recent years *railroads have come into such general use* that now a very large percentage of the transportation of the country is done upon them. Such railroads when owned and operated by individuals or corporations are not common highways in the sense that they are under the care and management of the municipality, but as to their purpose, which is transportation of persons and property for the public, they are, as to such purpose, as distinctively highways as the ordinary street. It is true that a uniform fee is charged for persons taking passage over them, but this does not differentiate them in their legal character from other highways, nor does the fact that the highway is occupied by rails in such a manner as to prohibit its use by teams and persons traveling on foot, distinguish it from others, for highways are often constructed for different uses. There are ways for pedestrians, others for teams and vehicles, and still others for equestrians. The foundation of the right of railroad companies to exercise the power of eminent domain rests in the fact that they are highways for purposes of passage and transportation.¹ Having the character of highways and being constructed for the same purpose as common highways, *railroads*, which are necessary for the common welfare of the people of the municipality, required for their use, public in character, and authorized by the legislature, are for a *city purpose* within the meaning of the Constitution of the State of New York,² and hence the legislature may authorize a city to enter into contracts with private individuals for the construction of such railroads upon the credit of the city and at the city's expense, and to make contracts for their operation.³ The fact that the statutes authorizing the city to con-

¹ Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 375; People v. Kerr, 27 N. Y. 188, 194; Olcott v. Fond du Lac County, 16 Wall. (U. S.) 678, 694; Sun Publishing Assoc. v. New York City, 152 N. Y. 257, 266. See more fully chapter xxiv on Streets, *ante*.

² Quoted *supra*, § 1293.

³ Sun Publishing Assoc. v. New York City, 152 N. Y. 257. Under this legislation and authority the great

subway railroad of New York City was constructed and is operated. See also Walker v. Cincinnati, 21 Ohio St. 14. See chapter vi. for full discussion of the subject of *aid to railroads* by public and municipal corporations. In Prince v. Crocker, 166 Mass. 347, it was held that the Massachusetts statute which authorized commissioners appointed by the legislature to construct a subway underneath the common and certain streets in the city of Boston and

struct the railroad provides that if the railroad be constructed by the city and at its expense, bonds of the city shall be issued to pay therefor is not a violation of a constitutional provision prohibiting municipalities from loaning their credit to or in aid of any individual association or corporation, although the statute provides for leasing the railroad to the contractor for a term of years.¹

§ 1295. **Power of State to prevent* Extra-territorial Interference with Waters and Water Supply.**—The pressing and increasing demands upon the supply of water in rivers and streams for irrigation and other public uses and for private consumption, particularly in those parts of the country where the supply is limited and inadequate, gives rise to questions not only between parties within the same State claiming the right to appropriate the waters, but also as between adjoining States and in some instances between municipalities in adjoining States. The counterpart of these questions arises through the use of rivers and streams for the disposal of sewage and other waste matter. The pollution of the streams thereby, with the consequent annoyance and injury to the health, not only of the residents and citizens of the State where the pollution originates, but also to the residents and citizens of adjoining States with the consequent injury to property therein, has raised

which authorized the commissioners to grant a lease of the subway to any street railway company, conferred authority upon the commissioners to enter the streets and exercise the power of taxation for a public purpose, and was within the constitutional power of the legislature.

Under a statutory provision which gives cities in *Mississippi* the right to amend their own charters, a city may adopt an amendment conferring upon it the power to own and operate an *electric street railway* and to issue bonds therefor. *Love v. Yazoo City*, 91 Miss. 535, 540. *Mayes, J.*, said: "What is the amendment adopted by the city of Yazoo about which complaint is made? It is that amendment which provides for the owning and operating of an electric railway and the issuance of bonds therefor. Such a purpose violates no law of the United States. It violates no section of the Constitution of the United States. It violates no clause of the Constitution of the State. The act of the legislature has given municipalities operating under special charters the power to so amend

their charters as to do anything they may wish, provided only that the amendment does not conflict with the enumerated laws. The most that can be said in reference to the city's engaging in the owning and operating of an electric railway system is that it is a business inconsistent with the customary functions of a municipality; but the legislature has given it power to do this, if it sees fit, by express terms. The power of the legislature to do this cannot be questioned."

But the laying of *street railway* tracks in the streets of a city is not a *part of the pavement* of the streets. Hence charter authority to "grade, pave, repave, or *otherwise improve*" its streets does not authorize a city to lay street railway tracks with a view to leasing them to private individuals or corporations. The authority to "otherwise improve" the streets is to be construed as conferring powers *ejusdem generis* with the enumerated powers. *Attorney General v. Detroit*, 148 Mich. 71.

¹ Sun Pub. Assoc. v. New York City, 152 N. Y. 257.

questions affecting the *right of a State to use or authorize the use of the waters of rivers and streams* for such purposes within its own limits, when the effect thereof is to cause loss and injury to the citizens of, and property within, a sister State. These questions have newly arisen, and the law on the subject is in an undeveloped condition requiring discussion and consideration fully to define the rights of the respective States and their citizens. It may, however, be said that the power of a State within which a river or stream rises is not absolute, and that it can neither unduly appropriate the waters of such river or stream to the loss and detriment of an adjoining State and the citizens thereof, nor can it pollute the same by the discharge of sewage in such a manner as to cause loss and damage to a sister State and its citizens unreasonably and unnecessarily. The State is sovereign within its own boundaries, and as to the public uses to which the waters of its rivers and streams may be applied therein by its citizens and residents, but in its relation to sister States, it is only municipal in its functions and powers, and it is bound to respect the rights of the sister State and its citizens. Hence a State has, under the provisions of the Federal Constitution extending the judicial power of the Federal courts over controversies between two or more States and between a State and citizens of another State, a standing in those courts to protect its lawful interests in rivers and streams flowing from an adjoining State from injury or damage to its detriment. And where a navigable stream rises in one State and flows thence into another, it has been held that the lower State is entitled to maintain a suit in equity against the upper or higher State (of which the Supreme Court of the United States has original jurisdiction), *to prevent an undue and improper appropriation of the waters of the stream, which otherwise would flow through and across her territory, and the consequent destruction of her property and of the property of her citizens, and injury to their health and comfort.*¹

¹ *Kansas v. Colorado*, 185 U. S. 125, s. c. 206 U. S. 46. In this case it was held that as the State of Kansas recognized the right of a riparian proprietor to use the waters of a navigable river for purposes of irrigation, subject to equitable apportionment among the different riparian owners, it was proper to enforce against that State its own local rule, when it sought to enforce against the State of Colorado, a State which recognized the public right in flowing waters, the right to have the stream flow as it had been accustomed.

Injunction at the instance of a property owner in *Connecticut restraining the city of New York* from appropriating and diverting waters of a stream rising in New York and flowing into Connecticut modified to provide for the ascertainment of compensation and damages payable to the plaintiff and the payment thereof by the city, with the direction that upon such payment a decree be entered in favor of the city denying the injunction. *New York City v. Pine*, 185 U. S. 93.

Similarly, it is within the power of a State to invoke the original jurisdiction of the Supreme Court of the United States to restrain an adjoining State and a municipality therein from *contaminating the waters of a stream* flowing along, past, or through the plaintiff's territory by discharging therein sewage in great quantities to the serious detriment and annoyance of the citizens and property owners of the plaintiff State.¹

But so far as concerns a supply of water which originates within a State, and as in a question with its own citizens, the State, as *quasi-sovereign* and representative of the interests of the public, has a standing to protect the same, irrespective of the assent or dissent of the private owners of the land most immediately concerned, and it has been held that a *statute of a State which prohibits the conveying of potable waters to points outside the State* in pipes and conduits does not impair any right vested in a corporation and citizen of that State. It was also said that the citizens of other States were not denied equal privileges within the meaning of the provisions of the United States Constitution when the citizens of other States are as free to purchase the water within the State as the citizens of the State in question, but in any event a corporation which is a citizen of the State in question, is not entitled to claim the benefit of this provision of the Constitution, as it does not come within its terms.²

¹ *Missouri v. Illinois*, 180 U. S. 208, s. c. 200 U. S. 496. But in this case, upon a hearing on the merits, it was found that the alleged facts as to pollution had not been fully proved; and inasmuch as it also appeared that the pollution might result from the discharge of sewage by cities of Missouri, the complaining State, into the same river, it was held that the bill should be dismissed, but without prejudice. Constitutionality of New York statute establishing state commission for the regulation of the flow of water courses sustained. *State Water Supply Commission v. Curtis*, 192 N. Y. 319, aff'g 125 N. Y. App. Div. 117.

A State, as a *quasi-sovereign*, can maintain an action, of which the United States Supreme Court has original jurisdiction, to prevent a corporation, a citizen of an adjoining State, from discharging over its territory *noxious fumes* from works in the adjoining State, where it appears that such fumes cause or threaten damage of a substantial nature to the forests and vegetable life of the plaintiff State.

Georgia v. Tennessee Copper Co., 206 U. S. 230.

² *Hudson Water Co. v. McCarter*, 209 U. S. 349, affirming 70 N. J. Eq. 695, s. c. 70 N. J. Eq. 525. In this case the facts were that the East Jersey Water Company had an intake on the Passaic River at Little Falls. It contracted to sell and deliver certain water to the New York and New Jersey Water Company, which in turn contracted to sell and deliver water to the Hudson Water Company. The Hudson Water Company contracted with New York City to supply certain water for use on Staten Island which is part of New York City. Prior to the contract with the City of New York, the New Jersey legislature in 1905 enacted a statute as follows: "It shall be unlawful for any person or corporation to transport or carry through pipes, conduits, ditches, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this State into any other State for use therein." The statute also authorized the attorney general to enforce its provisions. An

§ 1296. **Power to provide Water and Light.** — Power in a municipality to enter into the business of *providing and selling water and*

action was brought by the attorney general of New Jersey to enjoin the Hudson Water Company from transporting the waters of the State out of the State in violation of the statute. The Passaic River, whose waters were so transported, rose within the State of New Jersey and flowed entirely through the limits of the State to New York Bay. *Bergen, V. C.*, made a decree enjoining the defendant from transporting the waters out of the State in violation of the statute. This decision was rendered upon the following grounds. The Passaic River is a tidal stream, the bed of which so far as the tide ebbs and flows is the property of the State. The State, as the lowest riparian owner of all tidal streams, by virtue of the ownership of the bed thereof so far as the tide ebbs and flows, has the right to have the water reach its property undiminished in quantity subject to the use of the passing water by upper riparian owners in a reasonable manner for domestic use and for the purpose of irrigation, and holds the same in trust for the public, and may grant or restrain the appropriation thereof so long as it regards the reasonable rights of other riparian owners over whose lands it flows before reaching the lands of the State. As the lower riparian proprietor, the State holds the surplus of such flowing water as the common property of its citizens and has power to prevent the assumption by others of its sovereign rights or the converting of such common property as it holds in trust for the public, the loss of which may destroy the health and comfort of its people. The Vice-Chancellor further held that the Act of 1905 did not violate the interstate commerce clause of the Federal Constitution, for the right of the State to preserve the common property of its citizens cannot be destroyed merely because it is intended to transport the water into another State for use therein. (See 70 N. J. Eq. 525.)

This decision was unanimously affirmed by the New Jersey Court of Errors and Appeals. *Pitney, J.*, who wrote the opinion, concurred in the views of the Vice-Chancellor so far as they went. But he further said that charter authority, under a general

statute, to dam rivers and streams and to store, transport, and sell water therefrom cannot be deemed to authorize the depletion of New Jersey streams for the purpose of conveying water beyond the borders of the State. Assuming such power to have existed, the act of 1905 amounted to a repeal of the power of any corporation organized under the general law to transport water out of the State. But the common law did not recognize the right of a riparian owner as such to divert water in order to make merchandise of it, and the State of New Jersey has not by statute changed the rule of the common law so as to make the waters of lakes and streams subject matter of commerce in its ordinary sense, nor has it authorized the diversion of water for other than riparian uses, save for a limited class of purposes, beneficial to the people of the State. He further declared that the State of New York, or the people thereof, have no inherent rights to withdraw a supply of water from the territory of the State of New Jersey by artificial means; that the control of fresh water running in natural streams and in lakes and ponds that have outlets in such streams (subject to the interests of riparian owners therein), resides in the State in its sovereign capacity as representative of, and for the benefit of the people in common, and the legislature may prohibit the abstraction of such water except for riparian uses and for purposes authorized by legislative grants. *Pitney, J.*, also declared that the provision of the Federal Constitution which ordains that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states" does not guarantee to citizens of New York, while resident there, all the privileges they would enjoy if resident in New Jersey.

When the case came before the Supreme Court of the United States, that court treated the rights of the water company as being or representing the rights of a riparian proprietor only, Mr. Justice *Holmes*, saying: "The court below assumed or decided, and we shall assume, that the defendant represents the rights of a riparian proprietor, and on the other hand that

light to its inhabitants is not necessarily implied from the mere creation of the municipality. The power to do so must, like other

it represents no special charter powers that gave it greater rights than those." After referring to the grounds of decision assigned by the New Jersey courts, Mr. Justice *Holmes* declared that the United State Supreme Court did not say that the considerations inducing these decisions would not warrant the conclusion reached, but said that "We prefer to put the authority which cannot be denied to the State upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the State may be said to possess." The court thereupon justified the constitutionality of the statute and the decree of the courts enforcing it upon the paramount authority of the State for the protection of the health and welfare of its citizens. On this point Mr. Justice *Holmes* impressively said: "It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State, as *quasi-sovereign* and representative of the interests of the public, has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas v. Colorado*, 185 U. S. 125, 141, 142; *s. c.* 206 U. S. 46, 99; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 238. What it may protect by suit in this court from interference in the name of property outside of the State's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the State may make laws for the preservation of game, which seems a stronger case. *Geer v. Connecticut*, 161 U. S. 519, 534. The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly

within it, substantially undiminished except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health. We are of opinion, further, that the constitutional power of the State, to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an æsthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

As to the constitutional power of the State to *protect and preserve underground supplies of water* against abstraction by artificial means to the injury of the State and other adjoining proprietors, see *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326, aff'g 128 N. Y. App. Div. 33; *People v. New York Carbonic Acid Gas Co.*, 128

powers, depend upon a grant of authority, general or special, express or implied, from the legislature.¹ The power to construct and maintain a system of water works for furnishing water for munic-

N. Y. App. Div. 42; *Lindsley v. Natural Carbonic Gas Co.*, 162 Fed. Rep. 954. See also *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Townsend v. State*, 147 Ind. 624.

¹ *Matter of White Plains Water Com'rs*, 176 N. Y. 239; *White v. Meadville*, 177 Pa. 643. See also *Spaulding v. Peabody*, 153 Mass. 129; *Queens County Water Co. v. Monroe*, 83 N. Y. App. Div. 105. Index, *Water and Water Works; Gas and Gas Companies; Light*.

In *Savings Fund Assoc. v. Philadelphia*, 13 Pa. St. 175, the Supreme Court of Pennsylvania in discussing the authority of a municipality to manufacture and furnish gas to its inhabitants, said: "As a local sovereign it [the city] had no authority to enter into the business of manufacturing and selling gas, for its sovereignty did not extend to such subjects any more than it did to almost any other manufacture. It is true, a municipal corporation is not bound by any engagement which prevents a discharge of the duties imposed upon it by its organic law, for the plain reason that such engagements are contrary to law. But when such a corporation engages in things not public in their nature, it acts as a private individual, no longer legislates, but contracts, and is as much bound by its engagements as is a natural person. The distinction between public duties and private business is wide and obvious." In *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, it is said that a grant to the common council of a city of the exclusive power over the streets, highways, alleys, and bridges within the city comprehends the right to permit gas companies to use the streets.

In *Smith v. Stoughton*, 185 Mass. 329, a water company was authorized by statute to take the waters of a certain brook. The town within which the water company was situated was authorized to purchase the franchise, corporate property, and rights of the corporation. It had no other authority to construct or acquire water works. Having purchased the company's works, &c., the town made a contract for a supply of water from

wells to be driven in other sources than the brook from which the water company was authorized to derive its supply. It was held that the town had no authority to make a contract to take water from an unauthorized source, and that the contract was not binding on the town because it provided for the construction of water works in connection with a supply which the town had no legal authority to use.

There are decisions, however, which hold that the power to erect water or gas works or to provide water or light need not be specifically or in so many words conferred upon the municipality, but may be implied from the powers which are expressly conferred or even from the charter or act of incorporation. In *Memphis v. Memphis Water Co.*, 5 Heisk. (Tenn.) 495, the court held that the erection of water works to supply a city and its inhabitants with water falls naturally and legitimately within the ordinary powers derived from its incorporation, and that the exercise of this power within the limits of its charter needs no enabling act by the legislature. In *Crawfordsville v. Braden*, 130 Ind. 149, it was held that, by the act of incorporation, the legislature by necessary implication delegates to a municipality the power to preserve the health and safety of its inhabitants; that the power to light the streets and public places of a municipality is one of its implied and inherent powers necessary to properly protect the lives and property of its inhabitants, and as a check on immorality; that no statute is required to confer this power; that the power to light a city carries with it the further power to procure or furnish whatever is necessary for the production and dissemination of the light; that the city may therefore establish works for lighting its streets, and may, in connection therewith, furnish private consumers with light by contract, if by so doing no express provision of the constitution or laws of the State is violated. In *Gadsden v. Mitchell*, 145 Ala. 137, 157, it is said that power to contract for a supply of water is one of the incidental powers of a city.

ipal and domestic purposes may be conferred by the legislature upon any public corporation, whether its municipal purposes be general or limited.¹ Water and light are essential to the welfare of a city or compactly settled municipality. In the light of modern requirements such a municipality would fail in the purpose of its organization if, having the power, it omitted entirely to take such steps as are necessary or proper to obtain a supply of water and light for its streets and for the public use.² The nature of the

¹ *Mayo v. Dover & F. V. Fire Co.*, 96 Me. 539; *Kennebec Water Dist. v. Waterville*, 96 Me. 234. The expressed purposes for which a public corporation is created may limit the scope of its authority to provide water. Thus, it has been held that a public corporation created for purposes of fire protection and authorized to procure a supply of water therefor, has no authority to procure a supply of water for other municipal purposes and for domestic use. *Mayo v. Dover & F. V. Fire Co.*, 96 Me. 539.

In *Holroyd v. Indian Lake*, 180 N. Y. 318, aff'g 85 N. Y. App. Div. 246, a statute authorized the town board of any town, on a petition duly signed and acknowledged by a majority in value of the resident owners of real estate in the proposed district, to create a water district wholly within the town and appoint water commissioners who should have the power to advertise for proposals and to enter into contracts for the construction of the plant. It was made the duty of the town to issue its bonds for the purpose of paying for the construction of the plant. The water commissioners of the district were required in each year to apportion the amount to be raised for the payment of the principal and interest of the bonds upon the taxable property in the water district and present a statement thereof to the town board. Provision was thereupon made for the levying of a water tax on the district, and the money collected therefrom was to be applied to the payment of the bonds and the interest thereon. It was held that inasmuch as towns in New York are only municipal corporations with limited corporate powers and are unable to contract except as authorized by statute, the contract was not to be regarded as made by the town or by its officers or for its benefit, but was made by the water commissioners of the water district;

that no general liability was imposed upon the town for the cost of the construction of the waterworks, although the statute lent the credit of the town to the water district in order to raise money to pay for the water plant; and that an action would not lie against the town for the cost of constructing the plant pursuant to contract made with the water commissioners, the remedy of the contractor under such circumstances being mandamus to compel the water commissioners and the town authorities to perform their statutory duty to raise and apply the money necessary for the purpose in the prescribed manner. See also to the same effect, *Kerr v. Bellefontaine*, 59 Ohio St. 446.

² *Charter power of the city of New York to construct or acquire an electric lighting plant, and the principles applicable to the construction of such a power.* The author in 1904 gave to the city of New York an opinion that the city had the charter power to construct or acquire an electric lighting plant for lighting the public buildings, streets, and public places of the city, and stated, *inter alia*, the following grounds of such opinion. As they are believed to be sound and illustrate various phases of the subject treated of in this chapter, they are here condensed and reproduced.

Charter provisions. "The city of New York is by its charter vested with large and general powers of local administration and government of the people and property within the city, and the board of aldermen is its legislative body. Chapter 2 of the charter deals with the legislative department and invests the board of aldermen as a legislative body with many specifically enumerated powers, and in addition with general powers 'for the good rule and government of the city.' Among the enumerated powers granted to the board of alder-

service and the urgent necessity of furnishing it to a municipality have led the courts to *infer the power* to provide it from *any fair*

men in section 50 is the following: 'Subject to the Constitution and laws of the State, the board of aldermen shall have power . . . to provide for regulating, grading, flagging, curbing, guttering, and *lighting the streets.*'

"The charter has been constructed upon the declared principle that it is expedient to give the city all the powers necessary to conduct its own affairs. An adequate generating and distributing plant is absolutely necessary to enable a great city like New York to be lighted. This obvious fact is recognized by the charter of the city, which prohibits entertaining any bid for lighting the city from 'parties not possessed of sufficient plant.' (Section 530.) The city can be lighted in only one of two ways, viz., (1) by the city itself owning a lighting plant, or (2) by the city contracting for lighting with the private owners of such a plant; or in both of these ways. '*To provide*' is a phrase of wide meaning; and when, as in the present case, power to provide for a given end is conferred upon the legislative body of a great city without any restrictive words as to the ways and means or method of making such provision, the language in which the power is granted concurs with the nature of the deliberative and law-making body by which the power is to be exercised, in manifesting the legislative intention to be that the governing body may, within legal limits, select and determine as to it may seem meet the most expedient or advisable means and method of carrying the power into effect. Chief Justice *Marshall's* famous canon of construction in an analogous case as to the power of Congress, which has become fundamental in the construction of the Constitution of the United States, is applicable: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.' *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316.

"So here. The end — lighting the city — is legitimate, for the charter so expressly declares, and the grant of such a power carries with it all means

which are appropriate and plainly adapted to that end, which are not prohibited by the Constitution, the charter of the city, or the laws of the State.

"But in the present case the power in question is not left to implication. . . . By the charter the power is expressly conferred upon the board of aldermen of the city to adopt 'all such ordinances as to the board of aldermen may seem meet for the good rule and government of the city and to carry out the purposes and provisions of the charter, not inconsistent with the charter or constitution or laws of the United States, or of this State.' (Section 50.) The power of the board of aldermen to select and determine the most expedient or advisable means of exercising the power of lighting the city is legislative in its nature, and the wisdom of its determination fairly exercised is not subject to judicial revision or control. The only limitation expressed upon the power thus expressly given 'to provide for lighting the streets,' is that the power must be exercised 'subject to the Constitution and laws of the State.' The power of the board of aldermen over the subject of lighting, as thus conferred, is, in my opinion, a full power to make provision for that object, subject only to the Constitution and laws of the State. If this power is not limited in the Constitution or laws of the State, it is a power granted by the legislature of the State to the local legislature of the city to make provision for lighting the streets of the city, leaving the method of making that provision to the judgment of the local legislative body and conferring upon that body the power within legal limits to do all things which are necessary or proper to carry out the expressly conferred power.

Principles of construction. "Light is so essential to the comfort and safety of persons and property in a great city like New York that it cannot be supposed that in establishing in an elaborate charter a local government for that city, adequate provision would not be made for obtaining light; and the power to provide for this is essentially and peculiarly one pertaining to municipal rule and regulation. Such a power, so necessary to proper municipi-

grant of power to which it may be said to be naturally incident; *e. g.*, the general power of a city in respect to police regulations, the

pal rule, is not to be viewed jealously or subjected to any illiberal or narrow construction.

"I therefore think it indisputable that unless there is found in some other provision of law, or in the charter, a limitation upon this power, the power thus granted to the city to provide for lighting the streets gives to the legislative body of the city the authority to determine in what manner it will make this provision — whether by erection and operation of a municipal lighting plant, or by procuring the needed supply of light by purchasing the same from private parties by contract. It is no objection to this conclusion that the power to provide for lighting the streets is given in a few words. The Constitution of the United States provides that Congress shall have power 'to regulate commerce with foreign nations and among the several states,' and on those eleven words are based the laws of navigation, laws regulating foreign and domestic commerce, the interstate commerce commission, and the anti-trust legislation. In still fewer words, the Constitution of the United States confers upon Congress the power 'to establish post-offices and post-roads,' and on those words are based all the regulations of Congress relating to the Post Office Department, the establishment of post offices, and the transportation of the mails.

"Nor is it any legal objection to the existence of this power that the exercise of it may require a considerable expenditure of money. In the case of a small village the power to light the streets might require only a small expenditure, and in the case of a larger village a larger expenditure, and in the case of a city like New York, with approximately four million inhabitants, the power to provide for lighting the streets will necessarily require a large expenditure, and the legislature must be presumed to have known this when this power was conferred. Moreover, the exercise of the power is safeguarded against abuse or precipitate action by requiring the power to be exercised by ordinance to be passed by the board of aldermen with a veto power in the mayor, and, if bonds or stock are to be issued, the unanimous vote of the board of estimate and ap-

portionment. Unless, therefore, some other provision of the charter or law prohibits the city from erecting, or is inconsistent with its right to erect, a plant to light its streets and public places, the power of the city to provide by ordinance for erecting such a plant as a means of lighting its streets, is clear and unquestionable. I have been unable to find any provision in the charter prohibiting the city from erecting or acquiring its own lighting plant, or any provision in the charter inconsistent with the possession and exercise of such a power by the city.

"The proposition that the purchase from private corporations or parties is the only method by which the city has power to obtain light would involve very serious consequences. It would tie the hands of the city and compel or might compel it to buy its light from a monopoly. Suppose private corporations would not sell light to the city at reasonable rates. Is it to be suggested that under the city charter the city is helpless, and that the city cannot provide for lighting the streets; and this in the face of the express provision of section 50 that the board of aldermen shall have power nowhere limited to provide for lighting the streets? This power in section 50 is not limited to providing the light by any one method; and when the absolute necessity of lighting the streets is considered, it cannot for a moment be presumed that the legislature of the State, when they enacted this clause in section 50 of the charter, meant, in spite of this clause, to put the city at the mercy of private corporations or parties and to prevent the city from lighting the streets except by means of purchase of light from private corporations or parties. If the legislature had meant any such thing, it would have so stated in the charter, instead of giving the general and unlimited power to the board of aldermen to provide for lighting the streets.

Means of payment. "The construction or purchase of a lighting plant for the city would, or might, involve a large expenditure of money. Such money might be raised either by taxation or by the issuance of bonds under section 47 of the city charter, which section, as amended by chapter 409

preservation of the public health, and the general welfare, includes authority to use the usual means of carrying the power conferred into effect; and inasmuch as water and light are inseparably bound up with each of these matters, such authority, by implication, authorizes the city to construct municipal water and light works, if in so doing it contravenes no constitutional or statutory provision.¹

of the Laws of 1904, among other things expressly provides: 'In addition to the specific purposes hereinbefore set forth, the board of aldermen may also create loans and authorize the issue of bonds for any other purpose connected with the exercise of the various powers conferred by this act upon the city of New York or any department or official thereof; provided, however, that no bonds or other evidences of indebtedness shall be issued for such additional purposes unless first approved by a unanimous vote of the board of estimate and apportionment, entered upon the minutes of record of said board.' The power to provide for lighting the streets of the city being one of the 'powers conferred by this act upon the city of New York, or any department or official thereof,' is, in my opinion, one of the powers for which bonds may be issued under the above-quoted provision of section 47 of the charter, as amended in 1904."

In *Lake Charles Ice, L. & Water Works Co. v. Lake Charles*, 106 La. 65, where the power to construct and maintain water works and an electric light plant was implied from an authority to construct public works, and was held to carry with it the lesser power to contract for supplying the municipality with water and lights needed for public purposes, the court said: "We agree with the statement that the power was not expressed, but we are decidedly of the opinion that it may fairly be implied that the municipality did not act beyond its powers in so far as it made suitable provision for lighting the streets and for supplying the public with water. Those, in modern cities, have become essential improvements. Lights lessen the opportunity for committing crime and go far toward preventing disorder. They assist the police authorities in enforcing the ordinances and laws, and afford, in many respects, better protection to the owners of property, and add enjoyment to life not felt in dark

and gloomy streets where lights are dim and total darkness prevails. The other claim is covered, we have seen, by a contract having in view the supply of water to the city, as important to the general welfare and interests as lights. They are directly conducive to good health and to the preservation of property in the event of fires. The amount plaintiff seeks to recover is due for supplying wholesome water. The importance of such a supply to the extent that it is needed, cannot be exaggerated. A municipality would fail of the purpose intended in its organization if it failed entirely in taking such steps as are necessary to obtain enough water and sufficient light. They are intimately connected with its existence, if the purpose be to provide efficient systems when necessary in administering public affairs." Importance and necessity of lighting cities, see chap. i.

¹ *Mercantile Trust & Deposit Co. v. Columbus*, 161 Fed. Rep. 135; *Gadsden v. Mitchell*, 145 Ala. 137, 157; *Dyer v. Newport*, 123 Ky. 203; *Ellinwood v. Reedsburgh*, 91 Wis. 131; *Eau Claire Water Co. v. Eau Claire*, 132 Wis. 411.

The construction of water works or the obtaining of a supply of water has been held by the courts to be justified by the following general powers: To pass ordinances respecting the *police of the place* and to *preserve health*, *Livingston v. Pippin*, 31 Ala. 542; "to enact such laws and regulations not contrary to the Constitution and laws of this State as they may deem necessary in relation to the streets and highways, public buildings, powder magazines, and every matter or thing which they think reasonable for the good order and welfare of said city," *Greenville v. Greenville Water Works Co.*, 125 Ala. 625; to make such contracts as the mayor and council may deem necessary for the *welfare* of the city, *Rome v. Cabot*, 28 Ga. 50; see also *Wells v. Atlanta*, 43 Ga. 67; to construct public works,

The power when conferred is *discretionary* in its nature in the absence of any limitations, and the courts will not interfere with the manner in which the power is exercised, provided it be exercised

Lake Charles Ice, L. & Water Works Co. v. Lake Charles, 106 La. 65; to provide by ordinance for the *prevention and extinction of fires*, Webb City & C. Water Works Co. v. Webb City, 78 Mo. App. 422; Jack v. Grangeville, 9 Idaho, 291; Livermore v. Millville, 71 N. J. L. 503, aff'd 72 N. J. L. 221; to maintain the *health and cleanliness* of the city and to provide for the *extinguishment of fires*. Conery v. New Orleans Water Works Co., 41 La. An. 910. Power to repair and keep in order roads, by necessary implication, confers power to light them, when necessary. Scheffbauer v. Kearney, 57 N. J. L. 588. Power to light the streets, &c., with electric light or other form of light and to contract with any individual or corporation for lighting them, is broad enough to authorize the common council to buy and operate the necessary plant and machinery. Rushville Gas Co. v. Rushville, 121 Ind. 206. See also Overall v. Madisonville, 125 Ky. 684; 102 S. W. Rep. 278.

Charter authority to a city in Indiana to construct gas works, held to confer power to drill or purchase *natural gas wells* at a distance and to construct or purchase pumping stations and pipe lines to distribute the gas to citizens, although the authority was conferred before natural gas was known in the State. Indianapolis v. Consumers' Gas Trust Co., 144 Fed. Rep. 640, rev'g 140 Fed. Rep. 362. The providing of an adequate supply of water for municipal and domestic purposes in one of the communities of a county is a matter pertaining to the interests of the county and a legitimate *county purpose*. Hence, the board of county commissioners, having by statute power "to represent the county," and "the management of the interests of the county in all cases where no other provision is made by law," and also power to contract, may contract for a supply of water for the inhabitants of an unincorporated community. Agua Pura Co. v. Las Vegas, 10 N. Mex. 6; County purpose, see Index, *County*. Where the authority of the city is "to erect, construct, build, operate, and maintain a water and electric light system by construct-

ing and maintaining a reservoir of water in and about the channel of the Colorado River within and without the city limits by means of a dam across the same as the same now is constructed and build such other reservoirs as may be necessary at such an elevated point within and without the city as may be necessary," the city has no authority to purchase a water and electric light plant already constructed. Austin v. McCall, 95 Tex. 565; rev'g (Tex. Civ. App.) 67 S. W. Rep. 192. It has been held that the construction of an *electric light plant* is not authorized by the *general welfare clause* of a city charter or by power to purchase and hold necessary real estate, or by power to exercise such other powers as may be conferred by law. The court declared that electric light was not a necessity like water, and that therefore the power to supply it is not to be deduced by inference from other general powers. Posey v. North Birmingham, 154 Ala. 511; 45 So. Rep. 663.

Power to pass ordinances respecting the police and to preserve the public health, conferred upon a *civil agricultural district*, sparsely populated, created a body corporate with authority only to pass by-laws, rules, and regulations for the preservation of the health, good government, and police protection of the district, to regulate stock running at large, and to keep the public roads in repair, will not be construed to be a grant of authority to contract for water for fire protection when the district in question is purely agricultural, and the limited authority conferred upon it renders it unreasonable to construe the power to pass ordinances respecting the police and to preserve health as implying authority to contract for water. South Covington Dist. v. Kenton Water Co., 117 Ky. 489. Without express statutory authority a municipal corporation cannot become a *part stockholder* in a water-works or other corporation or borrow money by issuing bonds or otherwise to pay for stock therein. Voss v. Waterloo Water Co., 163 Ind. 69. Power to acquire and operate electric

in good faith and for a proper municipal purpose.¹ Under an unqualified power to purchase water works, a city may, if it finds that water works encumbered by a mortgage which is not yet due, can be bought on terms which it deems advantageous, *purchase* these works *subject to the encumbrance*.²

§ 1297. **Public Nature of the Service.** — The *occasion for a public service of water or light* is usually the compactness of the inhabitants

works does not authorize a city to *guarantee the bonds of a company* formed to furnish electric light to the city and its inhabitants. *Lynchburg & R. St. R. Co. v. Dameron*, 95 Va. 545. See further chapter on *Contracts*. Index, title *Guarantee*.

In *Kansas* a city of the second class has authority to grant a license to a person or corporation to establish water works to furnish the city and its inhabitants with water, to grant the privilege of using the streets to a private corporation for such purpose, and to agree to pay rent to it for the use of its hydrants. *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; *Wood v. National Water Works Co.*, 33 Kans. 590; *Burlington Water Works Co. v. Burlington*, 43 Kans. 725; *Columbia Water Works Co. v. Columbia*, 46 Kans. 666; *Manley v. Emlen*, 46 Kan. 655; *Columbus Water Works Co. v. Columbus*, 48 Kans. 99.

¹ *Phoenix Water Co. v. Phoenix*, 9 Ariz. 430; *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 125; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286; *Thomas v. Grand Junction*, 13 Colo. App. 80; *Rockebrandt v. Madison*, 9 Ind. App. 227; *State v. Topeka*, 68 Kan. 177; *Henderson v. Young*, 119 Ky. 224, 83 S. W. Rep. 583; *Avery v. Job*, 25 Oreg. 512; *Lucia v. Montpelier*, 60 Vt. 537. See Index, *Discretion; Powers*.

The discretionary nature of the power conferred upon a municipality to provide itself with water is the basis of the rule which exempts municipalities from responsibility for property destroyed by fire through neglect to construct or properly maintain water works, and the authorities cited in support of that rule, *infra*, § 1340, may be referred to for the purpose of sustaining the discretionary character of the authority of the municipality.

If it appear that a city purposes to

pay \$28,000 for works worth only \$10,000 which are also inadequate and unsuitable for the city's purposes, the court will enjoin the purchase. *Avery v. Job*, 25 Oreg. 512. A city may, under a general power to supply itself with water, which was held to be plenary, purchase the works of more than one company. *Stroud v. Consumers' Water Co.*, 56 N. J. L. 422. *Reed, J.*, said: "This act enables the city to supply itself with water. The power to accomplish that purpose is plenary. The city can buy or condemn land and sources of water supply, and build its own works and lay its own pipes. It can buy a fully equipped plant. It can buy such plant, and additional land and water supply. It can buy two or more plants, and additional land and water sources. It can do all this, under the power granted, so long as the exercise of the power, in view of present and future municipal needs, is not so grossly abused as to call for the supervisory interposition of this court." If the owner of land has laid it out into blocks and streets and for the purpose of improving his land has laid a system of pipes in the streets, connecting them by meter with the works of the city, the city cannot remove the meter and incorporate the pipes and mains into its own system without compensating the owner therefor. *Smith v. Chicago*, 107 Ill. App. 270, *aff'd* 204 Ill. 356. See also *Wright v. Mt. Vernon*, 44 N. Y. App. Div. 574.

² *State v. Topeka*, 68 Kan. 177, distinguishing *Browne v. Boston*, 179 Mass. 321, and *Ironwood Water Works Co. v. Ironwood*, 99 Mich. 454, on the ground that these were cases involving an attempt to evade statutes limiting the amount of municipal indebtedness. See also *Norwich Gas & Elect. Co. v. Norwich*, 76 Conn. 565.

within a limited territory. In the very nature of things, such a system is usually intended to supply a somewhat compactly settled community or a community whose geographical limits are restricted. As a matter of fact, throughout the United States these systems usually supply cities, villages, or the more compactly settled portions of towns, the latter being frequently organized into water or light districts. The necessity does not exist for extending such systems beyond these limits and the expense would be practically prohibitive.¹ The inherently local character of the enterprise renders competition exceedingly difficult and often impossible. As a physical matter, competing gas or water plants may exist, but as a business venture calling for the expenditure of large capital upon which an adequate return is expected and looked for, it is almost certain that one or both plants will be operated at a loss. The local character of the enterprise, the fact that one plant should naturally supply the whole locality, the necessity to a greater or less degree of using the public streets, and the collection of compensation by way of rates as well as the fact that a supply of gas is usually required for such purposes as lighting the public streets and buildings as well as the dwellings of the inhabitants, and that water is required by the municipality for protection against fire and for sanitary purposes, as well as

¹ *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371. In *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539, the court, after pointing out that the manufacture of gas for lighting the streets and buildings is not a domestic or family manufacture, said: "It is carried on either by public or associated capital, and is dependent for its profit upon general consumption. Corporations of this kind are not like trading or manufacturing corporations, the purview of whose operations is as extensive as commerce itself and whose products may be transported from market to market throughout the world. Their product is designed for the consumption of the immediate community in which the manufacture is wrought. It is not a trading corporation, for its product depends exclusively upon home consumption. If gas were an article of merchandise and could be bottled or packed up and imported or exported, 'like soap, candles, or hats,' to be distributed to the various markets of commerce, there might be possibly claimed for it the character of merchandise or manufactures par-

taking of that attribute. But such is not the fact. Its manufacture depends upon the consumption of the immediate neighborhood for its profit and success and upon no other place. It is local, and hence not commercial. It is consumed upon the spot of its manufacture, and hence can have no affinity with articles of trade. Its success necessarily depends upon its general use in the vicinity of its manufacture and seriously affects the public policy and individual convenience of the immediate community. The gas is not sold to whomsoever will buy, but is offered to be, and is, furnished to whomsoever is prepared to, and will, take and use it. It is not an article of trade, because it is not bought, measured, and delivered in quantity, but is furnished, used, and to be paid for after it is used, because it cannot be measured before. From the nature of the article, the objects of the company, their relations to the community, and from all the considerations before mentioned, it is to me apparent that the company is not at all analogous to an ordinary manufacturing or trading corporation."

for private consumption, naturally attach a *public use or character to the service*, whether it be rendered by the municipality or by a private corporation.¹ It is the public character of the use or service which justifies the *laying of pipes and mains in the city streets*, because these streets are devoted to public purposes and cannot be applied to a private use.² It is also the public character of the use

¹ As to *public character of water supply*, see *San Diego Land & T. Co. v. National City*, 174 U. S. 739; *Stanislaus County v. San Joaquin & K. R. C. & Irrig. Co.*, 192 U. S. 201; *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1; *Spring Valley Water Works v. Bryant*, 52 Cal. 132; *St. Helena Water Co. v. Forbes*, 62 Cal. 182; *Lux v. Haggin*, 69 Cal. 255, 300; *San Diego Water Co. v. San Diego*, 118 Cal. 556; *Wagner v. Rock Island*, 146 Ill. 139; *Danville v. Danville Water Co.*, 180 Ill. 235; *Bennett v. Mt. Vernon*, 124 Iowa, 537; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Wayland v. Middlesex County*, 4 Gray (Mass.), 500; *Olmsted v. Morris Aqueduct*, 46 N. J. L. 495, 499; *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249, 259; *Commonwealth v. Russell*, 172 Pa. 506; *Miller v. Pulaski*, 109 Va. 137; 63 S. E. Rep. 880; *Everett Water Co. v. Powers*, 37 Wash. 143; *State v. Pacific County Super. Ct.*, 51 Wash. 386; 99 Pac. Rep. 3. See also *Index, Water and Water Works*. The *Constitution of California* (Art. xiv, Sec. 1) declares: "The use of all water now appropriated or that may be appropriated for sale, rental, or distribution is hereby declared to be a public use and subject to the regulation and control of the state in the manner to be provided by law." A similar provision is found in the *Constitution of Idaho* (Art. xv, Sec. 1). In *West Hartford v. Hartford Water Com'rs*, 44 Conn. 360, the court, in discussing the *public character of a supply of water to a city*, said: "The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good in the judicial sense of that term; not indeed as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order."

As to *public nature of supply of light*, see *New Orleans v. Clark*, 95 U. S. 654; *New Orleans Gas Co. v.*

Louisiana L. Co., 115 U. S. 650; *Thomson-Houston Electric Co. v. Newton*, 42 Fed. Rep. 723; *Crawsfordville v. Braden*, 130 Ind. 149; *Opinion of the Justices*, 150 Mass. 592; *Mitchell v. Negaunee*, 113 Mich. 359; *Hequem-bourg v. Dunkirk*, 49 Hun (N. Y.), 550; *State v. Toledo*, 48 Ohio St. 112; *Miller v. Pulaski*, 109 Va. 137; 63 S. E. Rep. 880; *Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249, 263. See also *Index, Gas and Gas Companies*. "The right to operate gas works and to illuminate the city is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas pipes, electric lamp posts, and carry on the business of lighting the streets and houses of the city of New Orleans without special authority from the sovereign. It is a franchise belonging to the state, for in the exercise of the police power the State could carry on the business itself or select one or several agents to do so." *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. An. 138, 147, quoted with approval in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.

² But the erection of an *electric lighting plant within the street limits* is not a proper use of the streets and will be enjoined. *McIlhinny v. Trenton*, 148 Mich. 380. Under a charter vesting a city with power "to regulate" the use of streets, an ordinance which grants a private corporation the right to occupy the streets with subways and paraphernalia therein necessary to conduct electricity without imposing upon the company any obligation to allow the public to use them, and which reserves to the city no control of the works or business of the company, was considered to apply the public streets to *private purposes* and therefore *ultra vires*. *State v. Murphy*, 134 Mo. 548. A grant by a city of rights and privileges in its streets, parks, and public grounds for water systems for private use, — *i. e.*, a

which authorizes and justifies the application of *moneys derived from taxation* to the construction and maintenance of the works; if the enterprise were for private purposes exclusively, the power of taxation could not be exercised in its aid.¹ To enable a municipality or a corporation to discharge its duties to the public, it is clothed with the power of eminent domain; and to ensure to the public faithful service it is subject to the visitatorial powers of the State.² When owned by the municipality, the works and plant are usually the product of taxation, are held for public purposes, and are *exempt from taxation*,³ and are *not liable to sale on execution*.⁴

§ 1298. **Power of Municipality to furnish Water and Light for Use of Inhabitants.** — The furnishing of a *supply of water*, not only as protection against fires and for sanitary purposes, including sewers, but also for the individual use of the inhabitants of a municipality, has always been recognized as a *proper public and municipal purpose*, based upon the inherent and palpable necessity of the case and the customs of thickly settled communities.⁵ But in the case of

grant from which neither the city, its citizens, nor the public generally receive any consideration or derive any benefit, — is beyond the powers of a municipality and is void. *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1.

¹ A city, it was held, could not be authorized to construct a dam across a river with power to construct docks and booms, and at its option to construct water works. Such purposes are not necessarily public, and the funds of the taxpayers derived from the power of taxation cannot be applied to such purposes. *Attorney General v. Eau Claire*, 37 Wis. 400. In *Rochester v. Rush*, 80 N. Y. 302, the court held that water works constructed by a municipality were held for public use, and were therefore exempt from taxation. After referring to the statute authorizing the construction of the works, the exercise of the power of eminent domain, and the levy of taxes therefor, *Danforth, J.*, said: "The act under which these proceedings were taken could be valid only because its direct object was the promotion of the health and safety of the property of the citizens who were required to provide by taxation the means of carrying it on; and the work undertaken in pursuance of its directions must be regarded as executed for the

public good and the property therefor held for public purposes. It is itself the result or product of taxation. It stands in place of the money so raised, and therefore cannot be taken or diminished by taxation."

² *Commonwealth v. Russell*, 172 Pa. 506. See also chapter on *Eminent Domain*.

³ *West Hartford v. Hartford Water Com'rs*, 44 Conn. 360; *Commonwealth v. Covington* (Ky.), 107 S. W. Rep. 231; *Wayland v. Middlesex County*, 4 Gray (Mass.), 500; *Rochester v. Rush*, 80 N. Y. 302; *Swanton v. Highgate*, 81 Vt. 152.

⁴ *New Orleans v. Morris*, 105 U. S. 600. More fully see chapter xxi on "Corporate Property."

⁵ The question whether supplying water for the use of a locality is a public service or use has usually arisen when the right to exercise the power of eminent domain was involved. In such cases it has uniformly been held to be a public use. See *ante*, § 1297; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60. Authority "to provide the city with water" includes the power to furnish the inhabitants with water. *Smith v. Nashville*, 88 Tenn. 464. See also *Jacksonville Elect. L. Co. v. Jacksonville*, 36 Fla. 229; *Index, Water and Water Works*.

artificial light the usual method of obtaining a supply was, in the earlier municipal history of the country, through the agency of stock corporations performing a joint public and private service for private gain; and when cities and other incorporated communities sought to construct their own plants to light the city streets and to furnish gas and electric light for the individual use of their inhabitants, and to use the public credit, and exercise the power of taxation in connection therewith, the power and authority of the legislature to authorize municipalities to do so were vigorously contested. It has, however, been uniformly held that the legislature may confer upon municipalities the necessary authority for these purposes. The necessity of lighting public streets for the public benefit, for the common convenience of the inhabitants, and as a means of promoting order, and of affording protection to persons and property, is apparent, and the method by which it shall be done becomes a matter of expediency. The legislature may authorize municipalities to light public buildings and streets by any appropriate means which it may think expedient; and as a question of constitutional power there is no distinction between the right to authorize cities and towns to buy gas or electricity for their use and the right to authorize them to manufacture it for their use. The right of the legislature to authorize a municipality to *manufacture gas or electricity for the private consumption of its inhabitants* involves other considerations. Artificial light is not perhaps so absolutely necessary as water, but it is necessary for comfortable living and safety in modern communities. The use of gas and electricity for lighting cities and thickly settled towns is common and a great convenience; and it is practically impossible for every individual to manufacture gas or electricity for himself. If either is to be generally used in a city or town, it cannot be distributed without the use of the public streets or the exercise of the right of eminent domain. In general, it may be said that if the legislature is of the opinion that the common convenience and welfare of the inhabitants of cities and towns will be promoted by conferring upon municipalities the power of manufacturing and distributing gas and electric light for the purpose of furnishing them to their inhabitants, the legislature can confer this power; and it is not necessarily an objection that the exercise of the power incidentally benefits some individuals more than others, or that, from the place of residence or for other reasons, every inhabitant of the city or town cannot use it, if every inhabitant who

is so situated that he can use it has the same right to use it as the other inhabitants.¹

¹ *Fellows v. Walker*, 39 Fed. Rep. 651; *Jacksonville Elect. L. Co. v. Jacksonville*, 36 Fla. 229; *Crawfordville v. Braden*, 130 Ind. 149; *Overall v. Madisonville*, 125 Ky. 684; 102 S. W. Rep. 278; *Mealey v. Hagerstown*, 92 Md. 741, 754; *Opinion of the Justices*, 150 Mass. 592; *Mitchell v. Negaunee*, 113 Mich. 359; *State v. Allen*, 178 Mo. 555; *Linn v. Chambersburg*, 160 Pa. 511; *Crouch v. McKinney*, 47 Tex. Civ. App. 54; 104 S. W. Rep. 518.

The supplying of a municipal corporation and its citizens with *natural gas* is a public use or purpose for which the taxing power may be constitutionally exercised. *State v. Toledo*, 48 Ohio St. 112.

In *Thomson-Houston Electric Co. v. Newton*, 42 Fed. Rep. 723, it was held that statutory authority "to establish and maintain gas works or electric light plants with all the necessary poles," &c., authorized the city not only to construct an electric light plant for the purpose of lighting the streets and public places of the city, but also to furnish light for private use. Authority "to provide for lighting the city with gas, or other illuminating material, or in any other manner" is sufficient to authorize the city to furnish electric light to the citizens for use in their residences. *Jacksonville Elect. L. Co. v. Jacksonville*, 36 Fla. 229. The incurring of debt to establish an electric light plant for the purpose of supplying a city and its inhabitants with light is not within a constitutional prohibition against incurring indebtedness for other than city purposes. The lighting of streets and public places is one of the duties devolving upon a municipal government and is a city purpose within the provisions of the Constitution, and whilst light in a private dwelling may be equally important so far as the inhabitants are concerned, its use is more of a private nature. Although it may be that when considered alone it is not the duty of a municipality to supply it for private use, yet it may do so, in its discretion, in connection with the lighting of the streets. The furnishing of light in dwellings, if supplied in connection with the light furnished for the streets and public buildings, may be regarded as an incident thereto

and a proper municipal purpose. *Hequembourg v. Dunkirk*, 49 Hun (N. Y.), 550.

The fact that a portion of the property in a city is *wild land* which does not receive any benefit from electric light furnished to the inhabitants does not affect the power of the legislature to authorize and the city to incur debt and levy taxes for the purpose of furnishing such light. *Mitchell v. Negaunee*, 113 Mich. 359. In *Mauldin v. Greenville*, 33 S. Car. 1, it was held that the power to light a city may be fairly implied from a grant of the police power and under this implied power a city which has the express power to own property may purchase an electric light plant and manufacture electricity for the purpose of lighting the streets, but that such implied authority did not extend to the purchase of such a plant to furnish lights for private consumers either with or without compensation. Under the provision of the *California* Constitution, which permits any person to exercise the franchise of using the streets for the purpose of furnishing "gas light or other illuminating light" when there are no municipal works, a company does not forfeit its franchise by supplying gas for heating and cooking as well as for lighting purposes, the streets not being subjected to any additional burden thereby. *People v. Los Angeles Independent Gas Co.*, 150 Cal. 557. Where a city had charter power "to provide for lighting and watering of the streets," &c., and "to provide such lights as are necessary for the convenient transaction of public business," it was held, in an action to enjoin the sale of city bonds, purporting to be issued for the construction of a plant to light the streets and to furnish light to the inhabitants, that these powers did not authorize the city to establish a plant to furnish light to the inhabitants generally for their private use, and that the powers conferred related exclusively to public lighting. *Hyatt v. Williams*, 148 Cal. 585.

In *Illinois*, a village sued a consumer to recover for one month's electric light furnished to the defendant's building. The village had power (1) to provide for lighting the streets and other public places; (2) to

§ 1299. **Power of City to supply Water to other Cities and beyond its Limits.** — The purpose for which a municipality is authorized to construct water works or to contract for a supply of water is usually to supply its own needs and the needs of its inhabitants, and it may be laid down as a general rule that a grant of power to a municipality for these purposes gives it by implication *no authority* to enter into the business of furnishing water *to persons beyond the municipal limits*.¹ Nor does authority to provide water or light for its own use and for the use of its inhabitants authorize a municipality to go into the business of buying and selling water *as a commodity to other municipalities*.² But in the absence of any constitutional restriction

grant to others the power to do such lighting and to lay down their plant and pipes; but no express authority was conferred on the village itself to do such work. By another statute villages were authorized to build water works and to collect rates for furnishing water to private parties, but no express authority was conferred to collect rates for light to private houses and property. It was held that, as powers granted to municipalities are to be strictly construed, the village had no power to furnish light to the inhabitants, or to fix rates and to collect for such service, and that for lack of power it could not recover for light furnished to a private individual. *Ladd v. Jones*, 61 Ill. App. 584. This view of the powers of municipalities seems to be approved, *obiter*, in *Palestine v. Siler*, 225 Ill. 630, 637. *Sed quære?* A village had charter authority to borrow money for the expense of electric lighting of the village, to light the streets with electricity and to furnish water, electric lights, and electric power to parties outside the corporate limits. No express authority was conferred to furnish electric light *to individual consumers* within the village limits, and it was held that the village had no such authority. *Swanton v. Highgate*, 81 Vt. 152. It is to be noted, however, that in this case the question simply was whether the village works were *devoted to public use* so as to be exempt from taxation, and the court only held that as the village was under no corporate power or duty to supply light to its inhabitants, the works could not be regarded as devoted to public use. Statutory authority was conferred upon a town to condemn land to furnish water and

light to its inhabitants, *or other persons or corporations*. It was held that the furnishing of water and light to other persons or corporations was a private use, and the private use being inseparably mingled with a public use, the attempted delegation of the power of eminent domain was unconstitutional and void *in toto*. *Sed quære?* *Miller v. Pulaski*, 109 Va. 137; 63 S. E. Rep. 880.

¹ *Haupt's Appeal*, 125 Pa. 211, 223; *Bly v. White Deer Mountain Water Co.*, 197 Pa. 80; *Stauffer v. East Stroudsburg*, 215 Pa. 143; *Paris v. Sturgeon*, 50 Tex. Civ. App. 519; 110 S. W. Rep. 459. Statutory authority "to provide, or cause to be provided, the city with water, to make, regulate, and establish public wells, pumps, and cisterns, hydrants, and reservoirs, in the streets and elsewhere within said city or beyond the limits thereof for the extinguishment of fires and the convenience of the inhabitants and to prevent the unnecessary waste of water" was held to confer no authority *to supply water to a person outside the city limits*. *Paris v. Sturgeon*, 50 Tex. Civ. App. 519; 110 S. W. Rep. 459.

² *Dyer v. Newport*, 123 Ky. 203; *Rehill v. East Newark*, 73 N. J. L. 220; *East Newark v. New York & N. J. Water Supply Co.*, 67 N. J. Eq. 265, aff'd 68 N. J. Eq. 783; *Farwell v. Seattle*, 43 Wash. 141. Power to a city to procure a supply of water for the use of the city and its inhabitants "and any other persons" was construed to mean any other person of the same class, *i. e.* a person *within the city limits*. *Farwell v. Seattle*, 43 Wash. 141.

The city of Newport, Ky., had constructed water works and obtained a

or prohibition, it is *within the power of the legislature* to authorize a municipality, at least as an incident to the construction and maintenance of its own water works, to contract with neighboring municipalities to supply water thereto or to their inhabitants.¹ And in

supply of water more than sufficient for its own needs. Clifton, an adjoining municipality, passed an ordinance providing for the sale of the franchise for twenty years of laying water pipes and mains in its streets and for contracting with the purchaser of the franchise to furnish water to the municipality and its citizens. As required by the Kentucky Constitution, bids were advertised for. Newport was the successful bidder. It was held that, although Newport could dispose of its surplus supply for its advantage, it could not go into the business of *maintaining works and operating franchises* in and for the benefit of an *adjoining municipality* without express legislative authority. *Dyer v. Newport*, 123 Ky. 203.

¹ *South Pasadena v. Pasadena L. & W. Co.*, 152 Cal. 579. It may be doubted whether a municipality could be authorized to enter into the general business of supplying water or light to other municipalities and to persons outside its limits when such power is to be made the foundation for an independent commercial or business enterprise having no relation to its own supply of water or light. A grant of power for such a purpose would in effect be a permit to the municipality to engage in an independent commercial enterprise, an example of "municipal trading" pure and simple. On this subject, see *ante*, § 1292. This is a very different thing from legislative authority to a municipality to dispose of its surplus waters to a neighboring municipality or to other consumers. *Post*, § 1300. A charter provision authorizing a city to sell to a *corporation or individual outside the city limits* the right to make connections with the city mains for the purpose of drawing water therefrom, when coupled with a provision that the city authorities "shall not sell or permit the use of water" in this manner, "if thereby the supply for the city or its inhabitants shall be insufficient," does not violate a constitutional provision prohibiting a city from giving any property to or in aid of any individual, association, or corporation or to incur debt for

other than a "*city purpose*." The authority granted is to sell merely the surplus water for which the city has no use. This is not a gift or aid to the person to whom the sale is made. *Simson v. Parker*, 190 N. Y. 19, rev'g 113 N. Y. App. Div. 888.

A water company organized to supply a certain municipality may have legislative authority to *use the streets and highways of adjoining cities* for the purpose of transporting its water supply from the source to the place of distribution. *Pelham Manor v. New Rochelle Water Co.*, 143 N. Y. 532; *Rochester & L. O. Water Co. v. Rochester*, 176 N. Y. 36; *Rochester v. Rochester & L. O. Water Co.*, 189 N. Y. 323, modifying 114 N. Y. App. Div. 907. But a company so using the streets of another municipality cannot supply water to inhabitants of that municipality when it has no charter authority to do so, and when a statute expressly prohibits the sale within the limits of the adjoining municipality. *Rochester v. Rochester & L. O. Water Co.*, 189 N. Y. 323, modifying 114 N. Y. App. Div. 907. But the statutory prohibition does not apply to a supply furnished to a railroad company which has statutory authority to acquire a supply of water that may be necessary for its uses and purposes and to build or lay aqueducts or pipes to convey the same and to condemn any lands that may be necessary therefor, and which has granted to the water company a right of way along its railroad in consideration of a supply of water. *Rochester v. Rochester & L. O. Water Co.*, 189 N. Y. 323, modifying 114 N. Y. App. Div. 907.

A contract between two municipalities for a supply of water for public and private use is within the *statute of frauds*. A resolution of a town council in *New Jersey* directed the president and clerk to execute a contract with a city for a supply of water on certain terms. The city, learning of the resolution, caused to be drawn and executed by its officials and tendered to the town council, a paper which was claimed to be in accordance with the resolution. It was held that no con-

California it has been held that when a city is authorized to acquire waters and water rights beyond its limits, and in the exercise of that authority acquires the property of a water company, which under the Constitution and statutes of that State is charged with the duty of supplying persons with water outside the city limits, *the city becomes bound*, upon the purchase of the water rights and property of the company, *to fulfil its constitutional and statutory obligation*, and to supply the persons entitled to receive a supply from the source acquired by it from the water company.¹ And where the contract

tract had been made, partly because the paper tendered did not conform to the terms of the resolution, and partly because the resolution was never communicated by the town to the city, and hence was not a proposal which the city might accept and thereby bind the town. *Jersey City v. Harrison*, 72 N. J. L. 185, aff'g 71 N. J. L. 69. A statute which authorizes any municipal corporation owning or controlling water works to contract with "any adjoining municipal corporation" to furnish a supply of water for public or private use for a term of years only authorizes contracts with *contiguous* municipalities. The fact that the municipality is contiguous to the water supply or the water works does not warrant the contract. *Rehill v. East Newark*, 73 N. J. L. 220. *Power to Jersey City* to acquire water works and "distribute waters through the corporate limits of Jersey City and through such portion of the counties of Hudson and Bergen as the inhabitants may desire," contemplates that Jersey City shall distribute to consumers direct, and does not authorize it to make a contract with other municipalities in these counties to furnish a supply of water to be distributed by the latter. *Rehill v. East Newark*, 73 N. J. L. 220.

¹ A water company obtained its water from a source within the limits of a city and supplied water to plaintiff's lots which were outside the city limits. The company sold its water works and water rights to the city, and it was held that the city was bound by reason of the purchase of the works to continue its supply to the plaintiff's lots. *Fellows v. Los Angeles*, 151 Cal. 52, 63. *Shaw, J.*, said: "The charter of Los Angeles gives it power to acquire water and water rights, within or without the city, for the use of its inhabitants. In the exercise of this power

it would have the right to buy from any corporation or person engaged in supplying water for public use outside the city any surplus water which such corporation or person might possess. If it were necessary in order to obtain such surplus, the city might, under this power, purchase the entire water supply of such person or corporation and the water plant or system used in connection with it, so that, after operating the system and supplying the persons entitled to use that water, it could devote the surplus to the use of the inhabitants of the city. *Hewitt v. San Jacinto & P. V. Irrig. Dist.*, 124 Cal. 186, 192. The acquirement of this water plant, and the operation of the system, if necessary, were not beyond the power of the city, and for the purpose of this decision we must presume that the necessity existed. The question thus presented is whether or not, under the circumstances of this case as presented in the complaint, the city, after thus acquiring this water system, can now discontinue its operation, cease to furnish the water, or any water, to the persons theretofore receiving and entitled to receive it from said system, retain title, possession, control, and management of all the property composing the system, and allow the water previously devoted to the public use to run to waste. It is clear this cannot be allowed."

In *South Pasadena v. Pasadena L. & W. Co.* 152 Cal. 579, it was held that under the Constitution and statutes of *California*, on the purchase by the city of Pasadena of the property, franchise, and business of a water company, a portion of whose water was appropriated to the use of a part of the city of *South Pasadena* and its inhabitants, the duty devolved upon *Pasadena*, as a trustee, of continuing to supply water to that part of *South Pasadena* and its

with another municipality is confined to *surplus waters* which the city has in good faith acquired for its own purposes, but which it does not presently require, the contract has been sustained as within the power of the city.¹

§ 1300. **Power to apply Surplus to Private Purposes.** — The idea underlying the construction of public utilities by a municipality or by a public service corporation is that the municipality or company in furnishing water or light or rendering other similar services does so for a public purpose; and, as we have seen, the fact that the water or light is furnished for the individual consumption or use of the inhabitants does not detract from the public purpose. But in the nature of things there are necessarily purposes of a *peculiarly private nature* which do not justify the municipality in exercising

inhabitants that previously enjoyed such use. It was also held that such water could not be considered as surplus water subject to sale to others by virtue of a statutory provision authorizing a city to sell surplus water, but requiring that contracts for such sale should not run for a period of longer than one year. The court also declared that the supply of water by the city of Pasadena to territory beyond its limits, being a matter necessarily incidental to the main objects of supplying water to its own inhabitants, was "municipal affair" which might be made the subject of provision in a freeholders' charter adopted by the municipality under the provisions of the Constitution of that State. It was further held that under the provisions of the California Constitution, South Pasadena had power to fix rates to be charged for water supplied to it or within its limits, and to control the laying and repairing of pipes in the streets as against another city engaged in supplying such waters as well as when an individual or water company does so. But, subject to the provisions of the Constitution, the municipal corporation upon which the duty devolves of supplying water to another municipality, is authorized to lay its mains in the streets of the latter.

A quasi-municipal corporation with authority to maintain a water supply which has a contract with another similar corporation to supply it with water for a certain defined territory,

can maintain a bill in equity to restrain the other corporation from *wrongfully using water for more than the territory embraced in the contract*. So held in a case where, pursuant to statute, a fire district made a contract to supply with water a water supply district the territory of which was then wholly within a certain town. A later statute extended the boundaries of the water supply district so as to include additional territory in an adjoining town. It was held that the statute did not affect the contract between the two corporations or extend the territory to which it applied. The court expressed doubt whether the power of the legislature to change the boundaries of municipalities and to make provision for the transfer of property and the payment of debts, &c., would, under the Constitution, justify the legislature in increasing the obligation of the fire district by requiring it to supply water to increased territory without additional compensation. *Turners Falls Fire Dist. v. Millers Falls Water Supply Dist.*, 189 Mass. 263.

¹ *Colorado Springs v. Colorado City*, 42 Colo. 75. In this case the contract was sustained, although it was only given in consideration of the right to use the streets of the second city for water pipes and mains. As to the power of the *municipality to dispose of a surplus* arising only incidentally and not acquired with the intention of disposing of it for other than ordinary public purposes, see § 1300.

the power of taxation and which do not permit either the municipality or the public service corporation to exercise the power of eminent domain.¹ But whilst a private purpose cannot be the

¹ A question which has occasioned a diversity of opinion in judicial decisions is *whether the power of eminent domain may be exercised to acquire property for the purpose of applying it to the development of power, usually electric in its nature, for manufacturing purposes.* This question has usually arisen when it has been sought to condemn lands or water rights for the purpose of constructing dams, &c., to supply water power to generate electricity, and the power conferred has frequently been sought to be exercised in connection with the generation of electricity to supply light to municipalities and their inhabitants. The subject is not strictly within the purview of the present work, but it may be said that the decisions generally, but not uniformly, seem to lean to the view that the furnishing of power to all who may require or desire to use it under conditions which oblige the corporation seeking to exercise the power to furnish it to all applicants upon the same basis as any other public service, is a public use which justifies the exercise of eminent domain. See *Walker v. Shasta Power Co.*, 160 Fed. Rep. 856; *Jones v. North Georgia Elect. Co.*, 125 Ga. 618; *Minnesota Canal & P. Co. v. Pratt*, 101 Minn. 197; *Minnesota Canal & P. Co. v. Koochiching Co.*, 97 Minn. 429; *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108; *Spratt v. Helena Power Transmission Co.*, 37 Mont. 60; *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 531, 534; *McMillan v. Noyes* (N. H.), 72 Atl. Rep. 759; *Niagara, L. & O. Power Co.*, Matter of, 111 N. Y. App. Div. 686; *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388; *McMeekin v. Central Carolina Power Co.*, 80 S. Car. 512; *Wisconsin River Imp. Co. v. Pier*, 137 Wis. 325; 118 N. W. Rep. 857.

These decisions have largely been induced by the fact that electricity is in its nature capable of generation at a single point and of transmission and distribution to as many consumers as the power can supply. Thus in *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 531, 534, *Chase, J.*,

said: "Electricity is extensively used for the transmission of power from the point where the power is accumulated by means of a water-fall or by the combustion of fuel to distant points for use there; and the prospect is that it will be used in the near future to produce and distribute heat in a similar manner. . . . The knowledge recently acquired concerning electricity has made it possible to divide power into any desired portions and to freely transmit the same to almost any point for use. This has created a demand for power which, though not so universal as the demand for water, is nevertheless of a public character. Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires a large capital to collect, store, and distribute for general use. The cost depends largely upon the location of the power plant. A water power or a location upon tide-water reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of the necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing, and distributing electricity for the purposes of supplying power and heat to all who may desire it is a public use similar in character to the use of land for collecting, storing, and distributing water for the public needs, a use that is so manifestly public that it has been seldom questioned and never denied." The distinction is well illustrated in *Minnesota Canal & P. Co. v. Koochiching Co.*, 97 Minn. 429, 451, where a corporation had power, first, to generate electricity by water power for distribution and sale to the general public for light, heat, and power on equal terms, and, second, to acquire water power and to construct a water power plant for the purpose of "supplying water power from the wheels thereof." It was held that the first of these uses was a public use which justified the exercise of the power of eminent domain, but the second was a private

primary object of either the municipality or the public service corporation, the fact that incidentally and to a minor degree private

enterprise in aid of which the power of eminent domain could not be exercised. *Elliott, J.*, remarked with reference to the second power: "Water power is not, like electrical power, capable of being subdivided into innumerable units and distributed long distances."

But in some jurisdictions the generation of electrical power for distribution has been held to be a private use or enterprise in aid of which the power of eminent domain cannot be exercised, although it is intended for general distribution. See *Brown v. Gerald*, 100 Me. 351; *State v. Thurston County Super. Ct.*, 42 Wash. 660; *State v. White River Power Co.*, 39 Wash. 648; *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98; *Dice v. Sherman*, 107 Va. 424. But even in these jurisdictions it has been held that the generation of power is a public use when it is intended to be used only in connection with a recognized public use, e. g., the operation of railroads, municipal lighting, or the like. *State v. Centralia-Chehalis Elect. R. & P. Co.*, 42 Wash. 632; *State v. King County Super. Ct.*, 52 Wash. 196; 100 Pac. Rep. 317. *Contra, Avery v. Vermont Elect. Co.*, 75 Vt. 235.

Other decisions hold that the creation of power is a private use under varying circumstances not coming within any of the preceding. Thus, it has been held that the legislature cannot authorize the taking by eminent domain of the land for the purpose of creating a water power, which when erected may be used for public or private purposes at the option of the proprietor. It was so held in a case where the corporation claiming to exercise the right of eminent domain was organized to sell and supply water and water power for mining, milling, manufacturing, domestic, municipal, and agricultural purposes, and to furnish people in the vicinity with electricity. *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 48. Furnishing water to private persons and corporations to be used in boilers to generate steam for saw and shingle mills is a private and not a public use. *State v. Pacific County Super. Ct.*, 51 Wash. 386; 99 Pac. Rep. 3. The *Illinois* statute authorizing the condemnation of private prop-

erty for the purpose of public mills and machinery other than grist mills held to be unconstitutional as permitting the taking of property for private use. *Gaylord v. Chicago Sanitary Dist.*, 204 Ill. 576. An electric plant is not a "mill" within the meaning of the *Missouri* statute authorizing the condemnation of private property for the purpose of building a mill dam. *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 235. A *Pennsylvania* statute of April 29, 1874 (P. L. 73), authorized the incorporation of companies for "the storage and transportation of water with the right to take rivulets and land and reservoirs for holding water." It was held that a company organized under this act was presumably a corporation for private purposes only, and that it could not constitutionally be invested with the power of eminent domain. *Peify v. Mountain Water Supply Co.*, 214 Pa. 340. Power to a town to condemn land to furnish water and light to its inhabitants or other persons or corporations, held to be for a private use as to the "other persons or corporations," and as the private use was inseparably mingled with the public use, the grant of the power of eminent domain was held to be unconstitutional and void *in toto*. *Miller v. Pulaski*, 109 Va. 137; 63 S. E. Rep. 880.

A water company, under a charter granting it the right to take private waters "for the extinguishment of fires and for domestic sanitary and other purposes," cannot acquire the right to use the water of a stream for private manufacturing purposes against the objection of mill owners upon such stream who are injured thereby. The words "other purposes" in the grant of power must be construed to mean other public purposes of the same character. *In re Barre Water Co.*, 62 Vt. 27. See also *Smith v. Barre Water Co.*, 73 Vt. 310. By the *California* Constitution any person may exercise the franchise or right to use the streets for the distribution of "gas light or other illuminating light," when there are no municipal works. A gas company does not forfeit this franchise right by supplying gas for heating and cooking as well as for lighting purposes, as there is no additional burden

purposes are served does not render the action of the public service corporation or the municipality illegal. When a city owns, maintains, and operates its own water or light plant, it is to be reasonably expected that in the prudent management of its works *some excess beyond the natural requirements* of the public will arise; that there will be some surplus which will be available for disposal over and above such as it requires for its own purposes and such as its inhabitants can claim by reason of the prior duty which it owes them. With reference to the *surplus so arising, the city may contract with private individuals* for the private use thereof so long as it does so without affecting the supply which is required for public or quasi-public purposes. For example, if a city has legislative authority to erect a dam in connection with its water works, it may lawfully *lease for private purposes any excess of water* not required by itself for its inhabitants;¹ or it may lease to private individuals the use of water flowing through its water system to enable them to *generate power* to create electricity where such lease does not impair the usefulness of the water works or the efficiency of the system for the municipal purposes for which they were acquired.² Within these

imposed upon the streets thereby. *People v. Los Angeles Independent Gas Co.*, 150 Cal. 557. *The distribution of ammonia* by pipes laid in the streets held to be a private purpose for which the use of the streets could not be granted by the municipality. *Rhinehart v. Redfield*, 93 N. Y. App. Div. 410, *aff'd* 179 N. Y. 569.

¹ *State v. Eau Claire*, 40 Wis. 533; *Green Bay, &c. Canal Co. v. Kaukauna Water Power Co.*, 70 Wis. 635. See also *Dyer v. Newport*, 123 Ky. 203, 208; *Rogers v. Wickliffe* (Ky.), 94 S. W. Rep. 24; *Lucia v. Montpelier*, 60 Vt. 537; *Attorney-General v. Eau Claire*, 37 Wis. 400. *Ante*, § 1299. It has been suggested that if a municipality has a water supply of its own and this supply is more than sufficient for its needs, there is good reason for investing it with the power to sell the surplus water to neighboring municipalities; but this fact does not justify a city in the absence of legislative authority in contracting for or purchasing a supply of water in excess of its needs for the purpose of disposing it to another municipality. *East Newark v. New York & N. J. Water Supply Co.*, 67 N. J. Eq. 265, *aff'd* 68 N. J. Eq. 783.

² *Pikes Peak Power Co. v. Colorado*

Springs, 105 Fed. Rep. 1. Where a city has made a contract with an electric company for a supply of electric power greater than its present needs and which will go to waste unless it is sold to private individuals for such use as they desire to make of it, it may enter into a contract with a street railroad company to furnish such surplus power for a term of years for the purpose of operating the railway. The fact that the city, looking to its possible or probable future growth, and the resulting increased demand for electric lighting, might, if it had thought best to do so, have allowed its surplus electricity to be temporarily wasted, and ultimately have realized a greater revenue from its application to lighting purposes than will be realized on account of the street railway use for which it has contracted to furnish it, does not affect the power of the city. *Riverside & A. R. Co. v. Riverside*, 118 Fed. Rep. 736. Authority to sell and dispose of *surplus* water does not authorize a contract to furnish a fixed quantity of water for a fixed term. Statute construed as authorizing the sale of surplus water as such surplus might exist from time to time and forbidding the sale or use of water if thereby the supply of the city or its

principles too, where a city has an electric lighting plant which is capable without any increased expense, except a small additional expense for fuel, of furnishing light to a very much larger number of customers than it has, it may, by contract, agree to *extend its electric light service* to points beyond the city limits, if its action does not materially impair the usefulness of its plant for the purpose for which it was primarily created.¹

§ 1301. **Property acquired by Municipality is held in Trust for Public Purposes.** — Water works and lighting plants constructed and owned by a municipality for its own use and for the use of its inhabitants belong to the same class of property as wharves, parks, &c., and they are held by the municipality for similar purposes and upon similar trusts. The construction and maintenance of such works and plant are not the exercise of a strictly governmental power or purpose so far as it relates to the State at large, but such works and plants are so far *held for governmental purposes* and for the benefit of the public that they cannot be appropriated to any other use without special legislation. They are charged with a public trust of which the inhabitants of the city are the beneficiaries; and when a municipality is authorized to construct and maintain water or lighting works, the power implies a duty of the municipality, through its corporate authorities, to maintain and preserve possession of these works for the benefit of the public. The duty of the municipality in respect thereto cannot, without express statutory authority, be discharged and devolved upon another.² Without express authority the city *cannot sell its water works*.³ But it is within the power of the

inhabitants should become insufficient. *Simson v. Parker*, 190 N. Y. 19, rev'g 113 N. Y. App. Div. 888.

¹ *Henderson v. Young*, 119 Ky. 224. If a purchase by a municipality of existing water works is made in good faith primarily for the purpose of supplying its own needs and for the domestic uses of its inhabitants, the constitutionality of legislation authorizing such purchase, and the validity of any acts thereunder, including the raising of money by taxation therefore, are not affected by the fact that, incidentally, the municipality may be compelled to carry out the obligation of the owner of the works to furnish water for some takers outside the limits of the purchasing municipality. *Mayo v. Dover & F. V. Water Co.*, 96 Me. 539. Lessees of rapid transit subways belonging to

the city of New York held to have the right to use the ducts in said subways to transmit to other city railways the *excess of electric current* manufactured by it, provided such use does not interfere with the primary proposes of the subway, or the operation of the railroad therein, or the comfort or convenience of the passengers. *New York City v. Interborough R. T. Co.*, 125 N. Y. App. Div. 437, rev'g 55 N. Y. Misc. 138.

² As to the power of the legislature to select and appoint or to change the municipal agents by whom a public utility shall be controlled, see *ante*, § 116.

³ *Lake County W. & L. Co. v. Walsh*, 160 Ind. 32; *Huron Water Works Co. v. Huron*, 7 S. Dak. 9; s. c. 8 S. Dak. 169; *Ogden City v. Bear Lake & Riv. W. & Irr. Co.*, 16 Utah,

legislature to *authorize the municipality to sell and dispose of public utilities which have been constructed by it or acquired with its funds.*¹ Being held by the municipality in trust for a public

440. See also *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1. But see to the *contrary*, as to gas works, *Thompson v. Nemeyer*, 59 Ohio St. 486; *Kerlin v. Toledo*, 20 Ohio Cir. Ct. 603. See *ante*, § 991.

In *Huron Water Works Co. v. Huron*, 7 S. Dak. 9, the court, after examining the authorities, summarized its conclusions as follows: "From this examination of the authorities we conclude that there is no distinction between the nature of water works property owned and held by the city and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, court houses, fire engines, and apparatus and other property owned and held by the city for public use. All such property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it cannot be sold or disposed of by the common council of the city except under the authority of the State legislature. Such property as before stated is private property in the sense that the municipality cannot be deprived of it without compensation any more than can a private corporation be deprived of its property by the law-making power. But such property is so owned and held by the municipality as the trustee of the citizens of the municipality for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the taxpayers of the city for their use and benefit, and the law will not permit the corporation to divest itself of the trust or to deprive the citizens of their just rights as beneficiaries of the same."

In *Pennsylvania*, in holding that a borough might sell stock of a water company owned by it, the court seems to have been of the opinion, *arguendo*, that it might sell its water works under its incidental or implied right to alienate or dispose of property real or personal of a private nature held for the emolument and advantage of the municipality, unless restricted by charter. *Carlisle Gas & Water Co. v. Carlisle*, 218 Pa. 554. A water company cannot without legislative authority transfer to another its entire

property devoted to public use. If the transferee has not the corporate power to accept the property and continue the use to which it has been devoted, the transfer is not binding on the grantor or lessor. *South Pasadena v. Pasadena L. & W. Co.*, 152 Cal. 579, 588. As to power of municipality to mortgage its water works to secure bonds issued to provide funds for construction, see *Adams v. Rome*, 59 Ga. 765, cited *ante*, § 996. Lease of insufficient water works to person contracting to furnish new and adequate supply sustained. *Ogden v. Bear Lake & Riv. W. & Irr. Co.*, 28 Utah, 25.

¹ In *Cincinnati v. Dexter*, 55 Ohio St. 93, the city of Cincinnati, pursuant to authority conferred upon it in 1869, had constructed a line of railway known as the Cincinnati Southern Railway extending from the city through the States of Kentucky and Tennessee to the city of Chattanooga in the latter State. Under the power conferred by the statute, a board of trustees created by the act borrowed \$10,000,000 and the bonds of the city were issued therefor secured by a mortgage on the line of railway and its net income, and by a pledge of the faith of the city to levy taxes sufficient with the net income to pay the interest and provide a fund for the payment of the principal at its maturity. The statute authorized the trustees to lease portions of the road as the same should be constructed, and on its completion to lease the whole of it on such terms and conditions as should be prescribed by the city council. Under subsequent legislation, additional bonds were issued by the trustees until the whole amount exceeded \$18,000,000. For the security of these additional bonds the statute declared a mortgage should exist without conveyance, of the same purport as that given to secure the first issue of bonds. Statutes were passed by the legislatures of Kentucky and Tennessee respectively, which also declared that a mortgage should exist without conveyance as security for the bonds issued by the trustees. In 1887 a statute was enacted which authorized

purpose, such works and plant *are not subject to sale under execution*.¹

§ 1302. **Power to contract for Public Service of Water and Light.** — Authority to a city to construct water or gas works or to provide water or to light the city streets, whether it be derived from an express grant, or from the general power of the city in respect to police regulations, the preservation of public health and the general welfare, *confers upon the municipality authority to contract with an individual or corporation for a supply of water or light*. Any power which is sufficient to authorize the city to provide a supply of water or light implies, in the absence of special restriction, the power to make a proper contract with an individual or corporation therefor.²

the trustees upon certain conditions therein prescribed to sell the railroad "at a price and by terms of payment satisfactory to" them. In an action brought to enjoin a proposed sale pursuant to this statute, the court held that although the act for the construction of the railroad did not in terms authorize its sale, yet the legislature might subsequently authorize the municipality to sell and dispose of the railway, the ownership of the railroad by the city not being different from that of other property belonging to it for other public uses, and its sale by the duly constituted municipal authorities, when authorized by appropriate legislation, not being within any constitutional prohibition; that the fact that the contemplated sale provided that the purchasers, in addition to other considerations named, should pay to the city a percentage of the gross earnings of the railway in excess of a specified amount, did not have the effect of making the city a stockholder of the company or constitute a loan of its credit to the company within the meaning of a constitutional prohibition; that the statute providing for the sale of the railroad did not impair the obligation of the contract of the city with the bondholders; that, in any event, the creditors holding the bonds were the only parties who could take advantage of that objection; and that the fact that a portion of the railroad was in the States of Kentucky and Tennessee did not affect the validity of the sale, if the purchaser was willing to assume any risks which might arise with re-

spect to the continuance after sale of the franchises granted by the legislatures of these States.

The *lease or sale of gas works is not an executive function*, and the power to make such a lease or sale does not belong to the director of public works of a city as the head of the department, although as a legislative act it is within the clear power of the city. *Baily v. Philadelphia*, 184 Pa. 594. A city has the power to sell and transfer its *right to purchase a water works plant* reserved to it by an ordinance. *De Motte v. Valparaiso*, 161 Ind. 319. See *ante*, § 991.

¹ *New Orleans v. Morris*, 105 U. S. 600. See more fully chapter on Corporate Property, *ante*; Index, *Water and Water Works*.

² *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339; *Andrews v. National Foundry & Pipe Works*, 61 Fed. Rep. 782; *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1; *Austin v. Bartholomew*, 107 Fed. Rep. 349; *Anoka Water Works, &c. Co. v. Anoka*, 109 Fed. Rep. 580; *Mercantile Trust & Deposit Co. v. Columbus*, 161 Fed. Rep. 135; *Greenville v. Greenville Water Works Co.*, 125 Ala. 625; *Weller v. Gadsden*, 141 Ala. 642, 646; *Gadsden v. Mitchell*, 145 Ala. 137; *Denver v. Hubbard*, 17 Colo. App. 346; *State v. Tampa Waterworks Co.*, 56 Fla. 858; 47 So. Rep. 358; *Jack v. Grangeville*, 9 Idaho, 291; *Davenport Gas & Elect. Co. v. Davenport*, 124 Iowa, 22; *Newport v. Newport Light Co.*, 84 Ky. 167, 174; *Dyer v. Newport*, 123 Ky. 203; *Overall v. Madisonville*, 125 Ky. 684; 102 S. W. Rep. 278; *Conery v. New Orleans*

Express power in the city to construct and maintain water and gas works also carries with it all the necessary powers to enter into

Water Works Co., 41 La. An. 910; Lake Charles Ice, L. & Water Works Co. v. Lake Charles, 106 La. 65; Attorney General v. Detroit, 55 Mich. 181; Putnam v. Grand Rapids, 58 Mich. 416; East Jordan Lumber Co. v. East Jordan, 100 Mich. 201; Reed v. Anoka, 85 Minn. 294; Lexington v. Lafayette County Bank, 165 Mo. 671; Davenport v. Kleinschmidt, 6 Mont. 502; Brady v. Bayonne, 57 N. J. L. 379; Scheffbauer v. Kearney, 57 N. J. L. 588; Springville v. Fullmer, 7 Utah, 450. See Index, *Light; Water and Water Works*.

Authority to light the public streets and to levy and collect a tax for that purpose was held to give the power to the municipality to do this either by the construction of its own gas works, or by a valid contract with others acting within the scope of its authority. Garrison v. Chicago, 7 Biss. C. C. 480; *per Drummond*, J. But in Oconto City Water Supply Co. v. Oconto, 105 Wis. 76, the court expressed the opinion that while, under its charter, which contained general power in respect to police regulations, the preservation of public health and the general welfare, the city *might erect its own system*, it was a matter of grave doubt whether under a general authority of that character it was *authorized to contract* with a private corporation for the construction of water works to supply the city and to authorize the use of the streets for its purposes.

Authority conferred by statute on water companies to contract with cities and villages to furnish water thereto, by necessary implication, authorizes the cities and villages to contract with the water companies therefor. Hurley Water Co. v. Vaughn, 115 Wis. 470. The power to contract was held to include the power to grant to the contractor such rights and privileges in the city streets as may be required to enable it to carry out the contract. Pikes Peak Power Co. v. Colorado Springs, 105 Fed. Rep. 1; Anoka Water Works, &c. Co. v. Anoka, 109 Fed. Rep. 580. But it has been said that when the right to use the city streets is acquired as an incident to a contract to light them, the franchise or privilege is not permanent and terminates with the expiration of the

contract, and the company must then remove its pipes and mains at the request of the municipality. Horner v. Eaton Rapids, 122 Mich. 117. The fact that the water works system of the contracting company does not furnish water to the whole territory of a municipality does not render a contract for a supply of water void. Lewick v. Glazier, 116 Mich. 493; Mitchell v. Negaunee, 113 Mich. 359.

Although a municipality may have general power to contract for lighting, yet when its charter also contains a provision for the *submission to the electors* of the question whether it shall construct and maintain its own lighting plant and the electors have by vote determined that it should do so, the council, it was held, cannot thereafter contract with a company for lighting for a term of years. George v. Wyandotte Elect. L. Co., 105 Mich. 1. But in *Pennsylvania* it is held that a vote to borrow money to construct a municipal plant does not preclude the municipality from entering into a contract for lighting its streets. Seitzinger v. Tamaqua, 187 Pa. 539.

Power to a city to purchase and construct water works *does not confer*, without any other grant, authority to procure a supply of water by paying hydrant rentals. Lexington v. Lafayette County Bank, 165 Mo. 671. Statutory authority to acquire electric light works and machinery does not authorize a city to *guarantee payment of the bonds* of a lighting company which contracts to furnish light to the city. Lynchburg & R. St. R. Co. v. Dameron, 95 Va. 545. A provision in the charter of a city that it shall have power "by ordinance to make contracts with and authorize any person, company, or association to erect gas works, electric or other light works in said city, and give such person, company, or association the privilege of furnishing light for the streets, lanes, and alleys of said city, for any length of time not exceeding five years," relates to gas works, electric light works, and other plants of a permanent and extensive character, and does not include within its provisions a contract for *lighting the streets by gasoline lamps*, requiring no plant but the posts and lamps which are to remain the property of the con-

proper or needful *subsidiary contracts and arrangements*.¹ The power to contract is a matter which is delegated to the local authorities to be exercised according to their *discretion*; and, in the absence of fraud, and whilst they act within the authority delegated to them, their acts will not be reviewed or controlled by the courts.² If there

tractors. Such contract may be made by simple resolution of the council under the general charter power to make contracts necessary to the exercise of the corporate powers. *Lincoln v. Sun Vapor Gas Light Co.*, 59 Fed. Rep. 756. Where a village council was authorized to contract from year to year or for any period of time not exceeding ten years, for gas, electric, or other lights, it was held that the power to so contract was exhausted by making a contract for ten years, and the village could not make another contract for lighting while that contract continued. *Morrice v. Sutton*, 139 Mich. 643.

In the absence of a statutory requirement to that effect, the municipality is under no obligation to *solicit bids* for a supply of water. *Brady v. Bayonne*, 57 N. J. L. 379, 381; *Jersey City v. Kearny*, 72 N. J. L. 109, 111. A contract for street lighting is not a contract for *street work* within the meaning of a statute requiring such contracts to be let by *competitive bidding*. *Electric Light & Power Co. v. San Bernardino*, 100 Cal. 348; *Tanner v. Auburn*, 37 Wash. 38.

¹ *Roekebrandt v. Madison*, 9 Ind. App. 227. Where property owners lay pipe in a street under an understanding with the city officials that the city is under no obligation to pay therefor, but that when a sufficient number of houses exist in the street application might be made for refunding to the property owners the cost of the pipe laid, it is within the power of the municipality to purchase such pipe from the property owners and make it a part of its own water works system, and such purchase is not the rendering of financial assistance by the gift of public funds to an individual. *State v. St. Louis*, 169 Mo. 31. Although the duty of supplying water to a city does not contemplate that the city authorities should enter into a *general plumbing business*, yet a regard to the safety of the works gives them some discretionary power not only in supervising the connections made by others, but,

when large quantities of water are likely to be used, to themselves prevent waste and insure security. The city authorities may therefore lay pipes to connect a building using a large quantity of water upon the application of the owner thereof, and collect the cost thereof from the owner of the building. *Hale v. Houghton*, 8 Mich. 458. A city having general authority to secure a water supply and to construct works for that purpose, does not exceed its authority by *using driven wells*. *Westphal v. New York City*, 75 N. Y. App. Div. 252. A city authorized to grant a franchise to a water company to supply water to the city and its inhabitants cannot either *acquire a lot for the erection of the works of such private company*, or *give the lot or its use to such company for its private use or gain*. *Cain v. Wyoming*, 104 Ill. App. 538.

² *Fidelity Trust & Guaranty Co. v. Fowler Water Co.*, 113 Fed. Rep. 560; *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 125; *Indianapolis v. Indianapolis Gas L. & C. Co.*, 66 Ind. 396; *Vincennes v. Citizens Gas Light Co.*, 132 Ind. 114; *Roekebrandt v. Madison*, 9 Ind. App. 227; *Conery v. New Orleans Water Works Co.*, 41 La. An. 910; *Reed v. Anoka*, 85 Minn. 294; *Van Reipen v. Jersey City*, 58 N. J. L. 262; *Wade v. Oakmont*, 165 Pa. 479. Index, *Actions; Mandamus; Powers*.

Under a power "to contract with and procure individuals or corporations to construct and maintain water works, on such terms and under such regulations as may be agreed on," a city may agree that any one undertaking to construct and maintain water works for its benefit shall have the *right to assign his contract*, or to sell or mortgage the plant. *American Waterworks Co. v. Farmers' Loan & Trust Co.*, 73 Fed. Rep. 956. In *Utah* it is held that a *taxpayer may enjoin* the city authorities from wasting the funds of the city by paying exorbitant and unreasonable rentals pursuant to a contract for water supply. *Brummitt v. Ogden Waterworks Co.*, 33 Utah, 285.

is no limitation of the power to contract, the municipality *may modify an existing contract* or substitute a new one in its place, precisely in the same manner as a natural person, provided only that such modification or new contract be a reasonable and proper exercise of its power.¹

§ 1303. **Capacity in which Municipality acts in furnishing or contracting for Water or Light.** — It has been pointed out elsewhere,² that municipal corporations have been considered to possess two classes of powers; and that those which are granted *for public purposes exclusively* belong to the body corporate in its public, political, or municipal character, and are *legislative and governmental* in their nature, whilst if the grant is for the purpose of *private advantage and emolument*, though the public may derive a common benefit therefrom, the corporation acts in a *private or proprietary capacity*.³ No uniform rule can be applied to all the circumstances in which the municipality acts under power to furnish water or light, or to contract therefor. Thus, when it is sought to charge the municipality with *responsibility for property destroyed through failure to exercise its power to furnish water for fire protection* or for negligence in the exercise of the power, it has been repeatedly said that the grant of power must be regarded as exclusively for public purposes, and as belonging to the municipal corporation, when assumed, in its public, political, or municipal character.⁴ Similarly, in *granting a franchise or privilege*, or giving its consent to a public service corporation to use the streets and highways of the municipality for the purpose of *laying its mains, its pipes, &c.*, the municipality exercises a delegated legislative power derived from the State, and cannot be regarded as acting solely in its so-styled private and proprietary capacity, although the object of the exercise of the power may be to enable the grantee of the franchise or privilege to perform a contract to furnish the municipality and its inhabitants with water or light.⁵ A further instance of the exercise of *legislative authority* in dealing with public service corporations is the exercise by a city of delegated authority *to regulate the rates* to be charged to the municipi-

¹ *Arnold v. Pawtucket*, 21 R. I. 15.

² *Ante*, §§ 39, 109-131.

³ See *ante*, chap. iv., for discussion of public and private or proprietary rights of municipalities. *Post*, Ch. on Actions and Liabilities.

⁴ See cases cited *infra*, § 1340.

⁵ See *ante*, § 1227. The fact that the streets of a city are public high-

ways and that their use for public purposes is always subject to the regulation and control of the legislature, furnishes the simplest illustration of the legislative nature of the power which the city exercises in granting privileges to lay pipes and mains therein. See also cases cited under § 1304, *post*. Index, *Powers and Duties*.

pality and individual consumers for water or light. Such power is clearly legislative and governmental in its character, being intended for the prevention of abuses; and in the exercise of the power it is impossible to regard the municipality as acting in a private and proprietary capacity.¹ But in other respects the municipality acts in what is, in many cases, called its *private and proprietary capacity*. Although it is probably impossible to lay down any rule by which it can be determined in all cases where its legislative, governmental, and discretionary functions end, and the so-called private and proprietary character of its acts begins, there are cases that hold that in executing and carrying into effect the powers conferred upon it by constructing and erecting its own water or lighting plant, in managing and operating the plant, and in the furnishing and distribution of water or light to inhabitants and consumers, it acts or under certain circumstances will be considered to act in a proprietary and individual capacity rather than by virtue of its legislative and governmental functions.² If the municipality obtains its supply of water or light by a contract with a public service corporation or an individual, it acts in its so-called *private and proprietary capacity in negotiating and executing the contract*, and in questions arising in the performance of the contract the municipality should be treated in the same manner as a private individual or corporation and is subject to the same general rules of law, restrictions, and responsibilities.³ It has been held that the acts

¹ See *post*, §§ 1324, 1325.

² *South Pasadena v. Pasadena L. & W. Co.*, 152 Cal. 579, 593; *St. Louis Brewing Assoc. v. St. Louis*, 140 Mo. 419; *Esberg Cigar Co. v. Portland*, 34 Oreg. 282; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175. See *ante*, chap. i. Because a city acts in a private and proprietary capacity in maintaining and operating its water works, it is not obliged to limit its rates to sums merely sufficient to reimburse it for the expense of operation, but it may impose such rates as will yield a revenue or income therefrom provided the rates be not excessive or unreasonable. *Wagner v. Rock Island*, 146 Ill. 139. The private and proprietary capacity in which a city acts in maintaining and operating an electric light plant justifies it in making contracts to *dispose of surplus light* beyond its limits. *Henderson v. Young*, 119 Ky. 224.

³ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Safety Insulated*

Wire & Cable Co. v. Baltimore, 66 Fed. Rep. 140; *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. Rep. 271, 40 U. S. App. 257; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. Rep. 720; *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1; *Omaha Water Works Co. v. Omaha*, 147 Fed. Rep. 1, 5; *Weller v. Gadsden*, 141 Ala. 642, 658; *Gadsden v. Mitchell*, 145 Ala. 137; *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 125; *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219; *State v. Topeka Water Co.*, 61 Kan. 547; *Conery v. New Orleans Water Works Co.*, 41 La. An. 910; *Reed v. Anoka*, 85 Minn. 294; *State v. Great Falls*, 19 Mont. 518; *Cincinnati v. Cameron*, 33 Ohio St. 336, 367; *Esberg Cigar Co. v. Portland*, 34 Oreg. 282; *Appeal of Millvale Borough*, 162 Pa. 374; *Lansdowne v. Citizens' Elect. L. & P. Co.*, 206 Pa. 188; *Ogden v. Bear Lake & Riv. W. & Irr. Co.*, 28 Utah, 25. The acts of the city being such as pertain to it in its private and

of a municipality constructing, operating, or maintaining water works or a lighting plant are not governmental, but are or may be acts in its proprietary or corporate capacity, and the municipality is or may be liable for *damages caused by negligence* in such construction, maintenance, or operation,¹ but the authorities are conflicting. The general subject of municipal liability in such cases is discussed in a subsequent chapter, to which the reader is referred.

proprietary capacity, rather than in its governmental capacity, an ordinance may not under certain circumstances be necessary to enable its officers to make a contract for lighting the streets or supplying the municipality with water. *National Tube Works Co. v. Chamberlain*, 5 Dak. 54; *Gosport v. Pritchard*, 156 Ind. 400; *Ogden v. Bear Lake & Riv. W. & Irr. Co.*, 28 Utah, 25. See also *Ogden City v. Weaver*, 108 Fed. Rep. 564.

In *Kaukauna Elect. L. Co. v. Kaukauna*, 114 Wis. 327, where a *distinction* is made between those parts of an ordinance which grant a franchise by virtue of the delegated power from the State and those parts which stipulate for a supply of light, it is said that only the latter come within the city's business or proprietary powers. The court said: "In dealing with this street lighting contract the parties stand purely and simply as contractors, governed by the same rules of law which govern private contractors, except so far as the known situation of each may control the interpretation of their mutual promises. The company is to do certain things as a consideration of the city's promise to pay, and, as in the case of any other contract, the city's duty to pay arises only on performance of such of the undertakings of the company as can be fairly said to constitute essential consideration therefor. This consideration makes it necessary to examine the various failures of duty on the part of the plaintiff alleged and found to have occurred, in order to ascertain whether any of them were fairly germane to the contractual aspect of the ordinance, and conditions precedent to the duty of the city to perform its part of that contract." The conclusion which the court reached in this examination was that obligations to place the company's wires underground when ordered to do so by the city authorities, and to paint

its poles in the manner required by a city ordinance, related to the franchise rights, and not to the contract obligations in relation to a supply of gas; that an agreement by the company to give, and, whenever requested, to renew, a bond conditioned to indemnify the city from all damages which might in any way arise out of the exercise of the privileges granted, and for the faithful compliance by the company with all the terms and provisions of the contract applied to both rights or obligations, *i. e.*, the condition to indemnify the city from damages growing out of the exercise of the privilege granted related to the franchise rights and obligations, whilst that for faithful compliance with the terms and provisions of the ordinance included within its operation the contract obligations; and that an undertaking to install incandescent street lamps where and when demanded by the council related to its contract obligations.

¹ *Electric Light Plants*: *Posey v. North Birmingham*, 154 Ala. 511; 45 So. Rep. 663; *Devoust v. Alameda*, 149 Cal. 69; *Eaton v. Weiser*, 12 Idaho, 544; *Palestine v. Siler*, 225 Ill. 630, aff'g 128 Ill. App. 309; *Aiken v. Columbus*, 167 Ind. 139; *Richmond v. Lincoln*, 167 Ind. 468; *Owensboro v. Knox*, 116 Ky. 451; *Dickinson v. Boston*, 188 Mass. 595; *Yazoo City v. Birchett*, 89 Miss. 700; *Todd v. Crete*, 79 Neb. 671; *Twist v. Rochester*, 37 N. Y. App. Div. 307, aff'd 165 N. Y. 619; *Fisher v. New Bern*, 140 N. Car. 506; *Herron v. Pittsburgh*, 204 Pa. 509; *Emery v. Philadelphia*, 208 Pa. 492.

Water Works: *Winona v. Botzet*, 169 Fed. Rep. 321; *Hourigan v. Norwich*, 77 Conn. 358; *Chicago v. Selz*, 202 Ill. 545; *Roberts v. St. Mary's*, 78 Kan. 707; 98 Pac. Rep. 211; *Hand v. Brookline*, 126 Mass. 324; *Fox v. Chelsea*, 171 Mass. 297; *Lynch v. Springfield*, 174 Mass. 430; *Dunstan v. New York City*, 91 N. Y. App. Div.

§ 1304. **Grants of Franchises to Corporations and Individuals.**—

Although some of the cases use language which would seem to imply that the right to furnish a municipality and its inhabitants with water or light, irrespective of any use of the city streets, is a franchise belonging to the State which can only be exercised by its authority, the better view seems to be that such right, where no fixed toll is demanded or corporate rights affecting the public are exercised, is on the same basis as the rights of individuals to engage in any ordinary business.¹ But the business of furnishing water and

355; *Esberg Cigar Co. v. Portland*, 34 Oreg. 282; *Philadelphia v. Gilmartin*, 71 Pa. 140; *Brown v. Salt Lake City*, 33 Utah, 222.

For a more extended discussion of the *implied liability* of the city for its negligence and that of its officers and servants, see *post*, chapter on Actions and Liability.

Ferryboat: *Townsend v. Boston*, 187 Mass. 283.

In *Wiltse v. Red Wing*, 99 Minn. 255, it was held that a city is liable for damage caused by the *collapse of its reservoir* and the consequent flooding of property without proof of negligence on its part. See Index, *Actions and Liability; Negligence; Torts*. In *Judson v. Winsted*, 80 Conn. 384, where the plaintiff brought an action to recover damages to his horse and carriage through the act of an employee of the municipality in negligently flushing a borough hydrant, the court *differentiated as to the character* of the act performed by the employee of the borough, holding that if the hydrant was flushed solely to determine whether it was in a fit condition, the act was the performance of a public governmental duty and the borough was not liable; if, however, the flushing had for its purpose, wholly or in part, the improvement of the borough water supply for disposal to consumers, then the borough was liable.

¹ The *right to produce and sell electricity* as a commercial product is open to all without a franchise or legislative authority; but the right to use the city streets for the distribution thereof is a franchise which can only exist by legislative authority. Hence one who has no franchise to use the streets is not entitled to rent from the city special privileges in the city conduits to enable him to engage in the business of distributing electricity. *Purnell v.*

McLane, 98 Md. 589. In *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, it was held that an exclusive franchise granted to supply water to the inhabitants of the municipality by means of pipes and mains laid through the public streets, is violated by a grant to an individual by the municipality of the right to supply his premises with water by means of a pipe or pipes so laid. But the court declared that the grant did not assume to interfere with the right of any person or corporation to supply his place of business or residence with water therefrom obtained otherwise than by pipes, mains, or conduits laid in the public ways of the city.

In *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. An. 138, 147, it was said: "The right to operate gas works and to illuminate a city is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas pipes, erect lamp posts, and carry on the business of lighting the streets without special authority from the sovereign. It is a franchise belonging to the state, and in the exercise of the police power the State could carry on the business itself or select one or several agents to do so." This language is quoted with approval in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 659, but although the language might bear the interpretation that the business of operating gas works and illuminating a city is, in itself and without reference to the means adopted, a franchise, the context shows that the language must be construed with reference to the means adopted for the transaction of the business rather than to the business itself. The Constitution of *Idaho* (Art. xv, § 2) provides that "The right to collect rates or compensation

light, when carried on by a corporation or individual, of necessity involves the use of the streets and highways of the municipality; and the right to lay pipes, mains, and conduits, and to erect poles and stretch wires therein, and to maintain, operate, and use them, is a *franchise vested in the State*, which can only be exercised by a corporation or individual pursuant to authority granted by the State.¹ In the absence of any constitutional prohibition or restriction the legislature may, by statute, confer the franchise upon an individual or upon a corporation without the consent or over the objection of the municipality,² and formerly the franchise or privilege usually had its origin in a direct grant from the legislature, — frequently in a special law. But the prohibition of special laws and the growing tendency to regard these franchises as matters of peculiarly local concern have led to the adoption of other methods which vary greatly in form, although they have the same general result. The widest and most sweeping grant of such a right is probably that contained in the Constitution of California, by which the franchise or right to use the city streets for furnishing water or light is

for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise and cannot be exercised except by authority of and in the manner prescribed by law."

¹ *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Louisville Gas Co. v. Citizens' Gas Light Co.*, 115 U. S. 683; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. An. 138; *Horne v. Eaton Rapids*, 122 Mich. 117; *People v. Deehan*, 153 N. Y. 528; *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510; *Skaneateles Water Works Co. v. Skaneateles*, 161 N. Y. 154; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *State v. Cincinnati Gas Co.*, 13 Ohio St. 262; *Ashland v. Wheeler*, 88 Wis. 607. See *ante*, § 1210, and Mr. Justice Bradley's accurate definition of a "franchise" in its strict legal meaning. A statute declaring that no franchise or privilege granted by a municipality shall be called in question unless action is begun within six years after the grant, and that after that period such franchise or privilege shall be deemed valid, operates both as a limitation upon actions and as a validating act. *Agua Para Co. v. Las Vegas*, 10 N. Mex. 6.

² *Coverdale v. Edwards*, 155 Ind.

374; *La Harpe v. Elm Township Gas Co.*, 69 Kan. 97; *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 512. Incorporation to distribute water, with authority to lay pipes therefor without restriction, confers the right to do so in the usual way, and includes the right to use the streets in laying the pipes. *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606.

Generally the power of *eminent domain* dwells in a State for *domestic uses only*, and cannot be exercised to promote the public use of a foreign State, but the State may authorize a foreign corporation to exercise the power of eminent domain for public uses to be performed within the limits of the State. *Columbus Waterworks Co. v. Long*, 121 Ala. 245. See also *Peabody v. Westerly Water Works*, 20 R. I. 176. A Georgia corporation was engaged in supplying water to the inhabitants of two cities in Alabama as well as a city in Georgia. It sought to condemn lands in Alabama for the purposes of its water works. The court held that it might exercise the power of eminent domain in Alabama for the public purposes to be performed in that State, and that the right was not affected by the fact that public uses in another State would be promoted. *Columbus Water Works Co. v. Long*, 121 Ala. 245.

thrown open to any individual or domestic corporation organized for the purpose, when there are no public works owned and controlled by the municipality for supplying the same.¹ But in other

¹ *California Constitutional Provision*: "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company duly incorporated for such purpose under and by authority of the laws of this State shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof and of laying down pipes and conduits therein, and connections therewith so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof." Cal. Const. 1879, Art. XI. § 19, as amended in 1884.

Construction: This constitutional provision is a direct grant from the people to the persons and corporations therein designated of the right to lay pipes in the streets of a city for the purpose specified without waiting for legislative authority or being subject as to such right to any restriction from that branch of the government. *People v. Stephens*, 62 Cal. 209; *In re Johnston*, 137 Cal. 115. The prior grant of a similar franchise or privilege to other persons or corporations is no reason why an application should not be granted. The Constitution intends that there should be no restriction upon competition in supplying water and light, and neither the municipality nor the legislature can impose the condition that the franchise be advertised and sold to the highest bidder. Such course necessarily implies that the highest bidder will secure an exclusive right to the exercise of the franchise. *Pereria v. Wallace*, 129 Cal. 397.

Under this constitutional provision the local authorities have no power to prohibit the manufacture of gas, although it may in the legitimate exer-

cise of its powers regulate its manufacture and the place thereof. *In re Smith*, 143 Cal. 368. A municipality within which the right is sought to be exercised cannot impose additional burdens or terms as conditions to its exercise, *e. g.*, it cannot require a permit as a condition upon which the pipes may be laid in its streets. The provision that the work is to be done under the direction of the superintendent of the streets gives all the protection for the use of the street that could be obtained under a permit and under the provisions authorizing the municipality to prescribe regulations for damages and indemnity for damages, the city is fully protected against any pecuniary loss or detriment. *In re Johnston*, 137 Cal. 115. An ordinance prohibiting the erection of gas works in a sparsely settled rural district including only fifteen habitations, which has the effect to stop the operation of the gas works of the petitioners, in the immediate vicinity of which there are no dwelling-houses, is unreasonable and oppressive, and cannot be justified as an exercise of the police power of the local authorities to regulate the place where gas shall be manufactured. *In re Smith*, 143 Cal. 368. Under the Constitution, if it is the duty of the local authorities to grant a franchise when petitioned for, they must take each and every step required by the law for that purpose without further demand than the presentation of a petition. *Santa Rosa Lighting Co. v. Woodward*, 119 Cal. 30; *Pereria v. Wallace*, 129 Cal. 397.

A gas light company, exercising a franchise under this constitutional provision, does not forfeit the franchise by supplying gas for heating and cooking as well as for lighting purposes, the streets not being subjected to any additional burden thereby. *People v. Los Angeles Independent Gas Co.*, 150 Cal. 557. This constitutional provision gives the municipality the power to regulate the charges of any company furnishing water or artificial light within the city, and the right to regulate is not affected by the use made of gas. It covers all gas passing through the pipes for cooking and

States the general tendency, well grounded in reason, is for the State to confer upon the local municipal authorities the right to represent it in the matter of grants of franchises to the extent that the final act necessary to the creation or exercise of a franchise must be done by such authorities. This delegation of authority is sometimes effected by a direct authority to grant a franchise for the purpose, sometimes by requiring the consent of the municipality to the formation of a corporation for the purpose, and sometimes by requiring the consent of the municipality to the use of the streets and highways. The legal effect of a consent by the municipality given to the formation of the corporation or to the use of the highways is the same as if the local authorities in form granted the franchise, and an interest in the land.¹ A disposition has sometimes been shown to regard these franchises as originating with the municipality rather than with the State from whom the municipality derives its authority. Such franchises are not corporate franchises. Corporate rights and privileges are only such as come to the corpora-

heating purposes as well as for *lighting*. *Denninger v. Pomona Recorder's Court*, 145 Cal. 629, 632; *Denninger v. Pomona Recorder's Court*, 145 Cal. 638. The municipality may by ordinance provide for punishing the illegal exaction of an excessive gas rate and may subject the agent of the company to punishment. *Denninger v. Pomona Recorder's Court*, 145 Cal. 629. Under this constitutional provision the municipality has power to fix the rates to be charged for water, and to control the laying and repairing of pipes in the streets, as against another city engaged in supplying such water within municipal limits as well as when an individual or water company does so. *South Pasadena v. Pasadena L. & W. Co.*, 152 Cal. 579.

¹ *People v. Deehan*, 153 N. Y. 528; *Ghee v. Northern Union Gas Company*, 158 N. Y. 510; *People v. O'Brien*, 111 N. Y. 1. See generally as to the *consent of the municipality*, to the use of the streets for public utilities, *ante*, §§ 1223-1231.

When the *consent of a municipality* is required to be filed with the charter of a water company, the legislative intent is to cast upon the representatives of the municipality the duty of determining whether the company proposed to be formed for a purpose of great public interest should be formed or not. Such a determination can only

be made by considering who propose to form the company and on what terms it is to be organized. The consent required therefore is not a consent to the formation of any company, but of the company proposed by the persons and in the manner proposed. It is the duty of the corporate authorities to determine whether the company should be formed by those who propose to form it. *Tyler v. Plainfield*, 54 N. J. Law, 526; *Kemble v. Millville*, 69 N. J. Law, 637. Under a statute requiring the consent of the municipality to the formation of a company, a city, town, or village may consent to the formation of more than one company. *Atlantic City Water Co. v. Consumers' Water Co.*, 51 N. J. Law, 420.

A general unrestricted grant of authority to a city to light streets and public places authorizes the city to *grant franchises to use the streets* for the construction and operation of lighting plants. *Levis v. Newton*, 75 Fed. Rep. 884. Power to regulate and control streets and public places within the municipality and abate any encroachments, obstructions, or nuisances thereon, authorizes the municipality to make a grant of a right of way for the purpose of laying *gas pipes and mains* in the streets. *Quincy v. Bull*, 106 Ill. 337; *Chicago Mun. G. L. & F. Co. v. Lake*, 130 Ill. 42,

tion through its organization pursuant to statute, and do not include the right to use public property in connection with a public or *quasi*-public service, such as furnishing water or light to a city and its inhabitants. Theoretically, these franchises or privileges may be said to come by grant from the State, but the municipality, where its consent is required, is under no obligation to grant them or to consent to their creation, and hence it has been said (not perhaps with entire accuracy) that they are^{*} created by the municipality under its charter powers to contract with reference to the use of streets.¹ Nevertheless it is true, and must always be true, and it is important to maintain this truth unimpaired and unobscured, namely, that all franchises, properly speaking, originate and must originate with or under the authority of the legislative body of the State. Any municipal authority is purely derivative, and must flow from the legislative fountain. When the statute requires the consent of the "municipal authorities," and no method of manifesting this consent is pointed out, the fair and reasonable inference is that any body which represents the community in a general sense or in respect to the public rights which are to be granted is the body which is to give the consent. In a city, in the absence of some definite provision of law to the contrary, this body would be the common council or other body having like powers.² When the manner in which the municipality shall act in creating or granting the franchise is limited or restricted by Constitution or statute, *e. g.*, if notice of the application is required to be published, or if the proposition is required to be submitted to a vote of the electors, a compliance with these conditions and restrictions is essential to the validity of the franchise.³ The franchises so created vest in the corporation or indi-

¹ Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234; St. Cloud v. Water, Light & Power Co., 88 Minn. 329; Blair v. Chicago, 201 U. S. 400.

² Ghee v. Northern Union Gas Co., 158 N. Y. 510; People v. Cromwell, 89 N. Y. App. Div. 291.

³ When the statute authorizing a grant of a franchise to a water or light company requires the consent of the majority of the qualified voters thereto, an attempted grant without such consent is invalid. Carthage v. Carthage Light Co., 97 Mo. App. 20. Under a statutory provision authorizing cities "to erect water works or to establish and maintain gas works or electric light plants or to authorize the erection of the same, but no such works shall be erected or authorized until" the ma-

jority of the voters have approved the same at an election, a city cannot grant a franchise to erect poles and wires in the city streets for electric lighting without the approval of the erection of such plant by the voters of the city. Hanson v. Hunter, 86 Iowa, 722; Keokuk v. Fort Wayne Elect. Co., 90 Iowa, 67. An extension of an existing franchise is a grant of a franchise within the meaning of a statute requiring the reservation of compensation to the city and submission to a vote of the electors. Poppleton v. Moores, 62 Neb. 851. When a statute provides that no franchise for water works shall be granted or authorized until after notice of the application therefor has been published or submitted to a vote, the purpose of the

vidual receiving it an indefeasible interest in the use of the land constituting the streets of the municipality which is perpetual or limited to a term of years according to the provisions of the grant.¹ The duration of the corporate term of the grantee does not necessarily control the duration of the franchise or privilege. A franchise in perpetuity may be granted to and vested in a corporation whose term is of limited duration. If at the end of the term of the corporate life the existence of the corporation is not extended, the property which it owns is an asset divisible among the stockholders after the payment of its debts; and in a case where the franchise is transferable any company itself having corporate authority for that purpose can purchase the outstanding term and exercise the franchise and privileges thereafter.² A grant of a franchise or of rights in public property is always *to be strictly construed* in favor of the State, and will not operate as a surrender of sovereignty any further than is expressly declared or clearly shown by the terms of the grant. In case of

statute is to advise the property owners of the city, not only that a franchise is desired, but also of the terms of such franchise. Hence, a *definite proposal must be made* in such form that those interested may by examination thereof know just what is contemplated. *Hall v. Cedar Rapids*, 115 Iowa, 199. When notice of a franchise is required to be given, or if it is required to be submitted to a vote of the people, the terms of the franchise or ordinance cannot be materially changed *after the notice or after the vote*. *Hall v. Cedar Rapids*, 115 Iowa, 199. But when the question has, as required by the statute, been submitted to a majority of the voters, an ordinance embodying the contract, passed after election, is not invalidated by the fact that it differs in terms from that submitted to a vote when there is no wide departure, and the changes do not appear to be detrimental to the interests of the city or indicate bad faith on the part of the city council. *Centerville v. Fidelity Trust & Guaranty Co.*, 118 Fed. Rep. 332.

The consent of a municipality to the laying of water pipes required by a statute is not dispensed with by the consent of the municipality to the incorporation of the company proposing to lay the water pipes also required under a different section of the statute. *Franklin v. Nutley Water Co.*, 53 N. J. Eq. 601; *Saddle River v. Garfield Water Co.* (N. J.), 32 Atl. Rep. 978.

See also *Stockton v. Atlantic Highlands, R. B. & L. B. Elect. R. Co.*, 53 N. J. Eq. 418. Where the consent of the town committee of a township is necessary before laying water pipes in the streets of the township the municipality is entitled to a preliminary injunction to prevent the laying of pipes without its consent as the only method of securing to it an adequate protection of its rights. *Franklin v. Nutley Water Co.*, 53 N. J. Eq. 601.

¹ *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510; *People v. O'Brien*, 111 N. Y. 1; *Blair v. Chicago*, 201 U. S. 400. As to the *duration of street franchises*, see *ante*, §§ 1265-1268.

A proviso in an ordinance that "the acts and doings of the company under this ordinance shall be subject to any ordinance or ordinances that may be hereafter passed by the city" *does not convert* the grant into a mere *revocable permit*. *New Orleans v. Great Southern Tel. & Tel. Co.*, 40 La. Ann. 41. But if the grant contain a condition that it may be revoked at the pleasure of the municipality, it is merely a license. *Coverdale v. Edwards*, 155 Ind. 374.

² *Detroit v. Detroit Cit. St. R. Co.*, 184 U. S. 368, 395; *Detroit Cit. St. R. Co. v. Detroit*, 12 C. C. A. 365, 64 Fed. Rep. 628; *People v. O'Brien*, 111 N. Y. 1; *Miner v. New York Cent. & H. R. R. Co.*, 123 N. Y. 242; *State v. Laclede Gaslight Co.*, 102 Mo. 472.

ambiguity or fair doubt as to the scope of the grant the settled rule of construction is to resolve the matter in favor of the public.¹ A franchise to use the city streets for gas is usually to be deemed distinct and separate from a franchise to use the streets for the purpose of distributing electricity, and power to operate a gas plant does not include the power to operate an electric light plant. The permission to use the streets for the one purpose does not include permission to use them for the other.² But the rule that public grants of fran-

¹ *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 33, 34; *Blair v. Chicago*, 201 U. S. 400 (as to duration of certain street railway franchises in Chicago); *Valparaiso City Water Co. v. Valparaiso*, 33 Ind. App. 193; *State v. Murphy*, 130 Mo. 10; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *People v. Deehan*, 153 N. Y. 528; *Appeal of Scranton El. L. & Heating Co.*, 122 Pa. 154; *Woods v. Greensboro Nat. Gas Co.*, 204 Pa. 606. But the contract should be fairly construed. *Powers v. Detroit*, G. H. & M. R. Co., 201 U. S. 543; *Blair v. Chicago*, 201 U. S. 400.

A natural gas company authorized by statute to locate and appropriate a right of way for laying and maintaining a pipe line for the transportation and distribution of natural gas has not the right, as an *incident to its franchise*, to construct and maintain on the same right of way, a *telegraph or telephone line* to be used only in the necessary operation of the pipe line. *Woods v. Greensboro Nat. Gas Co.*, 204 Pa. 606. A corporation organized for the purpose of owning and operating gas and electric plants and water works to furnish light, power, and water to a city and neighboring towns and their inhabitants, cannot exercise a power of eminent domain granted by statute for the purpose of building and maintaining a *mill dam* to gather water power to run a public mill, although the purpose of the company is to create a water fall and thereby obtain water power with which to manufacture electricity and gas. *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 235. A statute which confers upon a gas light company power to manufacture and sell gas for the purpose of lighting the streets, buildings, &c., in a village "and its vicinity" only authorizes it to furnish gas for lighting buildings, &c. in the village and buildings in

the immediate vicinity of, or adjoining the village. It does not authorize the company to enter other places and territory constituting an independent municipal government beyond and outside of the village. Hence, it cannot enter into an independent municipality four miles distant from the village and lay pipes in the streets thereof. *Madison v. Morristown Gas Light Co.*, 65 N. J. Eq. 356.

A franchise to use the streets for water pipes is not to be construed *more strictly against the city* than the water company on the ground that the contract was prepared by the city with care and at leisure, and accepted by the water company without opportunity to consider its provisions as in case of a policy of insurance. *Valparaiso City Water Company v. Valparaiso*, 33 Ind. App. 193.

² *Capital City Gas Light & F. Co. v. Tallahassee*, 186 U. S. 401; s. c. 42 Fla. 462; *Newport v. Newport Light Co.*, 89 Ky. 454. See also *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435. The provisions of a statute authorizing a gas company to furnish gas within a city, and permitting the local authorities to contract therewith for a supply of light which also contains a provision that no such company shall go into operation in any city or village where another such corporation has already been formed, until after the question shall have been submitted to the qualified voters of the municipality and authorized by ordinance, may, by their purport and intent, be limited to those corporations which are engaged in the business of furnishing *artificial* gas. Hence, it has been held that such provision does not prohibit a company engaged in furnishing *natural* gas from entering a city or village where a corporation already exists for the purpose of furnishing

chises are to be construed strictly against the grantee simply means that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant.¹ If the franchise be granted by the authorities of the municipality, the annexation of the territory in which the franchise is to operate to another municipality, or a change in the form of government of the municipality, does not change the rights of the grantee of the franchise.² A grant of authority to use the streets of a municipality for the purpose of conducting water or gas without any express limitation, is not to be deemed *restricted to existing streets and highways*, but is to be construed as extending to streets and highways as subsequently enlarged, changed, or opened.³ The franchise so created is not necessarily limited to the municipality within which the public service is to be performed. For example, the legislature may by statute authorize a water company to lay its water pipes in the streets of an adjoining municipality whenever it is necessary effectually and properly to execute the purposes for which the water company is created.⁴ A franchise to a public service corporation must be construed both with reference to the powers of the municipality to grant it and the capacity of the corporation to receive it. Thus, when by statute it appears that it is the intention that rates for water

artificial gas. Circleville Light & Power Co. v. Buckeye Gas Co., 69 Ohio St. 259. See also Warren Gas Light Co. v. Pennsylvania Gas Co., 161 Pa. 510; Wilson v. Tennent, 61 N. Y. App. Div. 100, aff'd 179 N. Y. 546.

¹ People v. Deehan, 153 N. Y. 528.

² Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606. *Index, Boundaries.* The authorities of a town granted a gas light company authority to lay conductors for conducting gas in and through the public streets and highways of the town. A portion of the town for which such consent was granted was thereafter incorporated into a village. It was held that the change from town to village government did not affect the rights of the gas company, and that the village authorities could not arbitrarily refuse to permit the company to lay its conductors in a street within the village limits, which was opened subsequently to the grant. People v. Deehan, 153 N. Y. 528.

³ People v. Deehan, 153 N. Y. 528. If the company is authorized to use the streets of a municipality, the

authority conferred extends to and includes streets in territory subsequently added to the city by annexation. Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606.

⁴ Pelham Manor v. New Rochelle Water Co., 143 N. Y. 532; Rochester & L. O. Water Co. v. Rochester, 176 N. Y. 36. As to power to supply water to other municipalities, see *ante*, §§ 1299, 1300. Authority to lay water pipes through an adjoining municipality is not necessarily limited to cases where the adjoining municipality intervenes between the source of supply and the municipality to be supplied; the authority may be executed whenever it is necessary to lay the pipes effectually and properly to execute the purpose for which the water works company was created. Pelham Manor v. New Rochelle Water Co., 143 N. Y. 532. In *Pennsylvania*, water companies having power to supply water to the inhabitants of the town, city, or district where it is located, cannot supply other municipalities. Bly v. White Deer Mountain Water Co., 197 Pa. 80.

supplied to the inhabitants shall be collected by the municipality, and not by the company with which the municipality contracts, the company cannot, by virtue of its contract, acquire any right to levy the water rates.¹ Similarly, a franchise granted by the municipality or created by its act cannot be vested in a company which has not the corporate power to receive it and act under it.² The power conferred upon a municipality to grant a franchise or to perform the final act requisite for its creation, carries with it the incidental power to impose conditions upon the grant of the franchise provided such conditions be not inconsistent with the purposes of the grant.³ If it

¹ By statute a city was authorized to contract for a supply of water to the city for fire purposes and for other lawful uses and purposes. The city was authorized to collect water rents from consumers which were to be appropriated to the payment of the price agreed to be paid by the city to the company for the water supplied. It was held that the company had no right to make direct distribution to the inhabitants and to charge rates therefor, the inhabitants having the right to have their own representatives fix the just price for the water supplied. *Passaic Water Co. v. Patterson*, 65 N. J. Law, 472.

² If a corporation is only authorized to furnish gas light and has no facilities for furnishing any other, a franchise giving to such company the exclusive right to use the streets to furnish gas and "other illuminating light" was held to be void as to "other illuminating light." *Peoples Elect. L. & P. Co. v. Capital Gas & Elect. L. Co.*, 116 Ky. 82. A corporation chartered to supply a city with "light and motive power generated by electricity, steam, or other artificial means," cannot purchase or operate a gas plant. *Covington Gas Light Co. v. Covington (Ky.)*, 58 S. W. Rep. 805.

³ *Coverdale v. Edwards*, 155 Ind. 374; *Indianapolis v. Navin*, 151 Ind. 139; *State Trust Co. v. Duluth*, 70 Minn. 257; *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303. See generally as to the power of the municipality to attach conditions to grants of franchises, *ante*, §§ 1229-1231.

When the consent of the municipality is required to the use of the streets for water mains, it may impose reasonable conditions or terms as to the rates to be charged for both public and private consumption. *Long*

Branch v. Tintern Manor Water Co., 70 N. J. Eq. 71, *aff'd* 71 N. J. Eq. 790. In granting a franchise for gas purposes the municipality may reserve the right to fix the price of the gas furnished by the company. *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. Rep. 185; *Richmond v. Richmond Gas Co.*, 168 Ind. 82. A city may, in granting a franchise to use its streets, require a gas company to make an annual payment to it to compensate it for the necessary supervision of the pipes and mains and the opening of the streets. *Columbus v. Columbus Gas Co.*, 76 Ohio St. 309. The municipality in granting the franchise may incorporate into it a condition or an enforceable penalty to insure the performance of the public duty of the grantee. *State Trust Co. v. Duluth*, 70 Minn. 257. Where the original plant of a water company is extended without any ordinance or resolution prescribing terms or conditions of the extension, the terms and conditions applicable thereto are those contained in the ordinance under which the plant was originally constructed. *Illinois Trust & Savings Bank v. Arkansas City Water Co.*, 67 Fed. Rep. 196.

A condition in a lighting franchise that the city should have the right, at intervals of five years, to inspect the appliances and require them to be put in good condition and of such approved designs as shall efficiently produce gas and electricity and give the city the advantage of all improvements in the production of gas and electricity, does not permit the city to require an entire change of machinery and appliances, but only to compel them to be sufficient and effective to furnish light of the standard and power prescribed by the ordinance. *Davenport Gas & Elect. Co. v. Davenport*, 124 Iowa, 22.

be a condition of the franchise that it shall be formally accepted by the grantee, such formal acceptance may be waived by the municipality, as by permitting the grantee to erect its works and supply water or light according to the grant or franchise for a number of years; the construction of the works and the rendition of the public service in reliance upon the franchise estops the city from attacking the validity of the franchise for failure to comply with its conditions as to the form of acceptance.¹ In determining the relative rights of the municipality and the grantee of the franchise, the *nature of the ordinance* must always be taken into consideration. It frequently has a *dual character*. A corporation organized to supply water or light frequently operates under an ordinance containing not only a grant of the privilege to lay its mains or erect its appliances in the public streets, but also an agreement by the company to furnish, and by the city to receive and pay for a supply of water or light. An ordinance so framed is both a grant of a franchise to use the city streets to carry out a public purpose and a contract by the city for a supply of water or light; and in the application of the provisions of the ordinance to the rights of the municipality and of the com-

An ordinance granting a franchise to a gas company contained stipulations forbidding the company from *entering into any combination* with any other company concerning rates, and from selling its property and franchises to any other company under penalty of forfeiture to the city of its works, mains and other property. The ordinance also declared that acceptance of its provisions should be deemed a consent by the corporation that the title to the property should vest in the city at once in case of such sale. By statute the company had power to sell or mortgage its property and franchises. In a suit to enforce the forfeiture for a breach of these conditions of the ordinance, *the court refused to enforce the forfeiture*, saying that neither law nor equity recognized a forfeiture as a measure of damages for such conditions. *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594. An ordinance granting a franchise to a gas company, but *prohibiting combination* with any other company, is *repealed* by a later ordinance granting a similar franchise to another company, but expressly authorizing combination with the first company. *Theis v. Spokane Falls Gas Light Co.*, 49 Wash. 477.

Under the grant of a franchise to

use the streets for gas pipes, the company agreed to pay the city annually one-fifth of the *annual net profits* derived from the sale of gas to the inhabitants for domestic purposes. In an action by the city for an accounting and for payment of its proportion of the profits, the court held, (1) it was the duty of the company to furnish the instrumentalities for the supply of gas and the city had no ownership or interest therein; (2) expenditures for these instrumentalities could not be charged as expenses against the receipts from the sale of gas; (3) the cost of operation, including necessary repairs, should be charged as expenses and deducted from the income; (4) operating expenses do not include expenditures for new wells, mains, or other permanent improvements or betterments. It was also held that the term "domestic purposes" as used in the grant, included gas furnished for homes, churches, stores, offices, and the opera house, where its principal use was for heating and lighting and not for power. *Erie v. Erie Gas & Min. Co.*, 78 Kan. 348; 97 Pac. Rep. 468.

¹ *State v. Great Falls*, 19 Mont. 158.

pany, those provisions which relate to the franchise must be distinguished from those which relate to the contractual obligation.¹

§ 1305. **Sale of Franchises to Highest Bidder.** — The practice of selling franchises for street railroads, water works, and other public utilities to the highest or best bidder at public auction, or upon sealed bids, is steadily increasing. In the absence of any statutory or constitutional requirement there is *no obligation upon the city to sell a right or privilege of using the streets for railroad or other purposes at public auction or on sealed bids to the highest or best bidder.*² If, however, the Constitution or a statute requires that a franchise be sold and disposed of in this manner, a sale or disposal without compliance with the constitutional or statutory requirements is void.³ A statutory or constitutional requirement that a sale be

¹ Vincennes v. Citizens' Gas Light Co., 132 Ind. 114. In Kaukauna Elect. L. Co. v. Kaukauna, 114 Wis. 327, where the company brought an action against the city to recover for light furnished pursuant to an ordinance, and the city defended upon the ground that the company had failed to comply with certain conditions of its franchise, the court discussed *this dual character of the ordinance or contract*, saying: "The ordinance or contract serving as the basis of the rights of the respective parties in this case is one of a character now become very common in this State, where the city acts in a two-fold capacity. First, as a governmental body exercising delegated power of the State, it confers and limits with conditions the privilege or franchise to use the public streets under authority of § 1780 b Stats. 1898. . . . In addition to this function as an agent of the State, however, the city in the same instrument or ordinance exercises its function as a business corporation with power to purchase, contract for, and pay for electric lights for public purposes and to specify the conditions of such contract, — a power arising under its own charter. In the argument in this case as in the ordinance itself, these two functions are greatly confused, and it is not always easy to separate those provisions which pertain to the one portion or the other of the instrument. In the formulation of such a document reciprocal duties are usually imposed, both upon the grantee of the franchise and upon the city. Some of these

duties or conditions clearly relate exclusively to the subject of the franchise. Others with equal clearness may apply only to the contractual and commercial duty of supplying lights to the city, to be paid for when so supplied. Other provisions, conditions, and covenants may be of a mixed character, possibly applicable to both phases, so that their disobedience would at once constitute a breach of the plaintiff's contractual duty, which forms the basis of the city's promise to pay, and also a breach of the conditions upon which it holds its franchise from the State to occupy the public streets."

² Adamson v. Nassau Elect. R. Co., 89 Hun (N. Y.), 261. When a city has power to grant a telephone franchise and to impose conditions upon the exercise of the right, it may *ascertain the value of the franchise by competitive bidding*; the power to sell is implied from the power to grant the franchise. Plattsburg v. People's Tel. Co., 88 Mo. App. 306; California v. Bunceton Tel. Co., 112 Mo. App. 722. See also to the same effect, as to a street railway franchise, Hattersly v. Waterville, 4 Ohio Cir. Ct. (n. s.) 242.

³ Nicholasville Water Works v. Nicholasville, 18 Ky. Law Rep. 592; 36 S. W. Rep. 549; Merchants' Pol. & Dist. Tel. Co. v. Citizens' Tel. Co., 123 Ky. 90. The Kentucky Constitution requires municipalities to receive bids for any franchise or privilege "*for a term of years*" publicly and award the same to the highest and best bidder. Constitution, 1899, § 164, quoted *ante*, § 1223. This provision applies to a

made to the highest bidder without stating any other terms or conditions of sale means a *sale for cash*. It does not contemplate that the franchise should be bartered away for property or other considerations than money;¹ and when the statute, either expressly or by necessary implication, requires the sale of the franchise to be made to the highest bidder for cash, an agreement to pay a percentage of the gross receipts of the railroad or other undertaking after completion, and when in operation, does not comply with the statutory requirement.² When, however, the statute authorizes a

franchise or right to use the streets for permanent structures for one year. *Hilliard v. Fetter Lighting & Heating Co.*, 127 Ky. 95; 105 S. W. Rep. 115.

Although a franchise of an electric company was granted in violation of this provision and the grant was therefore void, it was held that the city was liable, notwithstanding the invalidity, for the reasonable value of the light furnished; and as the contract price was not attacked as unreasonable, a recovery at that rate was sustained. *Providence v. Providence Elect. L. Co.*, 122 Ky. 237. Under a statute which requires a franchise to be sold, it is discretionary with the city council to order the sale or not at its pleasure. *McGinnis v. San José*, 153 Cal. 711.

¹ *Thompson v. Alameda County*, 111 Cal. 553. In *Hart v. Buckner*, 54 Fed. Rep. 925, aff'g 52 Fed. Rep. 835, a sale of a street railroad franchise to the highest bidder in "square yards of gravel pavement" was held to be void, the statutory requirement implying a sale for cash only. In *Cincinnati v. Dexter*, 55 Ohio St. 93, the trustees of the sinking fund of the city were authorized to sell a railroad constructed by the city with its own funds "at a price and upon terms satisfactory to said trustees." An offer was received to purchase the railroad upon the following terms: (1) the sum of \$19,000 in gold coin payable one hundred years after the acceptance of the offer and secured by mortgage lien; (2) the sum of \$1,440,000 in cash in quarterly instalments of \$60,000 each, beginning at a specified date; (3) ten per cent of the gross annual earnings of the railway in excess of \$4,500,000. The validity of the sale was attacked on the ground that the only sale of the railroad authorized by the act was a sale for cash, but the court held that under the provisions of the statute the sale might

be made on credit, wholly or partially, as well as for cash, and declared that the statute excluded the idea that payment in cash was essential to a sale under its provisions by authorizing a sale to be made upon terms of sale. Whether the offer to purchase was to the advantage of the city was declared to be a question intrusted to the discretion of the city authorities and not one for the court.

² In *Thompson v. Alameda County*, 111 Cal. 553, *Garoutte, J.*, said: "The gross receipts of a passenger electric railway may be little and they may be much. The sum total of its annual receipts is a most indefinite and uncertain quantity. Such amount is illusive and depends upon many conditions. The franchise may be bought and the railroad put in operation for the single purpose of shutting off competition with other roads, and with no intention of making its gross receipts anything but merely nominal; and under such circumstances the bidder might well offer ten, twenty, or thirty per cent of its gross receipts for the purchase. Parties desiring to purchase in good faith for the purpose of operating a competing line could not afford to make any such bid. At the same time a bid from them of two per cent of the gross receipts would bring more money to the county or municipal treasury than the highest offer from other parties. These suggestions show how unsatisfactory and indefinite are sales of franchises and privileges based upon percentage of the gross receipts. But, beyond all such reasons the statute contemplates a cash sale, and a percentage of the gross receipts is in no sense cash." As to sale of street railroad franchises, under the *Ohio* statute to the person or corporation "that will agree to carry passengers upon such proposed railroad at the

sale to the bidder who will agree to give the *largest percentage* per annum of the gross receipts of the enterprise, the local authorities cannot accept a proposition to *pay a cash sum in addition* to the percentage of the gross receipts as an inducement to award the franchise to one of the bidders. The monetary conditions which the local authorities are authorized to attach consist merely of an annual revenue in perpetuity based on percentages of the gross receipts; and the public agencies entrusted with the power and duty to dispose of the franchise cannot permit their action to be influenced by the offer of pecuniary benefits to the locality other than those prescribed by law.¹ In offering the franchise for sale the general purpose of the statute must be carefully kept in view; and the franchises offered must be of such a nature that they properly constitute a single entity and do not consist of a number of separate and distinct franchises offered together. Hence, the city cannot make a valid sale of two or more extensions of a street surface railroad to be struck off upon one bid, when the extensions are separated from each other in such a way that they can only be operated together over the line of an existing railroad. Two extensions of an existing street surface railroad are not to be deemed to constitute but one extension and franchise and so to be legally subject to sale under one bid, because they are connected by an intermediate section of the main line of the applicant for the franchises, and the fact that there is included in the sale by the common council a consent of the applicant that in case any other corporation becomes the purchaser of the franchise it shall have the right in perpetuity to use the connecting tracks, does not alter the situation.² In disposing of the franchise to the highest bidder, the conditions attached to it must be prescribed in the notice of sale, and no other conditions can be inserted in the grant of the franchise or in the consent to use the public streets, or exacted from, or imposed upon the successful bidders, than those required by the statute and by the notice of sale.³

§ 1306. **Constitutional Prohibition against impairing the Obligation of Contracts.**— Ordinances made by municipalities under char-

lowest rates of fare," see *Simmons v. Div. 275; Starin v. Edson*, 112 N. Y. Toledo, 5 Ohio Cir. Ct. 124; *Knorr v. 206.*

Miller, 5 Ohio Cir. Ct. 609; *Sloane v. Beekman v. Third Ave. R. Co.*, 153 N. Y. 144.

Peoples' Elect. R. Co., 7 Ohio Cir. Ct. 84; *Compton v. Johnson*, 9 Ohio Cir. Ct. 532.

¹ *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144. See also *Heerwagen v. Crosstown St. R. Co.*, 90 N. Y. App. The common council may require as a condition of the sale of a franchise at public auction that the purchaser shall carry passengers for a single fare to and

ter or legislative authority, containing grants to water and light companies and other public service corporations of the right to use the streets for pipes, mains, &c., upon the condition of the performance of service by the grantee, are, after acceptance and performance by the grantee, *contracts protected* by the prohibition of the *Federal Constitution* against the enactment of any State law impairing the obligation of contracts.¹ The rights of such a grantee

from points beyond the termini of the proposed route over the roads of other street railways. *People v. Barnard*, 110 N. Y. 548. Allegation that bids for franchises were fraudulent held not to be sustained by the evidence. *Southern Boulevard Co. v. People's Traction Co.*, 5 N. Y. App. Div. 330.

¹ *Garrison v. Chicago*, 7 Biss. 480; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, *ib.* 683; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517; *Cleveland v. Cleveland Elec. R. Co.*, 201 U. S. 529; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453; *Cleveland Gaslight & Coke Co. v. Cleveland*, 71 Fed. Rep. 610; *Levis v. Newton*, 75 Fed. Rep. 884; *Little Falls Elect. & Water Co. v. Little Falls*, 102 Fed. Rep. 663; *Armour Packing Co. v. Metropolitan Water Co.*, 130 Fed. Rep. 851; *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 125; *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324; *Peoples' Gas Light & Coke Co. v. Hale*, 94 Ill. App. 406; *Indianapolis v. Indianapolis Gas Light & Coke Co.*, 66 Ind. 396; *Vicennnes v. Citizens' G. L. Co.*, 132 Ind. 114; *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107; *Conery v. New Orleans Water Works Co.*, 41 La. An. 910; *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43; *Phillipsburg Electric L. H. & P. Co. v. Phillipsburg*, 66 N. J. L. 505; *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377. See also the great case of *People v. O'Brien*, 111 N. Y. 1. *Ante.* § 1265.

Where a city council under legislative authority to prescribe rates passes an ordinance fixing and limiting rates, such ordinance is a law or act of the State within the meaning of the Fourteenth Amendment. *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517; *Cleveland Gaslight & Coke Co. v.*

Cleveland, 71 Fed. Rep. 610; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. Rep. 245. In *Smyth v. Ames*, 169 U. S. 466, 526, the court said: "A state enactment or regulation made under the authority of a State enactment, establishing rates, . . . that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public . . . would be repugnant to the Fourteenth Amendment of the Constitution of the United States." In *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, the Supreme Court, in passing upon the question whether a certain city ordinance could be considered as an act of the State, said: "A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law within the meaning of this article of the Constitution of the United States." See also *New Orleans Water-Works Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 18-31; *Hamilton Gas Light & Coke Co. v. Hamilton*, 146 U. S. 258. "Municipal ordinances," says the Court, in *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, are "but the exercise by the city of a legislative power which it assumed had been delegated to it by the State, and were therefore in legal intentment the equivalent of laws enacted by the State itself." See also *City Railway Co. v. Citizens' St. R. Co.*, 166 U. S. 557; *Illinois Central R. Co. v. Chicago*, 176 U. S. 646; chapter on Ordinances, *ante*. The Fourteenth Amendment, however, does not apply to ordinances or acts of a municipality simply because they are illegal under State laws, but it applies only when such ordinances or acts are in conflict with that amendment and deprive a person of rights secured thereby.

are property rights and contract rights, and are in the fullest sense vested rights. When, therefore, a city has by ordinance or otherwise granted to a corporation the right to lay its pipes and mains in the city streets or to erect poles and wires therein, and the corporation has in consideration thereof or in reliance thereon expended money in placing its poles or laying its mains and pipes, the city cannot by subsequent ordinances *revoke or impair* the rights which it has conferred.¹ Not only are the rights so granted beyond the power of revocation, but they also cannot be diminished in value by the imposition of unauthorized additional burdens upon their use and enjoyment.² But if the grant contains an unqualified condition

Owensboro Waterworks Co. v. Owensboro (bill to prevent improper issue of bonds), 200 U. S. 38.

A city ordinance which requires a water company which was operated in territory annexed to the city before the annexation, to furnish free all water used in the conduct and carrying on of all charitable, religious, and educational institutions, and to private dwellings, flats and apartment buildings for sanitary fixtures, including bath tubs, water closets, &c., thereby depriving the company of revenue to which it was entitled under the reasonable provisions of the ordinance of the annexed municipality, is unreasonable and void as a taking of private property for public and private use without compensation. *Chicago v. Rogers Park Water Co.*, 214 Ill. 212.

¹ *Cleveland v. Cleveland Elect. R. Co.*, 201 U. S. 529; *Suburban Elect. L. & P. Co. v. East Orange (N. J.)*; 41 Atl. Rep. 865; *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303; *Phillipsburg Electric L. & P. Co. v. Phillipsburg*, 66 N. J. L. 505; *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377.

Even if the right to amend or repeal the ordinance is reserved, such reserved right will not include the power to take away property and contract rights. See *Sinking Fund Cases*, 99 U. S. 700; *People v. O'Brien*, 111 N. Y. 1; *ante*, § 1265. If such a grant be made to a corporation, it is immaterial that no time for the existence of the right or the franchise is prescribed. The grant, in such case, continues for, and is limited to the term of the existence of the corporation, specified in its charter. *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43. See also

St. Clair County Turnpike Co. v. Illinois, 96 U. S. 63, 68. In *New York* the rule is that although a corporation be created for a limited period it may acquire title in fee to property necessary for its use, and where the grant to it of a franchise to use the city streets is not by its terms limited and revocable, the grant is in fee vesting an estate or interest in perpetuity notwithstanding the limited term of the corporate existence. *People v. O'Brien*, 111 N. Y. 1. As to the *duration of franchises* to use the city streets, see *ante*, §§ 1265-1268.

Tacit assent on the part of the city may also amount to a contract with the company. For example, a city, in connection with a contract for an increased supply of water, turned over its existing works to the company, and the company stipulated that it should not take from the river more than ten inches of water for the use of its water works without the previous consent of the city council. The water company was permitted to enlarge its works and take a much larger supply from the river in connection therewith without any objection on the part of the city or the city council. It was held that the city could not thereafter by ordinance revoke its implied consent and limit the supply of water company from the river to the original ten inches. *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, aff'g 88 Fed. Rep. 720.

² *Hot Springs Electric Light Co. v. Hot Springs*, 70 Ark. 300 (ordinance requiring electric company to pay rental for use of ground occupied by poles); *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107 (ordinance im-

that it may be revoked at the pleasure of the municipality it is a *bare license and is revocable* without cause at the will of the city.¹

There are, however, none of the elements of a contract connected with a legislative grant of authority to a municipality to construct water works or a gas plant, and to supply itself with water or light. The municipality is a mere agency for governmental purposes, and its charter is not a contract within the protection of the prohibition against laws impairing the obligation of contracts; it has no vested rights to its powers and franchises; the agency is revocable, and the legislature may take away the right of the municipality to construct such works and confer it upon another. If it does so, it merely creates a new agency and confers upon it privileges which formerly belonged to the municipality.²

§ 1307. **Term of Contract.** — When a city has statutory authority to enter into contracts for a supply of water and gas for its own use and for the use of its inhabitants, the *manner* in which its statutory power shall be exercised and the terms of any contract which it may enter into, including the *number of years during which it is to continue*, rest within the *discretion* of the municipal authorities; and the courts will not review it or set it aside in the absence of fraud or an abuse or excess of authority, or unless the contract is so unreasonable, inequitable, or unfair as to justify the interference of a court

posing unreasonable, unnecessary, and oppressive conditions on right to open city streets for repairs, &c.).

Plaintiff, a city, entered into an agreement with the predecessors in interest of the defendant, lessees of plaintiff's water works, by which, for an annual rental reserved, and other considerations, the lessees and their assignees were granted the right to sell and distribute water and to receive the rents and profits thereof for their own use, &c. Afterwards the city council passed an ordinance imposing monthly license rates upon all persons or corporations, not municipal, vending water for domestic purposes. An action was brought to collect such rates. It was held that plaintiff, the city, had already reserved the sum to be paid by defendant as the consideration for the privilege of vending water for domestic purposes, and could not during the term of the lease increase the amount to be paid for the privilege granted. *Los Angeles v. Los Angeles Water Co.*, 61 Cal. 65.

¹ *Coverdale v. Edwards*, 155 Ind. 374. If the city has power to revoke the grant, the motives or influences leading the members of the council to pass the resolution or ordinance of revocation are irrelevant and do not affect the revocation. *Coverdale v. Edwards*, 155 Ind. 374.

² *Gas & Water Co. v. Downingtown*, 175 Pa. 341. In this case, at a time when a borough possessed, but had not exercised, authority to provide a supply of water for the use of its inhabitants, the legislature passed a statute incorporating a company with exclusive authority to supply gas light and water within the borough and its vicinity and to such persons residing therein as might desire the same. It was held that the revocation of the power of the municipality to provide water for the use of its inhabitants implied in the creation of a company with the exclusive privilege of so doing, did not violate any vested right of the borough and was within the power of the legislature, and that the municipi-

on the established principles of law or equity.¹ In the absence of charter or statute provision there is no rule of law which requires the municipal authorities to confine the exercise of their discretion in contracting for water or light to the *term of office* of the council or other officers making the contract;² or to a contract for a single fiscal or calendar year.³ It has been said that the courts look with disfavor upon contracts involving the payment of moneys extending over a long period of time as tending to create a monopoly and involving undue restraint of the legislative powers of the successors of

pality thereafter could not undertake to construct its own works. It will be seen that no attempt had been made by the municipality to construct works prior to the enactment of the statute conferring the exclusive privilege; and this case is, therefore, not authority for the proposition that if the municipality has constructed its water works or gas plant, the legislature may destroy the value thereof by withdrawing from the municipality its power to continue in the business. As to the constitutional scope of legislative competency in such a case, see *ante*, chapter iv; Index, *Property*. As to legislative power over management and control of public utilities owned by a municipality, see *ante*, § 116.

¹ *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; *Gadsden v. Mitchell*, 145 Ala. 137; *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 130; *Vincennes v. Citizens' G. L. Co.*, 132 Ind. 114; *Tahlequah v. Guinn*, 5 Indian Terr. 497; *Clay Center v. Clay Center Light & P. Co.*, 78 Kan. 390; 97 Pac. Rep. 377; *New Orleans Gas Light Co. v. New Orleans*, 42 La. An. 188; *Reed v. Anoka*, 85 Minn. 294; *Atlantic City Water Works Co. v. Atlantic City*, 48 N. J. L. 378. Duration of contract, the public policy of the State and the principles of construction, see *Blair v. Chicago*, 201 U. S. 400; *Cleveland v. Cleveland Elect. R. Co.*, 201 U. S. 529; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453.

² *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; *Cunningham v. Cleveland*, 98 Fed. Rep. 657; *Denver v. Hubbard*, 17 Colo. App. 346; *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114; *Reed v. Anoka*, 85 Minn. 294; *State v. Great Falls*, 19 Mont. 518; *Blood v. Manchester El. L. Co.*, 68 N. H. 340; *Tan-*

ner v. Auburn, 37 Wash. 38. A city ordinance granting to a gas company, its successors and assigns, the privilege of furnishing gas to the city and to private consumers for a stated period, is not void because the time extends beyond the expiration of the company's chartered existence. It may be taken advantage of by its successors and assigns. *State v. Laclede Gas Light Co.*, 102 Mo. 472.

³ *New Orleans Gas Light Co. v. New Orleans*, 42 La. An. 188; *Black v. Chester*, 175 Pa. 101; *Seitzinger v. Edison El. Ill. Co.*, 187 Pa. 539. In *Atlantic City Water Works Co. v. Atlantic City*, 48 N. J. L. 378, it was urged that inasmuch as the power of taxation was authorized to be exercised annually, a limitation was implied that the municipal authorities could not make a contract for water to continue for a longer term than one year, but the court held that the power to raise money annually is quite as consistent with an agreement calling for annual payments through a series of years as it is with an agreement existing but for a single year.

Charter provisions prohibiting the creation of municipal liabilities in any one year exceeding the amount to be raised by tax and providing that payments on municipal contracts shall be made from sums raised by tax for the year for which such contract is made, held to prevent the creation of future liabilities for annual current expenses for lighting the streets extending over a term of years, and to limit contracts for light to terms of one year. *Putnam v. Grand Rapids*, 58 Mich. 416; *Niles Water Works Co. v. Niles*, 59 Mich. 311. See also *Kiichli v. Minnesota Brush Elect. Co.*, 58 Minn. 418. See *ante*, chap. vi, as to various constitutional and statutory debt-limit provisions.

municipal boards and officers.¹ But the great weight of authority clearly recognizes the validity of such contracts when they are not *ultra vires*, and they will not be disturbed if it appears that at the time when the contract was entered into it was fair and reasonable and warranted by the necessities of the case, or was then advantageous to the municipality.² The decisions do not disclose that

¹ *McBean v. Fresno*, 112 Cal. 159. A contract for electric light for a term of five years, contained a stipulation to extend it at the option of the contracting individual, provided he developed a site "to supply electric power for operating machinery" in the municipality. The city had express power to contract for electric light for a term of ten years. It was held that the stipulation for an extension was *ultra vires* and void, because the city alone was bound; that the consideration for its obligation did not relate to a municipal purpose and was not for the benefit of the city, but for the advantage of private parties operating machinery, and that the official powers of future officers could not be affected upon such a consideration. *Mealey v. Hagerstown*, 92 Md. 741.

² *McBean v. Fresno*, 112 Cal. 159; *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114; *Reed v. Anoka*, 85 Minn. 294. For what length of time a city may lawfully enter into a contract for water or gas depends for its answer on the facts and conditions and legislation involved in each particular case. *State v. Great Falls*, 19 Mont. 518.

Contracts by municipalities for water or gas extending over the following terms have been sustained:

Five years: *San Francisco Gas Co. v. Dunn*, 62 Cal. 580; *Seitzinger v. Tamaqua*, 187 Pa. 539; *Black v. Chester*, 175 Pa. 101; *Smith v. Avonby-the-Sea*, 68 N. J. L. 243.

Ten years: *Denver v. Hubbard*, 17 Colo. App. 346; *Reid v. Trowbridge*, 78 Miss. 542; *Blood v. Manchester El. L. Co.*, 68 N. H. 340.

Fifteen years: *Waco Water & L. Co. v. Waco* (Tex. Civ. App.), 27 S. W. Rep. 675; *State v. Great Falls*, 19 Mont. 518.

Twenty years: *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 130; *Maine Water Co. v. Waterville*, 93 Me. 586; *Light, Heat & Water Co. v. Jackson*, 73 Miss. 598.

Twenty-one years: *Illinois Trust &*

Savings Bank v. Arkansas City, 76 Fed. Rep. 271.

Twenty-five years: *Omaha Water Works Co. v. Omaha*, 147 Fed. Rep. 1, 8; *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114.

Thirty years: *Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453; *Little Falls Elect. & Water Co. v. Little Falls*, 102 Fed. Rep. 663; *Gadsden v. Mitchell*, 145 Ala. 137; *State v. Tampa Waterworks Co.*, 56 Fla. 858, 47 So. Rep. 358; *Jack v. Grangeville*, 9 Idaho, 291; *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76; *Hurley Water Co. v. Vaughn*, 115 Wis. 470.

Thirty-one years: *Reed v. Anoka*, 85 Minn. 294; *Anoka Water Works, &c. Co. v. Anoka*, 109 Fed. Rep. 580. *Sixty years*: *Tahlequah v. Guinn*, 5 Indian Terr. 497.

In *Atlantic City Water Works Co. v. Atlantic City*, 48 N. J. L. 378, the statutory authority by virtue of which the contract was made was to provide by ordinance "for a supply of water for said city," and it was held that under this authority the city might contract for a supply of water for an indefinite period continuing until the city should exercise a reserved power to take the water works at a valuation. Under authority to contract for a supply of water and annually to levy a tax not exceeding a certain rate to be used in the payment of water rents to a water company, a city cannot enter into a contract by which it binds itself to take water from the water company for all time and to pay annually to the water company, not a definite amount, but the proceeds of an annual tax at a certain rate on all the assessed property in the city. *Westminster Water Co. v. Westminster*, 98 Md. 551. Under a statute which authorizes a city "to contract with any reliable corporation, association, or individual for supplying" the city "with water and electric or gas light from year to year and to levy a tax necessary to discharge the debt in that behalf, con-

there is any *stated term* which the courts will regard as so unreasonable as to be an unfair and unreasonable exercise of the discretion-

tracted by them," the city may grant a franchise to a water company for twenty-five years and may contract for a water supply for twenty years. The words "from year to year" are not to be construed as a limitation in view of the fact that the contract necessarily calls for a large expenditure by the company in the creation of the plant. *Light, Heat & Water Co. v. Jackson*, 73 Miss. 598.

Power "to provide the city with good and wholesome water" and to erect and construct such water works or reservoirs within the established limits of the city as may be necessary therefor, while it authorizes the city to grant the use of its streets for a fixed reasonable period of time, does not constitute an authority to make a *perpetual grant*, and if under such authority the municipality makes an indefinite grant of authority to lay water pipes in the city streets, such grant is in the nature of a license only, and revocable at the will of the city. *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 123 Fed. Rep. 232.

In *Richmond County Gas Light Co. v. Middletown*, 59 N. Y. 228, the authorities of a town were authorized to cause the streets to be lighted with gas, and were required whenever they deemed it necessary to light them to contract with the plaintiff for furnishing and laying down the necessary gas pipes, &c., and for furnishing gas for the lamps. Under this authority a contract was made for the lighting of certain streets for a term of five years. A year after the authority was first conferred upon the town, the statute conferring authority was unconditionally repealed. It was held that the powers conferred upon the officers of the town were subject to modification or repeal by subsequent legislation; that the officers of the town could not prevent or control the action of the legislature in this respect; that they could only contract for a supply of gas for such term as the power to light was conferred upon them by law; that having no authority to contract beyond this, the contract entered into with the plaintiff for five years was not authorized by the statute and became void when the power to light the streets was taken away by repeal. If sought

to be made applicable to fully organized municipalities such as cities, this decision would seem to be contrary to the weight of authority; but it is possible that, upon the facts, it may be justified upon the ground that in New York, towns are only *quasi-municipalities*, and have no general authority to contract such as is usually vested in cities.

In 1897 a statute was passed extending the boundaries of New York City, the extension to take effect on January 1, 1898. On December 17, 1897, the authorities of a town included within the annexed district made a contract with an electric light company for the lighting of territory (which was to become a part of the city) for a term of ten years. It was held that the contract was void on the ground that it was not entered into in good faith by the town, but was intended to embarrass and control the city in lighting its streets in the territory covered by the town for ten years after its execution; that under the provisions of the charter of the Greater New York, the town had no power to enter into the contract; and that the legislative scheme as contained in that charter disclosed a public policy that was violated by the execution of the contract. *Hendrickson v. New York*, 160 N. Y. 144. In a petition for *mandamus* to compel a city to levy a tax to pay certain hydrant rentals, it was alleged that the city had by ordinance granted an exclusive franchise for a term of ninety-nine years and had agreed to pay certain hydrant rentals for twenty-one years. The company had expended large sums in the construction of its works and had operated for four years before the city notified it that the city would not receive and pay for water pursuant to the contract after a certain date. The question whether *mandamus* was a proper remedy was waived by the city which urged that it had no power to create a continuing liability covering, as in this case, a period of twenty-one years, under an exclusive franchise for ninety-nine years. The city did not seek either to erect water works for itself, or to make a contract with another company for a supply of water, and the exclusive feature of the

any powers of the municipality. If, however, it appears that the contract is unreasonable, inequitable, and unfair, *e. g.*, if it be shown that at the time when the contract was made the city did not, and will not for many years to come, require the hydrants or lights called for by the contract, or that the price agreed to be paid by the city for each hydrant or light is unreasonable and exorbitant, and more than the reasonable value thereof, or that the effect of the contract is to result in appropriating to its purposes the entire present income of the city, leaving nothing for other present, or so far as can be seen, for other future, needs, or that the natural effect of the contract is to create a monopoly during a long term of years, the contract so made will be regarded as an improper exercise of the power to contract conferred upon the city council, and it will be set aside by the courts.¹ If, however, the statutes limit the discretion and authority of the municipality by prescribing a term which shall not be exceeded, the municipality cannot enter into a contract for any term *exceeding the prescribed period*, and a contract made by it for any greater period

grant did not appear to receive any consideration by the court, the substantial point at issue being apparently the term of the contract. The court overruled a demurrer to the petition for mandamus. *Columbus Water Works Co. v. Columbus*, 48 Kan. 99. *Green, C.*, said: "As this court has already decided the city of Columbus had authority to make a contract for the supply of water for the protection against fire; and as such contract has been entered into and carried out in part, we are not prepared to say that it is void because the city authorities did not possess the power to make a contract for the period of twenty-one years. If the contract had only been executory and no rights had accrued, we might hold otherwise. As to the ratification of irregular contracts, see authorities cited in *Columbus Water Works Co. v. Columbus*, 46 Kan. 666, 677." The report does not show that there was any statutory limit upon the term for which the company might contract.

¹ *Flynn v. Little Falls Elect. & W. Co.*, 74 Minn. 180; *Reed v. Anoka*, 85 Minn. 294; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Brenham v. Brenham Water Co.*, 67 Tex. 542. But see *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. Rep. 586. A contract by a city for a supply of water for a term of thirty years runs for an unreasonable length of time under all the

circumstances, when it appears that the contract was for between thirty-five and forty per cent more hydrants than its present needs require, and stipulates that the city will pay for them one hundred per cent more than their present value. The court indicated that whilst it might regard liberal terms in favor of the water company as not necessarily a ground for setting aside the contract, yet the terms involved in this case were so unreasonable and continued for so many years that the court could not regard the power of the city as properly exercised. *Flynn v. Little Falls Elect. & Water Co.*, 74 Minn. 180. A city having a population of 10,000 inhabitants, an assessed valuation of \$5,000,000, a bonded indebtedness of \$19,500, a floating debt of \$15,000, and an annual income under its taxing power when exercised to the statutory limit of \$15,000 per annum, made a contract for a supply of water by which it bound itself for the period of twenty years to take all the water it required for fire and sewerage purposes from the contractor at a rent of \$15,000 a year for the first one hundred and fifty hydrants with obligations to erect more hydrants as the mains were extended. It was held that the contract was unreasonable and *ultra vires*. *Davenport v. Kleinschmidt*, 6 Mont. 502.

has sometimes, but not always, been held to be void as to the entire period and not merely as to the excess.¹

¹ *Manhattan Trust Co. v. Dayton*, 59 Fed. Rep. 327; *Gas Light & Coke Co. v. New Albany*, 156 Ind. 406; *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa, 250; *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637; *Davis v. Harrison*, 46 N. J. L. 79; *Wellston v. Morgan*, 59 Ohio St. 147. See also *Davis v. Harrison*, 46 N. J. L. 79; *Humphreys v. Bayonne*, 55 N. J. L. 241. But see *contra*, *Defiance Water Co. v. Defiance*, 90 Fed. Rep. 753. *Infra*, § 1308 and notes.

Where a statute prohibits any city from granting any franchise or privilege or making any contract in reference thereto "for a term exceeding twenty years" a contract granting a franchise for twenty years from a future date is void. So held in a case where an electric light and power franchise was granted about two years prior to the expiration of an existing franchise or contract to take effect at the expiration or termination of the latter. *Somerset v. Smith*, 105 Ky. 678. But in *State v. Excelsior Coke & Gas Co.*, 69 Kan. 45, it was held that under a statute forbidding a city to grant any franchise for a longer period than twenty years, an ordinance granting a franchise for twenty years from the date of its taking effect is not rendered invalid by the fact that it was passed several months before that date. At any time before it took effect, the city could repeal it notwithstanding that its terms might have been accepted and expenditure made in reliance upon it. Citing *Gormley v. Day*, 114 Ill. 185. Statutory authority was conferred upon a city to make a lighting contract for any term "not exceeding twenty-one years." It was held that a contract which contained a provision that if the city should refuse to extend the franchise at the end of twenty-one years, it should purchase the works, was void, because by implication it continued the franchise until the works were purchased. *Clay Center v. Clay Center Light & Power Co.*, 78 Kan. 390; 97 Pac. Rep. 377.

A city council adopted an ordinance granting a franchise to a gas company for a term of twenty years with the provision that, at the expira-

tion of twenty years, the city would either purchase the gas plant at the reasonable value thereof at that time, or grant the company the same rights and privileges enjoyed under the old ordinance for another term of twenty years. At the end of seventeen years an ordinance was passed extending the franchise with slight modifications for a period of twenty-three years. It was held that the latter ordinance was not authorized by the old one; and that it was an original substantive contract in violation of an existing statute limiting such contracts to ten years. *Gas Light & Coke Co. v. New Albany*, 156 Ind. 406. The courts will not scale down a contract binding the city to take a water supply forever to a reasonable term of years. The court has no power to make a contract for the parties. *Westminster Water Co. v. Westminster*, 98 Md. 551. If a statute authorizes a city to grant a franchise for water or gas works for a specified term, it has authority to contract with the grantee to take a supply of water during that term. *Davenport Gas & Elect. Co. v. Davenport*, 124 Iowa, 22. When the ordinance granted the privilege to use the city streets for twenty-five years, and bound the city to take gas for street lighting without specifying the term during which the supply was to continue, the contract was construed as binding the city to take and use gas during the term of the franchise, viz., twenty-five years. *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114. But where the statute authorized a contract or franchise for twenty-five years, and the franchise granted was "the exclusive privilege for twenty-five years and an equal right thereafter with all others of supplying the city with water," it was held that although the grant in excess of twenty-five years was invalid, yet the excess was severable from the authorized term, and the rights of the parties were to be construed as if the words "and thereafter an equal right with others" had never been embodied in the ordinance. *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa, 250.

A city charter contained separate grants of authority as follows: (1) to control all public highways, &c., and

§ 1308. **Exclusive Franchises and Contract Rights.** — In another part of this work the power of the municipality to grant franchises in the city streets for laying pipes for gas and water is treated, and in connection therewith the power to grant an exclusive franchise or right to use the city streets is discussed.¹ At this place it is not intended to enter into any extended examination of the law with reference to franchises or rights to use the city streets, but the subject of exclusive franchises in the city streets is inseparably connected with the subject of exclusive contract rights, and any discussion of the latter subject would be incomplete and unsatisfactory if it did not include some consideration of grants of exclusive franchises. Unless restrained by constitutional prohibition, the legislature may grant, or may authorize a municipality or other public body to grant, an exclusive franchise or right to use the city streets for the purpose of laying down pipes and appliances for water, gas, and other public utilities.² A legislative grant of an exclusive right to supply water

cause the same to be kept open in repair and free from nuisances, (2) to make contracts with and authorize any person, &c., to erect gas works, electric or other light works in the city and give such persons, &c., the "privilege of furnishing lights for the streets, &c. of said city for any length of time not exceeding five years," (3) to provide for the lighting of streets, laying down of gas pipes and erection of lamp posts, and to regulate the sale and use of gas, electric and other lights and the charge therefor. An ordinance granted a gas light company the privilege for twenty-five years to sell and supply gas within the city and to lay and maintain pipes and mains in the city streets. No contract or arrangement was made with the company for lighting the city streets. It was held that the restriction to a term of five years was intended to apply only to contracts for lighting the city streets; that the other provisions of the charter authorized the city to grant the privilege or franchise for the term of twenty-five years for the purpose of distributing gas light to the inhabitants; and that the ordinance was not *ultra vires*. *Sharp v. South Omaha*, 53 Neb. 700.

¹ *Ante*, §§ 1215-1219. The term *exclusive right* simply means that the company has the right to exclude any other person or corporation from pursuing the same business, or, in other words, the right to exclude competi-

tion. The right to exclude competition is not a right vested in the company for the benefit of the community because in its very nature it is injurious to the public; but it is a right vested in the company for its own benefit. The right to make and vend gas to the city and its inhabitants is a right conferred upon the company for the benefit both of the company and the public and not for the sole benefit of either, but the right to exclude competition is solely for the benefit of the company. *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69, 118.

² *New Orleans Gas Light Co. v. Louisiana Gas Light Co.*, 115 U. S. 650; *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. An. 138; *Long v. Duluth*, 49 Minn. 280; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 1905, holding that under its charter the city had the power for thirty years to exclude itself from constructing and operating water works in competition with its grantee.

The legislature may confer upon a private corporation the exclusive right to manufacture and sell gas and to erect works and lay pipes therefor within the limits of a municipal corporation. *State v. Milwaukee Gas Light Co.*, 29 Wis. 454. In an early case the Supreme Court of Connecticut held that an act of the legislature purporting to grant to a gas company an

or gas to a municipality and its inhabitants through pipes and mains laid in the public streets and upon condition of the performance of the service by the grantee is a grant of a franchise vested in the State, in consideration of the performance of a public service; and after acceptance and performance by the grantee, it is a *contract protected* by the Constitution of the United States *against impairment by legislative enactment*, or by constitutional provision subsequently adopted.¹ The legislature may *delegate its power* to grant an exclu-

exclusive property right and franchise in the streets, consisting of the right to use them for its purposes, *created a monopoly* and was *ultra vires* of the legislature. *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19. See *ante*, §§ 1218, 1219.

When a statute authorizing the organization of gas and electric companies contains a provision that no corporation organized thereunder shall, without special act of the legislature, make, sell, or distribute "gas or electricity, or both," for any purpose in any city or town in or to which another company is making, selling, or distributing, or is authorized to make, sell, or distribute, gas or electricity or both without the consent of the other company, authority in one company to supply either gas or electricity, or both, is prohibitive of the right of another company to supply either unless by consent or by special legislative authority. *Twin Village Water Co. v. Damariscotta Gas Light Co.*, 98 Me. 325. An exclusive right granted by a city to use the streets to furnish gas and "other illuminating light" is void as to "other illuminating light" when the charter of incorporation of the grantee does not authorize it to furnish any light other than gas. *Peoples' Elect. L. & P. Co. v. Capital Gas & Elect. L. Co.*, 116 Ky. 76.

¹ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Louisville Gas Co. v. Citizens' Gas Light Co.*, 115 U. S. 683; *St. Tammany Water-Works Co. v. New Orleans Water Works*, 120 U. S. 64; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453; *Long v. Duluth*, 49 Minn. 280; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167. An exclusive franchise to supply water to the inhabitants of a municipality by pipes and mains laid through the public

streets is *violated by a grant to an individual* of the right to obtain water by means of a pipe or pipes so laid, but the right of the individual to supply himself with water otherwise than by means of pipes laid in the public streets is not affected. *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674. Where a statute requires that franchises for water works shall be granted only on condition that the grantee shall pay a *special tax on the gross earnings*, a municipality cannot, by acts done after the grant, ratify a previous grant of an exclusive franchise which contained no such condition. *Westerly Water Works v. Westerly*, 75 Fed. Rep. 181. An ordinance giving exclusive right to light a city with gas is not impaired by a subsequent contract with another company to light the streets with *electricity*. *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435.

The grant of an exclusive right to use the streets for supplying the *streets, squares, and public places* with water and for extinguishing fires does not include a grant of the exclusive right of supplying the inhabitants for *domestic and industrial purposes*. *Mitchell v. Tulsa Water, L. H. & P. Co.*, 21 Okla. 243; 95 Pac. Rep. 961. Where one of the conditions of the grant is that the legislature may *alter or revoke* it, a law altering or revoking, or which has the effect to *alter or revoke*, the exclusive character of the privileges granted, cannot be regarded as impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. *Hamilton Gas Light, &c. Co. v. Hamilton*, 146 U. S. 258. If the State Constitution contains a provision that the legislature shall pass no act making an irrevocable grant of special privileges or

sive franchise to a municipality, but the power of the municipality to make the franchise exclusive must be expressly, or at least plainly, conferred, and will not be inferred from, or as an incident to, a mere general power, without more, to grant a franchise to use the city streets for these purposes.¹

immunities, a grant of an exclusive privilege to supply a city with water is within its operation, and the legislature may pass a statute repealing the exclusive feature without violating any constitutional right of the grantee. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212. See also *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, aff'g 95 Fed. Rep. 539.

An ordinance purported to grant exclusive franchises to construct and maintain plants for both gas and electricity and to use the city streets for each of these purposes. It was stipulated that the gas plant should be constructed at once, and it was so constructed and put in operation. The obligation to construct the electric plant was left in abeyance, and was not required to be exercised until consumers enough could be secured to pay eight per cent per annum on the additional capital required to purchase the machinery for and put in practical operation the lighting by electricity. By statute, it was provided that exclusive privileges granted pursuant to its provisions should run from the date when the corporation commenced to carry out in good faith the terms of its articles of incorporation. It was held that inasmuch as the corporation *had not proceeded to construct* an electric plant and had not acquired any exclusive privileges therefore, it was not entitled to object to the construction of such a plant by the city. *Capitol City Light & Fuel Co. v. Tallahassee*, 186 U. S. 401, s. c. 42 Fla. 462. Where the franchise of a water company was exclusive in its terms, but gave the city the right to purchase the plant, the fact that the city authorized the issue of bonds to *purchase or construct* a water works plant and authorized proceedings for purchasing or "for building and equipping water plant" was held not sufficient to show an intent to violate the plaintiff's exclusive right so as to justify the issuance of a temporary injunction. *Selma Water Co. v. Selma*, 154 Fed. Rep. 138.

¹ *Detroit Citizens' St. R. Co. v. Detroit R. Co.*, 171 U. S. 48; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22; *Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385; *Illinois Trust & Savings Bank v. Arkansas City Water Co.*, 67 Fed. Rep. 196; *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; *Thomas v. Grand Junction*, 13 Colo. App. 80; *Long v. Duluth*, 49 Minn. 280; *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *Matter of Brooklyn*, 143 N. Y. 596; *State v. Cincinnati Gas Co.*, 18 Ohio St. 262; *Smith v. Westerly*, 19 R. I. 437; *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435. The cases are not all reconcilable, but the conflict is not so great as it appears from general expressions on the opinions, if the legislation and particular facts in each case are carefully considered.

Charter authority to cause the city streets to be lighted does not authorize a grant of an exclusive right to use the city streets for a number of years. *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529. In *Newport v. Newport Light Co.*, 84 Ky. 167, it was held that when a city has the power by legislative grant to erect and maintain gas works and it is its duty to light its streets and furnish the inhabitants with a means of obtaining light, this implies power acting in good faith to grant to a corporation the *exclusive* right to the use of its streets for that purpose for a term of years. A statute which authorizes towns to make "any contract" with persons or corporations for a water supply, and which empowers the town councils to grant the right to lay water pipes in the public highways and to consent to the erection of reservoirs, &c., "on such terms and conditions as they deem proper" does not authorize towns to grant exclusive rights to construct and maintain water works. *Westerly Water Works v. Westerly*, 75 Fed. Rep. 181. A grant of an exclusive right to lay

When a public service corporation has received a grant of the right to construct its works and to use the city streets in connection therewith which is not expressly stated or does not plainly appear to be exclusive, it thereby acquires no exclusive franchise or right under which it can prevent any other corporation or the municipality itself from exercising similar privileges. *The mere grant of a franchise by a municipality does not of itself imply a contract that the grantor will not do any act to interfere with the rights granted to the water works or light company, e. g., by granting a similar franchise to another corporation, or by building and operating its own works and plant.* Municipalities are generally invested with the power either to construct their own works for furnishing water or light, or to grant a franchise and make a contract with some corporation or individual for that purpose. The great weight of authority in the absence of something else to manifest a contrary legislative intent is to the effect that the exercise of one of these powers does not *ipso facto* preclude the adoption of the other, and that the mere fact that a franchise, not expressed or plainly appearing to be exclusive, has been granted confers no right upon the grantee to object to a similar franchise being made, or to the exercise by the municipality of its power to construct its own works.¹ It

water pipes in the highways of a town, made by the town without authority, is *incapable of ratification* by the town. *Smith v. Westerly*, 19 R. I. 437. *Acceptance of an exclusive grant in good faith and expenditure of money in fulfilling its obligations do not estop the municipality from attacking it for lack of capacity to make the grant.* *Smith v. Westerly*, 19 R. I. 437. County commissioners were authorized to grant franchises in the highways for gas and other purposes. A statute prohibited the formation of any gas company in the county and provided that no gas company chartered in other counties should have the right to lay mains or sell gas in those counties. It was held that the prohibition only applied to *incorporated gas companies*, and did not include an individual manufacturing gas and that, under their power to grant franchises, the commissioners might grant a franchise to *individuals* to lay gas mains in the highways notwithstanding the prohibition. *Consolidated Gas Co. v. Baltimore County*, 99 Md. 403.

¹ *Lehigh Water Co. v. Easton*, 121

U. S. 388, 390; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, aff'g 143 N. Y. 596; *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109; 186 U. S. 212; *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, aff'g 161 N. Y. 154; *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561; *Helena Water Works Co. v. Helena*, 195 U. S. 383, aff'g 122 Fed. Rep. 1; *Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385, aff'g 144 Fed. Rep. 256; *Bartholomew v. Austin*, 85 Fed. Rep. 359; 107 Fed. Rep. 349; *Little Falls Elect. & Water Co. v. Little Falls*, 102 Fed. Rep. 663; *Newburyport Water Co. v. Newburyport*, 103 Fed. Rep. 584; *Sioux Falls v. Farmers' Loan & Trust Co.*, 136 Fed. Rep. 721, rev'g 131 Fed. Rep. 890; *Meridian v. Farmers' Loan & Trust Co.*, 143 Fed. Rep. 67, rev'g 139 Fed. Rep. 673; *Tillamook Water Co. v. Tillamook*, 150 Fed. Rep. 117, aff'g 139 Fed. Rep. 405; *Franklin Trust Co. v. Peninsular Pure Water Co.*, 161 Fed. Rep. 855; *Mobile v. Bienville Water Supply Co.*, 130 Ala.

has been said that power to enter into a contract exclusive in its nature and binding a municipality to obtain its supply of water and

379; *Phoenix Water Co. v. Phoenix*, 9 Ariz. 430; *Thomas v. Grand Junction*, 13 Colo. App. 80; *Revere Water Co. v. Winthrop*, 192 Mass. 455, 464; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *Columbus v. Columbus Gas Co.*, 76 Ohio St. 309; *Sapulpa v. Sapulpa Oil & Gas Co.*, 22 Okla. 347; 97 Pac. Rep. 1007; *Austin v. Nalle*, 85 Tex. 520; *Crouch v. McKinney*, 47 Tex. Civ. App. 54; 104 S. W. Rep. 518; *Brummitt v. Ogden Waterworks Co.*, 33 Utah, 285; *North Springs Water Co. v. Tacoma*, 21 Wash. 517; *State v. Taylor*, 36 Wash. 607. See also *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, holding that the city might build a competing system of water works. See and distinguish, *Vicksburg v. Waterworks Co.*, 202 U. S. 453, referred to *infra*, and like cases, where there is specific legislative authority to the municipality to make a contract with other parties to build and operate water works to supply the municipality with water. In this case the city was enjoined from building a competing plant.

In *Helena Water Works Co. v. Helena*, 195 U. S. 383, a water company was by ordinance granted for the term of twenty years the use of the streets, &c. for the laying and maintenance of pipes for the purpose of conveying water and selling it to those "desiring" to purchase the same and to the city for fire and other purposes in case the city "desired to purchase the same." The company also agreed to furnish and provide a full and sufficient supply for the use and wants of the inhabitants and to provide the city with water for fire and other purposes which supply should be full, ample, and sufficient for the then population of the city and for the future population of the city as the same might be from time to time during a term of five years, and an appropriation was made to cover the compensation to be paid by the city for the term of five years for the use of water for public purposes. Another provision of the ordinance contained a stipulation that the water company should at all times during the term of the agreement provide all the inhabitants, whatever their number might be, with a full supply of water, and should

sell it to them upon the terms and conditions provided. After the expiration of the term of five years, the city took steps to construct a water works system of its own, and the water company thereupon sought to enjoin it. The court held that the provision by which the water company was bound during the term of the agreement to provide all the inhabitants of the city, whatever their number, with water supply, must be construed in connection with the grant of the franchise, and therefore merely bound the company to furnish water to such inhabitants as might desire to purchase it; and that there was nothing in the agreement which bound the city to take water from the company beyond the term of five years; that whatever the rights of the city might have been during the five-year term, at the expiration thereof there was nothing to prevent the city from constructing its own plant. Referred to in *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 37.

In *Joplin v. Southwest Missouri Light Company*, 191 U. S. 150, cities were authorized to erect electric light works to light the streets and to supply the inhabitants with light, or they might grant to any person or persons or corporations the right to erect such works upon such terms as might be prescribed by ordinance provided such rights should not extend for a longer term than twenty years. Under this statute, a city, by ordinance, granted to certain persons the right to erect and maintain an electric light plant for a period of twenty years. The plant was erected, maintained, and operated. The city, pursuant to another ordinance, issued bonds for the purpose of erecting an electric light plant to be owned, controlled, and operated by the city. A bill in equity to enjoin the city from proceeding was brought by the water works company as grantee of the first franchise, and also as a taxpayer of the city. The court held that in the mere grant of the franchise there was no implied stipulation that the city would not during its life erect its own works. *s. p.* *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 37.

In *Skaneateles Waterworks Co. v.*

light from the person or corporation with which it makes the contract and from no other is governed by similar considerations as the power to grant an exclusive franchise. It has been held that authority to enter into such a contract must be found in an express statutory provision authorizing the municipality to make the contract exclusive in its nature, and a general authority to contract for a supply of water or light does not authorize stipulations conferring exclusive rights on the contracting person or corporation to the use of its streets.¹ But the better view seems to the author to be found

Skaneateles, 184 U. S. 354, aff'g 161 N. Y. 154, pursuant to statute, certain inhabitants of a village who desired to form a water company to furnish water to the village, presented an application to the village authorities for a franchise to form a corporation to supply water within such village. The application was granted, and a corporation was thereupon formed and erected water works. Upon the completion of the works, the village made a contract with the water company for a supply of water for the period of five years. At the time when the franchise was granted and when the contract was made it was within the power of the village either to contract with the water company for a supply of water or to construct its own water works. It also had authority to take proceedings for the acquisition of any water works existing within its limits by condemnation under the power of eminent domain. At the expiration of the contract the village proceeded to construct an independent system of water works. It was held that the water company, by applying to the village and incorporating under the consent of the village authorities, acquired no contract right, express or implied, to any exclusive privilege of supplying the village with water, and that the erection of water works by the village after the expiration of the contract did not violate any property or contract right of the water company. *Peckham, J.*, said: "There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even

in matters not immediately connected with water, to be left to implication."

In *New Jersey*, it was held that where a water company was incorporated under a general statute to supply a city with water and afterwards contracted with the city for that purpose, accepted the provisions of certain ordinances regulating the method of supply and constructed works at a large expense, and supplied water satisfactorily, the ordinance granting the privilege containing a clause conferring an exclusive right, the city had exhausted its power as to providing a water supply; and that, so long as the company continued to comply with the ordinance and contract and furnished an adequate supply of water, the city had no further statutory authority to make any grant to any other person. Hence the chancellor held that whether the grant of the exclusive privilege of furnishing water was *ultra vires* or not, the water company was entitled to an injunction against any invasion of its rights by other persons seeking to lay water pipes, &c., under municipal authority. *Atlantic City Water Works v. Atlantic City*, 39 N. J. Eq. 367. But in *Read v. Atlantic City*, 49 N. J. L. 558, aff'd 50 N. J. L. 665, this contract was held to be invalid as creating debt in excess of the limit prescribed by law. In *Atlantic City Water Works Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427, *Van Fleet, V. C.*, held that the statute authorizing the incorporation of water companies permitted the formation of two or more companies for the same locality.

¹ *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Long v. Duluth*, 49 Minn. 280; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167.

Legislative authority to a muni-

in those decisions which hold that *specific power* in a city to make a contract for a water supply may authorize the city to make a contract in good faith excluding itself from competing with its grantee for a definite reasonable period, although the power to make an *exclusive* contract is not given to the city in express terms or in so many words.¹ Thus, power in the charter of Vicksburg "to provide for the erection and maintenance of a system of water works to supply said city with water, and to that end contract with a party or parties who shall build and operate water works," was held to authorize the city to give to a water company, if it would build water works, "the *exclusive right* for the period of thirty years to erect, maintain, and operate water works in the city for public and private use." The grantee built water works, but within the thirty years the city, on the alleged ground that the exclusive feature in its grant was *ultra vires*, and under legislative authority subsequently conferred upon

cipal corporation to provide a system of water works, to grant the right to a private corporation to establish such a system to supply the municipality with water, and to contract therefor, does not confer upon the municipality the power to stipulate in a contract that it will not, for the period of thirty years, either grant to any other party than the water company in question the privilege of supplying water and maintaining a system of water works, nor itself exercise the right of establishing water works or supplying water. *Long v. Duluth*, 49 Minn. 280. A water company was required by its charter, when requested, to furnish water to a city for the extinguishment of fires and for other purposes upon such terms as might be agreed upon between them, and provision was made for fixing the terms by judicial process in case they could not agree. The company was created solely for the purpose of supplying water within the city for the use of it and its inhabitants; and, so far as appeared, the city then had no means of obtaining such supply other than such as were in the possession of the company, or such as it may have been contemplated the company would provide. Contracts were made from time to time between the city and the company to supply water for certain periods. In an action by the company to restrain a grant of a rival franchise, it was held that the request by the city to the water company to furnish

water, in view of the duty imposed upon the company by its charter, merely made the grant to the company effectual for the purpose provided by the statute; that the city as such could only bind itself by such contracts as it was authorized by statute to make; that by statute it was not authorized to grant exclusive privileges — especially for the use of its streets — and it could not lawfully by contract deny itself the right to exercise the legislative powers vested in the common council; and therefore the contract made between the city and the water company did not constitute any ground for enjoining the grant of a rival franchise. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167. Without express statutory authority a municipality cannot, in making a contract for a supply of light, stipulate that it shall not during the term of the contract give the statutory consent to any gas or electric company to use the streets for lighting purposes. *Parfitt v. Ferguson*, 159 N. Y. 111.

¹ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453; s. c. 206 U. S. 496, *Mercantile Trust & Deposit Co. v. Columbus*, 161 Fed. Rep. 135; *Newport v. Newport Light Co.*, 84 Ky. 167, cited *supra*, § 1215; *Muncy Elect. L. H. & P. Co. v. Peoples' Elect. L. H. & P. Co.*, 218 Pa. 636.

it, undertook to erect water works in competition with the water company. The Supreme Court of the United States, in deciding that the city had no right to erect its own water works during the term of the contract, held two propositions: 1. That the city under the charter power quoted had the right to make a contract excluding itself for a thirty-year period from competing with the private company, although (it will be noticed), the charter did not in *express* terms give the city the power to make the grant exclusive. 2. That the grant of the city to the water company had the effect to disable the city from building water works of its own within the thirty years. Whether the city might give or did give an exclusive right as against all third persons was not involved or decided.¹ Contracts for a

¹ *Vicksburg v. Vicksburg Water-works Co.*, 202 U. S. 453. As to the city's power to exclude itself from competition the court considered the case as controlled by *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1. See *Vicksburg v. Vicksburg Water-works Co.*, 206 U. S. 496.

In *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, the city charter provided that no exclusive grant should be made, nor should any grant prevent the council from granting the right to others. The charter also provided that the city should "have power to erect and maintain water works within or without the city limits, or to authorize the erection of the same for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water." A contract was made for twenty-five years. The grant was not made exclusive to the water works company, but the city agreed not to erect water works of its own, and reserved the right to take, condemn, and pay for the works of the company at any time after the expiration of the contract. It was held by the Supreme Court of the United States that the city might thus exclude itself from competition during the period of the contract, and of this feature of the contract, Mr. Justice Brown used the following pertinent language: "An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term

not exceeding twenty-five years. In establishing a system of water works the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. . . . Cases are not infrequent where, under a general power to cause the streets of a city to be lighted or to furnish its inhabitants with a supply of water, without limitations as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party." See and compare *Water, Light and Gas Co. v. Hutchinson*, 207 U. S. 385, distinguishing *Vicksburg* case, *supra*, 206 U. S. 496.

A city made a contract with a water company for a supply of water for a term of thirty years, and in consideration of the promises and undertakings of the water company the city covenanted and agreed, among other things, "not to grant to any other person or corporation, any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes, or

supply of water and gas to a city and its inhabitants are frequently framed in such terms that the contracting corporation is required to supply all the water and gas which may be reasonably required by the city and its inhabitants, and it has been urged that such a contract necessarily implies that during its continuance the city should be precluded from entering into contracts for water or light with other persons or corporations. But these contracts are to be construed with reference to the general rule that in the absence of an

alleys, or other public grounds for the purpose of furnishing such city or the inhabitants thereof, with water for the full period of thirty years." Before the expiration of the period of thirty years, the city took steps to construct its own water works. Construing the contract, the court held, by a bare majority, that the city had not excluded itself from constructing during the thirty-year term, a competing plant, although the grant excluded all others during that term. This decision was rendered upon the doctrine of a strict construction of the grant, but *quaere* whether this doctrine of strict construction (especially in view of the right reserved to the city of purchasing the existing plant) was not too strictly applied, especially as the thirty-year term had not expired. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22.

In *Pennsylvania*, it is held, where a borough has statutory authority to contract for a supply of light, it may contract with a company for the same for ten years with a provision that the franchises for the purpose shall be exclusive, and that the borough may purchase the works at the end of the term. The consent of the borough to the use of the streets was required by statute. *Muncy Elect. L., H. & P. Co. v. Peoples' Elect. L., H. & P. Co.*, 218 Pa. 636. *Mitchell, C. J.*, said: "Both companies, parties to this litigation were incorporated under the Act of May 8, 1889, P. L. 136, which provides that 'No company which may be incorporated under the provisions of this act shall enter upon any street in any city or borough of this Commonwealth until after the consent to such entry of the councils of the city or borough in which such street be located, shall have been obtained.' Neither company, therefore, had any rights in the streets except by the borough's consent. The borough was

under no obligation to consent at all. It might have built its own light plant, and refused all franchises to others. Or it might have granted a franchise on its own terms or conditions. *Allegheny City v. Millville, E. & S. St. R. Co.*, 159 Pa. 411. And what the borough might do itself it might do by contract with others. That is what it did here. Instead of expending the public money in building a plant, it accepted the offer of the appellee to build the plant in consideration of a franchise which was to be exclusive for ten years. It was a valid exercise of the borough's contractual power, on a valid consideration, and cannot now be rescinded directly or indirectly at the will of one party."

Where a gas franchise is granted by a municipality and in consideration thereof the gas company agrees to pay for the same annually \$300, a further provision that such payments are to *continue only so long* as the company enjoys its franchise *without competition*, is not contrary to public policy as tending to destroy competition and create a monopoly. *Richardson Gas & Oil Co. v. Altoona*, 79 Kan. 466; 100 Pac. Rep. 50.

In *Rogers Park Water Co. v. Chicago*, 131 Ill. App. 35, it was held that an ordinance and contract for a supply of water containing a grant of an exclusive franchise for thirty years did not prohibit the city from supplying the water from its own works. The court refused to follow the decision of the Supreme Court of the United States in the *Vicksburg* case, *supra*, and based its decision upon the view that the power to contract was to be strictly construed, that no authority was given to the municipality to make an exclusive contract and the grant did not bind the municipality itself not to act, but only not to give a similar right to another.

express legislative authority or its equivalent, an exclusive right will not be implied against the public, and in the absence of a valid express provision or its equivalent in the contract prohibiting it from so doing, the municipality is not precluded from making a like grant to or contract with another company for another or further supply if the public needs require it.¹ A contract giving an exclusive right to a public service corporation to supply a city with water or light for a term of years has also been attacked and held to be invalid and unenforceable on the ground that it creates a monopoly within a constitutional prohibition of monopolies.² The grant of an exclusive right to a *municipal corporation* to operate water or gas works does not stand upon the same ground as an exclusive right held by a private corporation or an individual. In the one case the right is in effect exercised by the people who are affected by it and not for profit, but for the welfare and convenience of the public and the inhabitants of the municipality. The correction of abuse in its management whereby oppression may be avoided is in the hands of the people; whilst on the other hand, if such works are operated for private gain, there is every incentive to oppression, without power in those to be affected, to relieve themselves from it. In the one case the exclusive right may create a monopoly and in the other not.³

But the fact that a contract or ordinance is exclusive in its nature and that the exclusive feature is not justified by legislative authority, does not necessarily render the contract entirely void. It has been

¹ Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, aff'g s. c. *sub nom.* Matter of Brooklyn, 143 N. Y. 596; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 1905; Helena Water Works Co. v. Helena, 195 U. S. 383, aff'g 122 Fed. Rep. 1; Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453; Bienville Water Supply Co. v. Mobile, 175 U. S. 109; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354; Cunningham v. Cleveland, 98 Fed. Rep. 657; Little Falls Elect. & Water Co. v. Little Falls, 102 Fed. Rep. 663; Vincennes v. Citizens' Gas Light Co., 132 Ind. 114; Jersey City v. Kearny, 72 N. J. L. 109; Syracuse Water Co. v. Syracuse, 116 N. Y. 167; Matter of Brooklyn, 143 N. Y. 596; Philipsburg Water Co. v. Philipsburg, 203 Pa. 562. In Davenport Gas & Elect. Co. v. Davenport, 124 Iowa, 22, the city was merely authorized to contract for a term of twenty-five years. An exclusive contract for that

term was sustained, on the ground that all contracts of this nature must, in their very nature, be exclusive. After the expiration of a contract by a city granting "the exclusive privilege" of furnishing water for twenty years, the power of the city to construct and maintain its own water works is not affected. Sioux Falls v. Farmers' Loan & Trust Co., 136 Fed. Rep. 721.

² Brenham v. Brenham Water Co., 67 Tex. 542; Altgelt v. San Antonio, 81 Tex. 436, 448. See also Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19; *ante*, §§ 1218, 1219; Austin v. Nalle, 85 Tex. 520, 549; Edwards County v. Jennings, 89 Tex. 618. But compare Houston v. Houston St. R. Co., 83 Tex. 548.

³ Brenham v. Brenham Water Co., 67 Tex. 542. See also Hartford Fire Ins. Co. v. Houston (Tex. Civ. App.), 110 S. W. Rep. 973, s. c. (Tex.) 116 S. W. Rep. 36.

held that an ordinance containing an exclusive grant may be void as to the exclusive feature, and valid as to the remainder.¹ It has also been said that the corporation may waive all claim to an exclusive right which is attacked as *ultra vires*, and may insist upon the validity of the remaining provisions of the contract.² If the municipality has general authority to contract for a supply of water or light, it is liable for water or light furnished to it under an implied liability, whether the contract be affected by illegality by reason of a stipulation for an exclusive right or not.³ The fact that an exclusive provision, if void, does not, being separable, affect the remainder of the grant, or the liability of the municipality for water or light supplied, is, where the works have been constructed and are in operation, a complete answer to a suit by a taxpayer to cancel, annul, or enjoin the enforcement of the contract or the franchise rights conferred, so long at least as neither the city nor any other person or corporation seeks to exercise competing rights.⁴ But although the

¹ *Kimball v. Cedar Rapids*, 100 Fed. Rep. 802; *Gadsden v. Mitchell*, 145 Ala. 137; *Bellevue Water Co. v. Bellevue*, 3 Idaho, 739. But if the exclusive provision of a franchise is *ultra vires* and void, the consideration for a bond conditioned for the performance of the conditions of the ordinance granting the franchise fails, and a suit upon the bond cannot be maintained on the theory that only the exclusive feature of the grant is void. *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637.

² *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. Rep. 271.

³ *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. Rep. 271; *Greenville v. Greenville Water Works Co.*, 125 Ala. 625; *Bellevue Water Co. v. Bellevue*, 3 Idaho, 739; *East St. Louis v. East St. Louis G. L. & C. Co.*, 98 Ill. 415; *Decatur G. L. & C. Co. v. Decatur*, 24 Ill. App. 544; *Valparaiso v. Valparaiso City Water Co.*, 30 Ind. App. 316; *State v. Great Falls*, 19 Mont. 518; *Monroe Water Works Co. v. Monroe*, 110 Wis. 11. See *infra*, this chapter, § 1338.

⁴ *Grant v. Davenport*, 36 Iowa, 396; *Dodge v. Council Bluffs*, 57 Iowa, 560; *Reid v. Trowbridge*, 78 Miss. 542; *Patton v. Chattanooga*, 108 Tenn. 197; *Altgelt v. San Antonio*, 81 Tex. 436, 449; *Waco Water & Light Co. v. Waco* (Tex. Civ. App.), 27 S. W. Rep. 675. In these cases remarks are to be found to the effect that, by reason of

the separable character of a provision for an exclusive right, one who does not infringe, or threaten to infringe, the exclusiveness of the grant cannot be heard to allege its invalidity upon that ground after the works have been constructed and the contract has been substantially performed by the grantee. The validity of an ordinance giving to a company the exclusive privilege for a term of years of laying water pipes in the streets, &c., may be contested by another company or individual claiming such right, but not in a suit by taxpayers. *Grant v. Davenport*, 36 Iowa, 396. A gas company already having the use of streets for its pipes has the right to question the validity of an ordinance granting the same right to a rival company. So also has the owner of the part of the street. *Peoples' Gaslight Co. v. Jersey City*, 46 N. J. L. 297; *Peoples' Elect. L. & P. Co. v. Capital Gas & Elect. L. Co.*, 116 Ky. 76. The mortgagee of a water company has such an interest in the franchise and property of the company as entitles it to bring a suit to enjoin the city from constructing and maintaining a rival water system. *Sioux Falls v. Farmers' Loan & Trust Co.*, 136 Fed. Rep. 721, s. c. 131 Fed. Rep. 890. See also *Columbia Ave. Savings Fund, &c., Co. v. Dawson*, 130 Fed. Rep. 152. A bill to enjoin city authorities from passing an ordinance repealing a grant of an exclusive privilege to lay gas pipes in the city streets

municipality may have the power to erect competing works, neither the statutory authority pursuant to which it acts, nor its own ordinances, can be so framed as to devise a system of water taxes and rates by which taxpayers who are consumers of the existing water company may be injuriously and unjustly discriminated against, and compelled through self-interest to cease taking water from the water company and take from the municipality instead, thereby depriving the existing company of all its customers, and, as a result, destroying the business of the corporation by unfair means.¹

§ 1309. **Exclusive Franchise and Contract Rights; Rule in Pennsylvania.** — The result has been reached, under certain statutes of that State as construed by the courts, which deprives municipalities of the right to construct and maintain their own water works when they have previously contracted with a water company for a supply of water and have secured such supply. By the Pennsylvania Municipal Corporation Act of 1874, it was provided that cities were authorized in their corporate capacity to "supply with water the

and granting that privilege to others will not lie; the threatened action is legislative in its character, and if the ordinance is void by reason of its unconstitutionality the plaintiff cannot be injured by its passage. *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *Montgomery Gas Light Co. v. Montgomery*, 87 Ala. 245. Index, *Equity, Injunction, Ordinances*.

¹ A statute which authorized villages to supply themselves with water works and permitted them to acquire the works of any private corporation that might be supplying the municipality with water contained a provision which authorized the local boards of water commissioners to establish a scale of rates for the use of water, and also rates for fire protection, to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, or on such real property so abutting or within such limits as such boards might deem benefited, upon which real property the water is not used by the owners or inhabitants thereof for domestic or manufacturing purposes. In actions brought by existing water companies to enjoin the construction of the water works by villages, it was held that the provision authorizing the vil-

lages to acquire existing works was not mandatory, but the court also held that this provision of the statute could not be sustained, as it permitted any board of water commissioners, which refused to take an existing plant, to assess a large part of the cost of the fire protection on inhabitants who had contracted to take water from the private corporation, thereby discriminating against them and by unfair means compelling them to take water from the village works, and that these provisions must be held to be unconstitutional and invalid. *Skaneateles Water Works Co. v. Skaneateles*, 161 N. Y. 154; *Warsaw Water Works Co. v. Warsaw*, 161 N. Y. 176. A city which owns and operates its own water works cannot impose upon all property owners having sewer connections the same rate or charge for both water and sewer connections, thereby compelling the customers of a water company to pay as much for their sewer connections alone as if they also received water from the city and making it impossible for the company to compete with the city in the supply of water. To do so is discrimination between taxpayers as to the use of the sewers which is not permissible. *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379.

city and such persons, partnerships, and corporations therein as may desire the same, at such prices as may be agreed upon, and for that purpose have at all times the unrestricted right to make, erect, and maintain all proper water works, machinery, buildings, cisterns, reservoirs, pipes, and conduits for the raising, reception, conveyance, and distribution of water, or to make contracts with, and authorize any person, company, or association to erect all proper water works, machinery, buildings, cisterns, reservoirs, pipes, and conduits for the raising, reception, conveyance, and distribution of water, and give such persons, company, or association the *exclusive* privilege of furnishing water as aforesaid for any length of time not exceeding ten years." By the Pennsylvania Private Corporation Act of the same year, water and gas companies were given the right to introduce into boroughs and cities, wherever they might be located, a sufficient supply of pure water or gas, and, when completed, the right of the company in the locality covered by its works *was exclusive*, until, during a period of five years, the company had divided among its stockholders a dividend equal to eight per cent upon its capital stock. This statute also contained a provision that at any time after twenty years from the introduction of water or gas the city in which the company should be located, might become the owner of the works and the property of the company by paying the net cost of erecting and maintaining the same with interest thereon at the rate of ten per cent per annum, deducting from the interest all dividends theretofore declared, and it was further provided that nothing contained in the act should authorize a company incorporated under the provisions of the act to construct gas or water works within the limits of any municipality, when gas or *water works should have been constructed by the municipality*, without the lawful consent of the corporate authorities thereof. In construing these statutes the court has held that inasmuch as they were passed at the same session of the legislature they must be construed as *in pari materia*, and that effect should be given to both enactments so far as possible. It therefore held that the power conferred upon the municipality to construct water works or to contract for water was alternative in its nature; that it could not exercise both powers at the same time; that when it had contracted for a supply of water pursuant to the provisions of the municipal corporations act, it had exhausted its powers under that statute and could not proceed to erect water works of its own, and if it desired to acquire its own water works, it must wait until the end of the twenty years and then proceed to acquire them by purchase in the manner pointed out by

the act.¹ The reasoning of the court in reaching these conclusions was that the statutes contained two distinct methods by which the municipality could supply its citizens with water; by putting either method in operation the same end was accomplished, *i. e.*, the supplying of the citizens with water; there was no repugnancy in the provisions of the two acts on the assumption that one or the other alone would be adopted to effect the purpose, whilst there would be a decided repugnancy in their operation if both be put at work at the same time to effect that purpose. The court said that it was manifest that if two water mains were laid side by side in the same street equally accessible to the householders on each side, conveying double the quantity needed with double sets of hydrants, pumping stations, officers, salaries, and expenses, one or the other must be abandoned. If the property holder must by compulsory taxation support the municipal system, he would not voluntarily support the private corporation system, and such a conflict of interests would inevitably bankrupt the system which depended upon the voluntary patronage of the public. The court declared that it must hesitate before assuming that the legislature intended by grants to distinct corporations for public purposes that there should arise such conflict in the exercise of the franchises as would result in the practical destruction of the property of any citizen without compensation. Hence, under the statutes the primary grant was the power to supply the city with water, the secondary one, a grant of two dis-

¹ *White v. Meadville*, 177 Pa. 643 (overruling *Howard's Appeal*, 162 Pa. 374; distinguishing *Lehigh Water Co.'s Appeal*, 102 Pa. 515); *Metzger v. Beaver Falls*, 178 Pa. 1; *Wilson v. Rochester*, 180 Pa. 509; *Welsh v. Beaver Falls*, 186 Pa. 578; *Carlisle Gas & Water Co. v. Carlisle Water Co.*, 188 Pa. 51; *Tyrone Gas & Water Co. v. Tyrone*, 195 Pa. 566; *Troy Water Co. v. Troy*, 200 Pa. 453; *Bennett Water Co. v. Millvale*, 200 Pa. 613; *s. c.* 202 Pa. 616; *Potter County Water Co. v. Austin*, 206 Pa. 297. See also *Harlow v. Beaver Falls*, 188 Pa. 263.

But a water company incorporated after the enactment of the Pennsylvania statute of June 2, 1887, P. L. 310, has no exclusive privilege to use the streets of a municipality in the absence of an agreement between the company and the municipality to that effect. *Hastings Water Co. v. Hastings*, 216 Pa. 178. The Act of 1887 repeals by implication, as to corporations

thereafter incorporated, the exclusive privileges conferred under the Act of April 29, 1874. *Luzerne Water Co. v. Toby Creek Water Co.*, 148 Pa. 568; *Boyertown Water Co. v. Boyertown*, 200 Pa. 394. As to the power of a municipality in Pennsylvania to stipulate in a contract for a supply of light that the grantee shall have an exclusive franchise, see *Muncy Elect. L. & H. & P. Co. v. Peoples' Elect. L. & H. & P. Co.*, 218 Pa. 636, cited *ante*, § 1308. By the express provision of the statute of April 29, 1874, a gas company organized thereunder has, as against all subsequently incorporated companies, an exclusive privilege until it has earned and distributed for five years a dividend of eight per cent on its capital stock. This is the case although there is in existence a previously incorporated company having the right to supply gas in the same territory. *Commonwealth v. Consumers' Gas Co.*, 214 Pa. 72.

inct methods of exercising the power, either of which might be adopted. But there was no grant of power to put both methods in operation at the same time, for once the power had been exercised to supply the city by contract through another creature of the same sovereign, then the municipal function had passed from the city and must be performed by the other contracting party which had rights and obligations imposed upon it by law as clearly defined and as capable of enforcement as those of the city. Within the same principles the Supreme Court of Pennsylvania has also held that when a borough has, by contract with a private corporation, exhausted its municipal power to introduce water, it will not be permitted to accomplish in an indirect way what it has no power to do directly; and therefore it cannot subsequently make a contract with another private corporation to supply the borough with water for fire and other purposes, to supply the citizens with water at rates designated in the contract, and to sell the plant to the borough at a price not exceeding its cost.¹ But if the water company has been incorporated without exclusive privileges prior to the Act of 1874, and has supplied water to the residents of a town prior and subsequent to its incorporation as a borough, but has never had any contract with the borough and has never by any action of the borough been induced to extend its pipes or expend money upon its plant, it cannot restrain the borough from establishing and maintaining water works of its own.²

It seems to the author that taking the two acts of 1874 together the legislature did not intend that there should be at the same time, in the same municipality and in the same streets, two independent water systems, one owned by the municipality and one by a private company, and that the construction of these statutes by the Supreme Court of Pennsylvania is sound and well justified by a fair consideration of their language and purpose. Under this legislation the cases in *Pennsylvania* can perhaps be satisfactorily distinguished from cases in other jurisdictions which hold that if a municipality authorizes or consents to the construction of water works within its limits and makes a contract for a water supply, it does not thereby impliedly grant any exclusive privilege, or enter into any implied contract that it will neither erect competing works of its own, nor grant a similar right or franchise to another company. In the *Pennsylvania* cases, rights were granted by stat-

¹ *Welsh v. Beaver Falls Borough*, 186 Pa. 578. See also *Hall Borough*, 186 Pa. 74. *Boyertown Water Co. v. Boyertown*,

² *Centre Hall Water Co. v. Centre* 200 Pa. 394,

ute, and that fact is of great, if not controlling importance. The courts in other jurisdictions have held that where a municipality in the same statute or in different statutes has been authorized either to erect its own water works or to contract for a supply of water, and to authorize or consent to the erection of water works by a private corporation, the grant of the right to, or a contract with, the private corporation does not imply any exclusive right; that the two powers are separate and distinct, and not alternative in their nature; that an exercise of the power of a city to construct its own works has no relation to or connection with a contract made with a water company for a supply of water and a grant of authority by a municipality to the company to construct its works; that when a public service corporation undertakes, without an express or unmistakable exclusive grant, to construct works to supply water or gas, it does so with the knowledge that it is always within the legal power of the municipality to construct its own plant for these purposes, or to grant a competing right to another corporation organized for similar purposes; and if the municipality constructs its own works or grants such right, it thereby violates no contract or stipulation made with the company, and the company has no legal grievance unless it has a valid exclusive privilege. The force of the observations of the Supreme Court of Pennsylvania *arguendo* in support of its judgment that when a municipality makes a contract with a water or gas company, and grants authority to construct works therefor, it holds out inducements to the company to expend money in exercising the privileges conferred; and that it is unjust that the value of the plant constructed by the company should be destroyed by the acts of the municipality in constructing its own works or in authorizing another company to construct rival works cannot be denied. The *Pennsylvania cases* have been elsewhere distinguished as founded upon the peculiar provisions of the Pennsylvania statutes.¹ Where the power to the municipality is to construct its own water works or to grant to a private company the right to construct such works, and there is nothing more, the general conclusion of the courts (applying the doctrine of strict construction to the grant to the private corporation) is that the two powers are independent and not alternative, unless the contrary intent appears either expressly or by necessary or unmistakable implication. On legal principles this conclusion under such circumstances is justified.

¹ For cases distinguishing the decisions of the Pennsylvania courts, see App. 80; *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 531. *Thomas v. Grand Junction*, 13 Colo.

It is proper to observe that in many cases the application of the principle works great injustice to private capital which has been induced to undertake the construction of water or light plants when they are not presently remunerative, and when at length they become so, the municipality then exercises its power to destroy the investment by building works of its own or making a grant to another and favored company to build such works and agreeing to take the municipal supply of water or gas from such company. The law reports show that such instances of municipal injustice, to use no harsher term, are of not unfrequent occurrence, and have sometimes been met with deserved judicial reproof and condemnation. Under such circumstances, if there is anything in the legislation or contract that fairly shows that the two powers are not independent and concurrent and were not thus intended to be exercised, the courts should not press the doctrine of strict construction so far as to work injustice and irretrievable loss to the bondholders and stockholders of the first company. The legislative control over the company by fixing reasonable rates, by taxation, by police regulation, or, if necessary, by eminent domain, is ample to protect, if necessary, the public against the first company without dooming it to destruction by building or authorizing the building of a rival system, when only one is necessary and when the first cannot survive the municipal attack.

§ 1310. **Agreements by Municipality to satisfy or pay Taxes.**—When a corporation constructs water works or other public utilities for the purpose of supplying a municipality and its inhabitants, it brings into existence property which becomes the subject of taxation within the municipal limits. It is apparent that inasmuch as the primary purpose of the corporation is to furnish water or light to a city and its inhabitants upon reasonable terms, the cost of the water or light to the city and its inhabitants is necessarily increased to the extent to which its property is subjected to taxation. In undertaking to construct water works and lighting plants, it has consequently sometimes been stipulated that in consideration of the furnishing of water and light to the municipality, *the city will pay therefor a sum equal to the tax* assessed against the company by the city upon the value of its property devoted to these purposes. Such agreements have been attacked as *ultra vires* on the part of the municipality as exempting property from taxation contrary to the provisions of law; but the courts have held that a municipality may make a valid and fair and reasonable contract with a corporation

wherein, in consideration of the contract of the company to furnish a supply of water or light for municipal purposes, it agrees to pay therefor, in addition to a specified sum of money, another sum each year equal to the amount of the tax for that year assessed against the company, provided that the consideration for this agreement upon the part of the municipality is reasonably adequate. Such a contract when made in good faith and when its terms are reasonable and fair has been held not to be contrary to public policy, and not in itself to be an exemption of the property from taxation contrary to the provisions of the law. But the decisions which have recognized the validity of such contracts have always been careful to declare that it is essential that the contract should not be intended as a cover of an illegal attempt to exempt the company's property from taxation.¹ If for any reason the stipulation that the company

¹ *Maine Water Co. v. Waterville*, 93 Me. 586. In *Portland v. Portland Water Co.*, 67 Me. 135, it was held that, pursuant to valid legislative authority, the city *might exempt from taxation* for a term of years the property of the water company in consideration of an undertaking and agreement by the company to furnish free of cost to the city a supply of water for its public municipal purposes. The court pointed out that the legislative action followed by the vote of the city council pursuant to it partook of the nature of a contract with the defendant corporation. In *Maine Water Co. v. Waterville*, 93 Me. 586, the city *contracted to pay* to the water company each year a *sum of money equal to all taxes* assessed for that year upon the property owned by the company in the city in excess of the tax assessed upon a valuation of \$25,000 for and during the remainder of the term of a contract for the supply of water. It was held that this was a valid contract and that it did not mean exemption from taxation if the consideration for the agreement upon the part of the city was reasonably adequate. Upon an examination of the facts the court held that the consideration for the agreement was adequate.

In *Cartersville Imp. Gas & Water Co. v. Cartersville*, 89 Ga. 683, the city agreed that it would exempt or caused to be exempted from municipal taxation all the property of the company of a term of five years, and that if the city should at any time during the five years find it was obliged by a decree of any court or by operation of law to

assess and collect a tax against the property mentioned, then the city agreed that, in consideration of the reduced prices at which the gas light was to be furnished it and its citizens, it would pay or return to the company all sums of money which it or they might have been obliged to pay and which might have been levied or assessed against the property by the city in violation of the spirit of this contract. In an action by the company to recover from the city the amount which it had been obliged to pay as taxes assessed upon its property, the court held that, while a city cannot exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp and in addition thereto a sum for all lamps supplied equivalent to the amount of taxes imposed upon the company, provided this additional sum is a fair and just allowance to compensate for the actual value of the services and the stipulation is *bona fide* and not in the nature of an evasion of the law prohibiting an exemption from taxes.

In *Grant v. Davenport*, 36 Iowa, 396, an ordinance provided that the water company should, during the life of the grant, furnish water free of charge to all public schools and to all city buildings and for certain other purposes "and in consideration of the foregoing provisions the said company, during the term of twenty-five years, shall be exempt from all municipal taxation on the franchises hereby granted and all property owned by said company and actually required

shall be released from taxation in consideration of the rendition of services by it proves to be void, the company can recover for the water or light furnished under the arrangement.¹

for the economical management of the works aforesaid." The court held that the ordinance was valid; that when the whole ordinance was construed together it did not amount to exemption from taxation; that it in effect applied the taxes as they would otherwise become due in part payment of, or in part consideration for the water rent. In *Bartholomew v. Austin*, 85 Fed. Rep. 359, the contract between the water company and the city provided that the city should have the right to use water free of charge for flushing sewers, for the fire department buildings, city hall and public schools, and for watering places &c., "in consideration of all of which the property of the city water company shall be, and the same is hereby, exempted from municipal taxation during the full term for which the contract is executed." The court held that the contract was valid, and that the meaning of the provision was not to grant an exemption from taxation. But see *Columbia Ave. Savings Fund, &c., Co. v. Dawson*, 130 Fed. Rep. 152, 175.

In *Utica Water Works Co. v. Utica*, 31 Hun (N. Y.), 426, 431, the contract between the water company and the city provided that for the water service furnished by the company for municipal purposes the company was to

receive a definite sum each year and in addition thereto a sum equal to one half of its taxes paid in excess of one thousand dollars. The court sustained the contract as merely furnishing a mode of computation by which the sum to be paid annually by the city for water supplied should be ascertained. In *Ludington Water Supply Co. v. Ludington*, 119 Mich. 480, it was held that a contract whereby a city, as part consideration for a water supply, agreed to pay all taxes levied against the property of the water company in excess of a certain amount during the continuance of the contract, was not invalid as an attempt to exempt the company's property from taxation in excess of the amount named. See also *Alpena City Water Co. v. Alpena*, 130 Mich. 518; *Washburn v. Washburn Waterworks Co.*, 120 Wis. 575.

In *Monroe Water Works Co. v. Monroe*, 110 Wis. 11, an ordinance granting a franchise to use the city streets for laying water mains, &c., and contracting for a supply of water to the city, stipulated that the city should "pay each year to said grantee in addition to the hydrant rentals herein specified, a sum equal to the amount of the State, county, and city taxes which may be levied upon such portions of said water works plant as is located on the streets

¹ *Bartholomew v. Austin*, 85 Fed. Rep. 359; *Columbia Ave. Savings Fund, &c., Co. v. Dawson*, 130 Fed. Rep. 152, 175. In *New Orleans v. New Orleans Waterworks Co.*, 36 La. An. 432, the statute incorporating the company provided that the city should be allowed water free of charge for fires and other public purposes "and in consideration thereof the franchises and property of said New Orleans Water Company used in accordance with the act shall be exempted from taxation, State, municipal, and parochial." A contract was made between the company and the city in accordance with the legislative enactment, but the city subsequently assessed and brought suit against the company for taxes. The court held that the city was entitled to judgment, since by express provision of the Con-

stitution property could not be exempted from taxation unless it was "actually used for church, school, or charitable purposes," but that the water company could compel the city to pay for water used a sum equal to the amount of taxes thus recovered, as the latter amount was made by the act of the legislature and by the parties the exact consideration for the free supply of water. A city leased a building for a water office, agreeing to rebate the water rate thereon, as part of the rent payable by it. It was held that in an action against the city for rent, the lessor could recover the amount of rebate to which the lessor was entitled under the lease, and which the city had refused to allow. *Chicago v. English*, 180 Ill. 476, aff'g 80 Ill. App. 163.

§ 1311. **Breach of Conditions by Company; Forfeiture; Specific Performance.** — Every grant of a franchise in the legal sense of the word, whether corporate or otherwise, *is made subject to the condition* that the privileges and franchises conferred shall not be abused or so employed as to defeat the purpose of the grant, and that when abused or misemployed they may be *withdrawn or resumed* in such way and by such modes of procedure, either at law or in equity, as are consistent with established legal principles. Although no such condition may be expressed in the charter or grant of the franchise, it is necessarily implied as an incident thereto.¹ The franchises

and public grounds." For a number of years the city only levied taxes upon the real estate of the water company, but in 1898 it assessed the entire system, including franchise rights, privileges, real estate, pipes, hydrants, &c. The water company paid the tax so assessed and brought suit against the city for a sum which it alleged was the portion of the tax assessed applicable to the portions of the plant located in the public streets. The court held that the agreement was not invalid as an exemption of property; that it was competent for the city and the company to agree that as the price of services to be rendered the city would pay a sum equal to the amount of municipal taxes to be levied; but that inasmuch as it appeared that there was no means by which the tax could be apportioned between the property in the streets and the property elsewhere, and as under the existing rule of assessment the plant had to be assessed as a whole, it was impossible to establish any basis for the enforcement of the stipulation and the water company could not recover.

A city sold its gas plant, and the buyer in connection with the sale entered into a contract to furnish light for the use of the inhabitants and in lighting the public streets. The contract contained a provision that the property sold and all additions should be exempt from the payment of all city taxes, and if it should be determined that the city had not the power to make an exemption from city taxes, then all sums which the buyer should pay for city taxes should be added to the sum stipulated to be paid for lighting the city streets. It was held that as the exemption was part of the consideration inducing the purchase of the property, its terms

should be enforced. *Frankfort v. Capital Gas & Elect. L. Co. (Ky.)*, 29 S. W. Rep. 855. Subsequently, by a contract between the same municipality and the same corporation, electric light was substituted for gas and a new contract was made. The new contract stipulated that the city should pay for street lighting "such further sums each year as shall be equal to the city tax of every kind required to be paid" by the company "including therein any assessments for city taxation on its capital stock in the hands of its stockholders." The Constitution required all property not expressly exempt by it to be taxed *ad valorem* at its actual cash value. It was held that the stipulation was not for the payment of taxes upon the plant of the company only, but was for exemption from taxation upon all the property of the company including its corporate franchises, and the stipulation was therefore void as attempting to evade the constitutional provision. *Frankfort v. Capital Gas & Elect. L. Co. (Ky.)*, 96 S. W. Rep. 870. Under the *Kentucky* Constitution in force in 1888, a city could not agree with a water company to exempt its property from taxation as a part of the consideration of a contract for water for fire and domestic purposes. *Dayton v. Bellevue Water & F. G. Co. (Ky.)*, 68 S. W. Rep. 142.

¹ *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336; *State v. Twin City Water Co.*, 98 Me. 214; *State v. Portage City Water Co.*, 107 Wis. 441. In *New Orleans Water Works Co. v. Louisiana*, 185 U. S. 336, the United States Supreme Court held that a forfeiture of the franchise of a water company in an action by the State through its attorney general for illegally exacting and collecting

and privileges of a public service company organized for the purpose of furnishing water or light to a community, to use the streets and highways, and to transact the business for which it is incorporated, being derived from the State, these rights and privileges may be *resumed by the State* in a direct proceeding by *quo warranto* commenced by it to forfeit them for a failure to comply with the conditions upon which they are granted, and some cases hold that the remedy by the State is exclusive and that the franchises and privileges of the corporation cannot be forfeited in any other way.¹

greater rates than those permitted by law, did not impair the obligation of any contract, or deprive the water company of its property without due process of law, or otherwise violate any provision of the Federal Constitution. This determination was made upon the general principle that franchises or privileges granted by the State have the tacit condition annexed to them that they may be resumed by the government under judicial proceedings; and the authority for so holding was found in the implied conditions which are attached to grants of the franchise or right to exist as a corporation. Citing *Terrett v. Taylor*, 9 Cranch (U. S.), 43; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 579; *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 287.

A franchise to furnish a city and its inhabitants with water or light and to use the streets therefor is *not* a corporate franchise, or dependent upon corporate existence, and a proceeding by the State to forfeit it may be brought whether the company be a domestic or foreign corporation. *State v. Portage City Water Co.*, 107 Wis. 441. When no time is fixed by statute or by ordinance within which the franchise or privileges should be exercised, the law requires them to be exercised within a reasonable time. *State v. Twin Village Water Co.*, 98 Me. 214. When a corporation has by charter two distinct franchises or privileges, *e. g.*, to furnish water for domestic and municipal uses and to furnish electric light for lighting the streets and for the use of individuals, the franchise or privilege for furnishing electric light, being distinct and separate from the franchise or privilege to furnish water, may be forfeited in a proceeding by the State for non-user, although no ground of forfeiture be shown as to the water franchise.

State v. Twin Village Water Co., 98 Me. 214. A provision of an ordinance of an Illinois city relating to a water works company, that if the company shall fail to furnish the inhabitants of the city water fit for drinking and domestic purposes, the municipality may give the company notice of such failure, and if the company does not within a period prescribed by the ordinance maintain such filtering process as will make water suitable for these purposes, then, until it is made fit, the municipality shall be relieved from paying hydrant rentals, is valid as a provision for stipulated and liquidated damages, does not provide for a forfeiture, and exempts the municipality from liability to pay for hydrant during such period. *Illinois Trust & Savings Bank v. Pontiac*, 112 Ill. App. 545, aff'd 212 Ill. 326.

¹ *State v. Madison St. R. Co.*, 72 Wis. 612 (failure to comply with conditions of street railway franchise). *Ashland v. Wheeler*, 88 Wis. 607; *Wright v. Milwaukee Elect. R. & L. Co.*, 95 Wis. 29; *Stedman v. Berlin*, 97 Wis. 505 (action by taxpayer to set aside franchise of water company for fraud); *State v. Portage City Water Co.*, 107 Wis. 441 (failure to perform conditions of contract or ordinance granting franchise to water company); *Kaukauna Elect. L. Co. v. Kaukauna*, 114 Wis. 327; *Gas & Water Co. v. Downingtown*, 193 Pa. 255.

In considering the question whether the franchise of a water or gas light company to use the city streets to transact business in the locality can only be attacked by the State, the Supreme Court of Wisconsin differentiated between the various conditions of the ordinance or contract containing the grant of the franchise. It divided conditions of such ordinance or contract into two classes, one having reference

But when it is considered that the franchises and privileges of water and light companies are usually brought into existence by an affirmative act on the part of the municipality, — either in granting the right and privilege to use the city streets under its power to provide water or light for the use of the city and its inhabitants, or to contract therefor, or by giving its consent to the use of the streets under a condition attached to a franchise or right granted by statute, — it is apparent that any rule of law which confines the remedy to an action by the State and precludes any action by the municipality, does not fully meet the exigencies of the situation. And therefore some courts have adopted the view that, while, in a sense, the privilege of the grantee of the right to occupy the streets for the purpose of furnishing water or light is in the nature of a franchise, such franchise does not have its legal basis, or entire legal basis, in the fact that the State has conferred the privilege, but also and chiefly in the fact that the franchise or privilege was created or brought into existence by the city within its charter powers to contract in reference to the use of its streets and on these and like grounds have refused, and as we think properly refused, to limit the right to maintain an action to annul the franchise to an action by the State.¹ And whatever may be the exact nature or origin of the franchise or privilege, the Supreme Court of the United States has held that when an ordinance granting a franchise shows that it is made for the purpose

to the franchise or privilege, and the other to the contractual element involved in the furnishing of water or light to the municipality. Thus, in an electric light franchise or contract, it has said that breaches of the conditions which relate to the burying of wires or painting of poles are germane only to the franchise. A condition for the giving of a bond to protect the city from damages growing out of the exercise by its grantee of the privileges granted, and for the faithful performance of all the terms and provisions of the ordinance, applies both to the franchise and to the contract; while stipulations for the furnishing of light to the city have reference entirely to the contractual element of the contract, and have no connection with the franchises. See *Kaukauna Elect. L. Co. v. Kaukauna*, 114 Wis. 327. In *Gas & Water Co. v. Downingtown*, 193 Pa. 255, the company brought a suit to enjoin the borough from interfering with its exclusive franchises to furnish water. The defence was that the

charter therefor was forfeited by failure to furnish an adequate supply. The court held that the borough could not set up this defence to the suit, its remedies being (1) proceedings under a statute to compel an adequate supply, or (2) revocation of the company's charter by the legislature, or (3) proceedings for forfeiture by writ of *quo warranto*.

Combination between the only companies in a city fixing price of gas and agreeing as to division of customers held ground for forfeiture of franchise at suit of State as a restriction on competition. *State v. Portland Nat. Gas Co.*, 153 Ind. 483. Illegality of combination or agreement as to division of territory and as to rates between two gas companies supplying the same city. See *Dibbs v. Baltimore Consolidated Gas Co.*, 130 U. S. 396.

¹ *St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329. See also *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540, aff'd (Tex. Civ. App.) 41 S. W. Rep. 629.

of supplying a city and its inhabitants with water for public and private use and requires that the works shall be increased in capacity as the growth of the city and its needs require; that there shall be mains of a sufficient size to furnish all the water required by the city and its inhabitants; that the water supplied shall be good, clear water; that the source of supply shall not be contaminated by sewage; and that sufficient pressure shall be furnished for the extinguishment of fires, these stipulations constitute a *continuing obligation* on the part of the grantee; and the right to the continued enjoyment of the franchise (which is the consideration for their performance) is *dependent upon the continued performance* of this obligation by the grantee. When a contract — such as a contract for a supply of water — is made as an incident to a franchise to use the city streets, the ability of the company to continue to furnish water according to the terms of the contract is a condition precedent to the continuance of the right of the company to use the streets of the city and to furnish water during the life of the franchise; and when, after a reasonable time, the water company has failed to comply with the condition as to the quality and quantity of water, the *city has a right* to treat the contract as terminated and to *invoke the aid of a court of equity to enforce its rescission*. A suit for specific performance of the contract or a suit to recover damages for its non-performance would be a wholly inadequate remedy in such a case. The danger to the health and lives of the inhabitants from impure water, and the continued exposure of property in the city to destruction from fire by an inadequate supply of water, are public matters peculiarly under the care of the municipality, and it is entitled, if necessary for their protection, to maintain a suit to declare the contract forfeited and rescinded for failure to comply with its conditions.¹

¹ Farmers' Loan & Tr. Co. v. Galesburg, 133 U. S. 156.

The city of Galesburg granted a franchise for thirty years to construct and maintain within and near the city water works for supplying it and its inhabitants and those of the adjacent territory with water for public and private use, and to use the streets, &c. of the city within its present and future corporate limits for placing mains, &c. The ordinance required that pumping engines should be furnished of a specified capacity, a stand-pipe, and not less than eight miles of mains for the distribution of water of a sufficient size to furnish all the water required for the wants of the city and

its inhabitants. It also provided for a test of the mains at the place of their manufacture; the character of the fire hydrants to be rented by the city; and that there should be a test of the capacity of the water works on their completion. It also stipulated that the water supplied should be good clear water and the source of supply should not be contaminated by sewerage. The franchise rights under this ordinance were transferred to a corporation, which proceeded to construct the works. Upon their completion, a test of the works was made and an ordinance was passed accepting the works as sufficient. The company thereafter made various efforts to

The right of a municipality to *have a contract declared forfeited and rescinded* does not necessarily rest upon express terms of forfeiture for

supply the city with water of the quality and in the quantity called for by the ordinance, but failed to do so, although full opportunity was afforded by the city. The water furnished was filthy in character, polluted by drainage, stagnant and wholly unfit for use, unhealthy and dangerous to life. Eighteen months after the works had been tested, the city passed an ordinance repealing the franchise and declaring all privileges granted to be null; and thereafter filed a bill setting forth the facts and asking that all rights conferred by the ordinance and contract be declared to be annulled. It was held that the city made out a case entitling it in equity to a rescission of the contract. *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156. This decision has been followed and applied in *Grand Haven v. Grand Haven Water Works*, 99 Mich. 106; *St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329; *Meridian Waterworks Co. v. Meridian*, 85 Miss. 515; *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540, aff'g (Tex. Civ. App.) 41 S. W. Rep. 659. See also *Bolivar v. Bolivar Water Co.*, 62 N. Y. App. Div. 484; *Harrodsburg Water Co. v. Harrodsburg* (Ky.), 73 S. W. Rep. 1032; *Burlington Water Works Co. v. Burlington*, 43 Kan. 725; *Winfield v. Winfield Water Co.*, 51 Kan. 70; *Topeka v. Topeka Water Co.*, 58 Kan. 349.

When an ordinance granting a water franchise contains a stipulation that it should be voidable at the instance of the city, so far as it required the payment of money, upon the judgment of a court of competent jurisdiction, whenever there should be a substantial failure of such supply, or a like failure on the part of the company to perform its agreements, and that until the contract should have been so avoided, the city should not erect, or maintain, or become interested in other water works, the city cannot declare the contract avoided for failure to furnish a supply of water and proceed to construct its own works without an adjudication of the nullity of the contract. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1. Where a water contract was declared rescinded by a court of equity, and the city continued to use water for fire protection

after it had exercised the right to rescind, it was held that the city was equitably bound to pay therefor, and the measure of compensation was fixed at eight per cent per annum on the cost of a plant to furnish fire protection. *Grand Haven v. Grand Haven Water Works Co.*, 119 Mich. 652. The mere fact that for a period of fifteen years a city has been served unwholesome water does not estop it from requiring that the water company comply with its contract to furnish pure water, especially when it appears that protests were made and notice given to the company of its violation of the contract. *St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329. Bondholders of a water company secured by mortgage of its property and franchises acquire their rights subject to conditions in the franchise requiring the continued rendition of services and have no greater rights, as against a suit to forfeit the franchise for failure to comply with its conditions, than the company itself. *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156. It has been said that the city council has no authority to waive the right of the public to revoke a franchise which has been abused by the grantee. *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540; citing *Morris v. State*, 65 Tex. 53. But see *Galesburg Case* and others cited *supra*.

An ordinance giving an exclusive franchise for water purposes reserved to the city the right to purchase at intervals of fifteen years. The supply proved to be unsatisfactory, and the company was placed in the hands of receivers appointed at the instance of the bondholders. The city proposed to build its own works, and thereupon an action was brought by the trustee for the bondholders to enjoin the city from doing so. The city filed a cross bill to forfeit the franchise for failure to perform the franchise obligations. Pending the litigation and various negotiations, the bondholders attempted to improve the supply. It was held that the bondholders were entitled to an injunction to restrain an infringement of the exclusive franchise, but that inasmuch as the city was entitled to relief by reason of the defective performance, the relief

breach of conditions set forth in the ordinance granting the franchise. It exists inherently in the nature of the contract obligations, and in this respect the municipality occupies no different position from that of an individual seeking the assistance of the courts to be relieved from the obligations and burdens of a contract, which, by the conduct of the other party, have become intolerable.¹ But a forfeiture will not be enforced, or the contract cancelled and annulled, where the failure to comply with its terms has been accidental or occasional and reasonable cause can be shown for excusing the same, but only when it appears that, persistently and in opposition to the will of the people, there has been a continued purpose on the part of the grantee not to comply with the contract, justifying the city in accepting the grantee's attitude as a deliberate intention to violate the contract.²

granted should take the form of a decree denying any injunction on the condition that the city *should buy the plant* at a value to be fixed, at the election of the city, either by a master or by arbitrators or appraisers appointed pursuant to the contract and ordinance. *Mercantile Trust & Deposit Co. v. Columbus*, 161 Fed. Rep. 135.

A suit was brought to cancel a water contract for breach of conditions. The statute authorized the municipality to contract for "a sufficient supply of pure and wholesome water," but required that the contract "shall be guarded and carefully drawn so as to secure the city in the performance of the same." The statute also provided that rights of way should only be granted on the condition that the company "shall furnish an abundant supply of pure and wholesome water." The contract named different sizes of pipes that might be used by the company. It was held that, under a contract for a supply of "pure and wholesome water," the water supplied need not be perfectly pure to be wholesome, but must be reasonably pure and wholesome; that the city contracted for results, and not merely for a supply according to the then conditions; and that the approval of samples of water to be furnished and of the plan of the reservoir did not estop the city from attacking the quality of the water; that although the contract designated the sizes of pipes which might be used, the use of pipes and mains of the specified sizes did not excuse a failure

to furnish "first-class fire protection"; and that the fact that additions and betterments were made on the plant after the suit to cancel the contract was begun did not estop the city from insisting upon the forfeiture, the extensions and improvements being the act of a volunteer. *Meridian Waterworks Co. v. Meridian*, 85 Miss. 515.

In *DuBois v. DuBois City Waterworks Co.*, 176 Pa. 430, it was held that equity, as a general rule, will only rescind a contract on the ground of fraud, mistake, turpitude of consideration, or circumstances entitling to relief on the principle of *quia timet*; and hence that where a contract between a borough and a water company provided that water for the borough supply should be drawn only from certain designated land, and it turned out that there was not sufficient water at the designated source to supply the borough, the failure of the water company to furnish to the borough a sufficient supply of water, arising, as it did, from a *mutual mistake of the parties* was not sufficient to justify a court of equity in cancelling the contract. In so holding the court was careful to say that it did not intend to rule that a wilful and positive refusal to perform a contract under circumstances which practically prevent the party aggrieved from entering into another might not afford ground for equitable cancellation.

¹ *St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329; *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540.

² *Winfield v. Winfield Water Co.*,

And if it should appear that the grantee of the franchise may be able to comply with the contract in the future and furnish water in accordance therewith if given reasonable time, the decree of the court may, in furtherance of justice, provide that the contract will be annulled and the franchise cancelled only at a time certain, within which the grantee should be given the privilege of complying with the contract.¹ The law does not look with favor on forfeiture, and if another remedy is available by which the city can obtain just redress, an annulment of the contract will not be decreed.² It has also been held that when a city has secured, for the benefit of its citizens, agreements on the part of a water company, as a condition of the granting of a franchise, to furnish water for the use of the city and its inhabitants, it may maintain an action in a court of equity for the *specific performance* of these agreements, *e. g.*, a stipulation that the water should be properly filtered.³ And it has been

51 Kan. 70; *St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329; *El Reno v. El Reno Water Co.*, 14 Okla. 53. See also *Harrodsburg Water Co. v. Harrodsburg (Ky.)*, 73 S. W. Rep. 1032; *Davenport Gas & El. Co. v. Davenport*, 124 Iowa, 22.

Before a court of equity will cancel the contract after construction and long use of the water works, the city must notify the company of the defects, demand the rectification thereof and give the company a reasonable opportunity to comply with the contract. *Winfield v. Winfield Water Co.*, 51 Kan. 70. The fact that the inadequacy of water supply is caused by a failure of the original source of supply, resulting from continued dry weather, does not show a failure on the part of the company to perform the conditions of its contract which will justify a decree declaring the contract forfeited and rescinded. *El Reno v. El Reno Water Co.*, 14 Okla. 53. Where a city after accepting water for fire protection and paying therefor for a long time repudiates the contract and refuses to make further payment, but continues to use the water without objecting to the sufficiency of the service, it cannot ask for a forfeiture of the contract for defective or insufficient service, as a defence to a suit by the mortgagee of the water company to enjoin the city from incurring debt for the creation of another water system in violation of the company's exclusive franchise, and to specifically

enforce the contract between the water company and the city, and to recover water rentals past due. *Columbia Ave. Savings Fund, &c., Co. v. Dawson*, 130 Fed. Rep. 132.

¹ *St. Cloud v. Water, Light & Power Co.*, 88 Minn. 329.

² *Topeka v. Topeka Water Co.*, 58 Kan. 349.

³ *Burlington v. Burlington Water Co.*, 86 Iowa, 266. If a municipality begins an action for a rescission of the agreement and facts are found sufficient to sustain its right to that relief, the court may, instead of terminating the contract by forfeiture, make a decree requiring *specific performance* of its conditions, and such relief being more favorable to the company than the judgment required by the evidence, the company is not in a position to claim that it is aggrieved thereby. *Bolivar v. Bolivar Water Co.*, 62 N. Y. App. Div. 484. But *specific performance* cannot be awarded by way of counterclaim by the city in an action by the company to recover the contract price of light furnished, although the city may have pleaded that the company has failed to comply with the conditions of its franchise. *Kaukauna Elect. L. Co. v. Kaukauna*, 114 Wis. 327.

In *Brymer v. Butler Water Co.*, 172 Pa. 489, the plaintiffs, *citizens of a borough*, pursuant to a statutory provision allowing them to sue in equity, brought a bill in equity against a water company to restrain the collection of water rents and to compel the com-

held that the company may be compelled in proper cases to perform its duties toward the city and the public by *mandamus*.¹

§ 1312. **Purchase of Works of Company by Municipality.** — Where a municipal corporation has granted a franchise to a water or gas company to construct its plant, to use the city streets for pipes and mains, and to furnish water or light to the city and its inhabitants, it has been held that the legislature, under special constitutional restrictions, was without authority to *compel the city to purchase* the property or plant of the company if it desired to acquire or construct works of its own.² But in the absence of constitutional limitations statutes may be enacted and contracts made which in their effect prevent municipalities from establishing water works of their own, *until they have at least offered to purchase the works* of corporations organized and existing within their limits.³ In Massachusetts,

pany, which had an exclusive franchise, to supply pure water as required by its act of incorporation. The evidence showed that by reason of pollution the water was utterly unfit for domestic use, that domestic animals would not use it, and that it was so destructive to the flues of boilers as to be unsafe for use for steam purposes. It was held that the plaintiffs were entitled to injunction restraining the collection of water rents, the water company having no right in equity to collect pay for what they did not and could not supply.

¹ *Topeka v. Topeka Water Co.*, 58 Kan. 349 (enforcement of stipulation to extend water mains as necessary). See also *Potwin Place v. Topeka R. Co.*, 51 Kan. 609.

² The legislature of *Montana* passed a statute declaring that when a franchise has been granted to, or a contract made with, a person or corporation, and pursuant thereto and in good faith, such person or corporation has established and maintained a system of water supply, the municipality, before taking any action for the procuring of a water supply to be owned and controlled by it, shall give notice to such person or corporation that it desires to purchase the plant and franchise, and shall have the right to do so upon such terms as the parties may agree or may acquire it by eminent domain, if an agreement cannot be reached. The statute also prohibited the municipality under such

circumstances from proceeding with the erection or construction of a water plant of its own in any other way. The *Constitution of Montana* contained a provision prohibiting the legislature from levying taxes upon any municipality for municipal purposes. The court held that this statute placed a restriction upon the municipality and made mandatory the incurring of indebtedness for the purpose of acquiring the plant if it decided to maintain and operate its own works; that it in effect levied taxes upon the municipality in violation of the constitutional provision referred to; and also that the statute was an infringement of the right of local self-government inherently vested in all municipal corporations in a matter relating purely to its property rights and private affairs as distinguished from its rights and duties as an agency of the State. *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1. See *Helena Water Works Co. v. Helena*, 195 U. S. 383, 393. Suppose the water supply of the existing plant is inadequate for the present and future, or is of poor quality, or the plant old and insufficient, and a better source of supply exists elsewhere, can the legislature compel the city against its will to buy the old plant?

³ In *National Waterworks Co. v. Kansas City*, 62 Fed. Rep. 853, 10 C. C. A. 653, a statute authorized a city to grant the right to erect and operate water works for a period of twenty

statutes have been enacted which authorize municipalities to establish water or lighting works, but which contain a provision that if any municipality should decide to establish a plant and any person or corporation engaged in the public service should elect to sell his or its plant and property suitable and in use for such business, the municipality shall, before establishing a plant of its own, purchase from such person or corporation his or its plant and property. The constitutionality of this statute has been upheld on the ground that the statute is not compulsory either upon the municipality or the private person or corporation. Under the statute a city or town is not required to establish a plant, and private persons or corporations are not required to sell any existing plant. If a municipality chooses to act under the statute, it must act in accordance with its provisions and take the burdens with the benefits; and even if it be assumed that when property is taken by a municipality for a public use, the owner has a right to a jury trial upon the amount of the reasonable compensation to be paid, still the constitutional provision guaranteeing that right has no application to a party who comes in voluntarily under the provisions of this act and elects to sell his property to the city, and he cannot complain that another method than a jury trial is provided for the determination of his rights and obligations.¹ It has also been held in Connecticut, that a statute which

years with the power to renew the grant for another term of twenty years. It also provided that, at the expiration of twenty years, if the grant should not be renewed, the city should purchase the works, and, if the price could not be fixed by agreement, pay therefor the fair and equitable value. The ordinance granting the franchise to the company provided that on a failure to renew the grant at the expiration of twenty years the city should then be required to purchase the works. It was held that the provision for purchase was mandatory, and on the failure of the city to renew the grant at the expiration of twenty years, the city might be compelled to specifically perform its contract to purchase.

¹ Citizens' Gas Light Co. v. Wakefield, 161 Mass. 432; Newburyport Water Co. v. Newburyport, 193 U. S. 561, aff'g 103 Fed. Rep. 584; Gloucester Water Supply Co. v. Gloucester, 193 U. S. 580; Revere Water Co. v. Winthrop, 192 Mass. 455. See also Newburyport Water Co. v. Newburyport, 163 Mass. 541; Gloucester Water Supply Co. v. Gloucester, 179 Mass.

365. In Newburyport Water Co. v. Newburyport, 103 Fed. Rep. 584, the plaintiff was chartered by the State of Massachusetts to supply the city and its inhabitants with water, and had constructed a system of water works and for many years furnished water. In 1893 the legislature, on the petition of the city, authorized the city to build its own water works. In 1894, on the application of the plaintiff, a statute was passed which provided that before proceeding to supply itself and its inhabitants with water under the act of 1893, the city should purchase the franchises, corporate property and rights and privileges of the plaintiff, if plaintiff, within thirty days after the passage of the act, notified the mayor of its desire to sell. The latter statute also provided that if the parties were unable to agree upon the terms of sale, appraisers should be appointed who should determine the fair value of the property "for the purpose of its acceptance by the city" and "without enhancement on account of future earning capacity or good will or on account of the franchise of said com-

provides that cities desiring to establish lighting plants for municipal use must purchase the local plant of any corporation engaged in the business, if such corporation shall elect to sell and comply with the terms of the act, does not confer upon the company an exclusive privilege contrary to a declaration of the Constitution that no one shall be entitled to exclusive public emoluments or privileges from the community;¹ and the fact that such statute creates a commission which is charged with the duty of ascertaining the value of the property, the determination of the commission to be submitted to and approved by the court, does not confer *judicial powers* upon the commission, thereby creating a court unknown to the Constitution. It is within the power of the legislature to create a particular kind of administrative tribunal to decide questions regarding the value of property to be appropriated to a public use, and the method and terms of such appropriation.²

pany." Under these circumstances the plaintiff began an action in the Federal Circuit Court against the city in which it was agreed by stipulation that the single question should be presented to that court *whether the plaintiff was deprived of its property without due process of law* in violation of the Fourteenth Amendment to the Constitution of the United States. In support of the plaintiff's contention it was claimed that the rule of compensation laid down by the statute did not furnish just compensation within the meaning of the constitutional provision; and the court held that while it was not within the power of the legislature to fix the compensation, or to determine of what it should consist, or prescribe the rules and principles upon which it should be computed when property was taken under the power of eminent domain, yet the acquisition of the property under the statute was not by virtue of the power of eminent domain, but by virtue of an offer by the plaintiff to sell its property upon certain terms which offer was accepted by the municipality by the command of the legislature; that the compensation was therefore contractual in its nature; and that the fact that the statute compelling the municipality to enter into the contract prescribed the rule for ascertaining the compensation, did not render the statute unconstitutional under any provision of the Federal Constitution. It was also urged on

behalf of the plaintiff that the statute was unconstitutional because it *impaired the obligation of the contract* under which it had constructed its works; and because, in effect, it compelled the plaintiff to sell its property against its will. The court, however, held that the franchise of the plaintiff was not exclusive; that authority to the city to construct its own works did not violate any contract; and that the compulsion placed upon the plaintiff (assuming it to exist), by creating or authorizing municipal works which would destroy the value of the plaintiff's property was not illegal in its nature and that the statute could not be attacked on that ground. In rendering the decision of the court, *Colt, J.*, gave an able and elaborate opinion. The decision of the Circuit Court was affirmed by the United States Supreme Court. *Newburyport Water Co. v. Newburyport*, 193 U. S. 561.

The power of a municipality to take by its own act, without any election by the company to sell or refuse to sell, has also been sustained as constitutional in *Massachusetts*, when the right is a condition of the charter which the company has accepted and under which it is acting. *Rockport Water Co. v. Rockport*, 161 Mass. 279. See also *Braintree Water-Supply Co. v. Braintree*, 146 Mass. 482, 486.

¹ *Norwich Gas & Elect. Co. v. Norwich*, 76 Conn. 565. See *ante*, §§ 1218, 1219.

² In *Norwich Gas & Elect. Co. v.*

By virtue of the power to establish water works, a *city may purchase existing works*; and the power so to do justifies a reservation in an ordinance granting a franchise and contracting for a water supply for the purchase of the works at periodical intervals, and also justifies the exercise of the power to purchase so reserved.¹ When a stipulation or reservation of the right to purchase is not a part of the charter of the company, or is not a condition of a franchise granted to the company by the municipality, statutory authority on the part of the municipality to make the stipulation and to exercise the right to purchase must be found, otherwise the stipulation will be deemed *ultra vires* and cannot be

Norwich, 76 Conn. 565, the statute provided that in case of disagreement as to what shall be sold or the terms of sale either party might apply to the Superior Court for the appointment of a "special commission" who shall hear the parties and "adjudicate" those matters, and that its doings shall be reported to the court for confirmation. It was held that such a commission was not a court. *Baldwin, J.*, thus clearly states the view of the court: "That the statute uses the term 'adjudication,' as descriptive of the decision which the commission is charged with rendering, is not enough to change the obvious character of that body. Whether it be regarded as an arm of the court in the exercise of its legal or equitable jurisdiction, analogous to a special jury or committee or as a tribunal in the nature of a board of appraisers or other body appointed to ascertain the just compensation to be paid for property condemned for a public use, it is clear that it is not a court, nor its members judges, within the meaning of the constitutional provisions prescribing the mode by which judges are to be appointed. Its functions are but *quasi-judicial*. *State v. New Haven & N. Co.*, 43 Conn. 351, 382; *New Milford Water Co. v. Watson*, 75 *id.* 237, 242, 247. Only if its report is confirmed can it assume the character of a judicial act, and then that character will be due wholly to the approving judgment of the court to which it was returned." But under some Constitutions the right of the property owner to a *judicial* determination by review or in some other adequate form is required. See *ante*, chapter on Eminent Domain.

¹ *Eau Claire Water Co. v. Eau*

Claire, 132 Wis. 411. The exercise of the power to purchase involves *discretion*; and an agreement as to the price will not be interfered with by the courts in the absence of clear evidence of abuse of discretion. *Connor v. Marshfield*, 128 Wis. 280. A stipulation reserving the right to purchase water works at an *appraised price* is *not unreasonable*, although the company is bound to sell, but the city is not bound to purchase. *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517; 119 N. W. Rep. 555. Where a statute authorizes a municipality to contract for a supply of water and also to stipulate in such contract for an option to acquire the works and plant *on such terms as may be fixed by the contract*, an option in a contract to acquire the plant by purchase at a price to be fixed by commissioners, two to be appointed by each party, fixes, in the statutory sense, the terms upon which the plant is to be acquired. *Livermore v. Millville*, 74 N. J. L. 158. See also *Livermore v. Millville*, 71 N. J. L. 503, *aff'd* 72 N. J. L. 221.

The principle that a *public service corporation* cannot sell its franchises and property without express legislative authority *does not apply* when the purchaser of the corporation is a municipality, and the sale is effected pursuant to a reserved right. *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. Rep. 640, *rev'g* 140 Fed. Rep. 362. The *right of a city to purchase* gas works reserved in an ordinance granting the franchise may be *assigned*. *De Motte v. Valparaiso*, 161 Ind. 319; *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. Rep. 640, 647; *Covington Gas Light Co. v. Covington (Ky.)*, 58 S. W. Rep. 805.

enforced by or against the municipality.¹ But if a municipality stipulates in a contract with a water or other public service company, that it shall have the right to purchase the works of the company at a time and in a manner specified, and such stipulation is inserted in and becomes a part of a grant of the right to use the streets and public places of the municipality for the purpose of laying mains and pipes, the corporation is estopped to deny the authority of the municipality to make and enforce the stipulation.² Where

¹ Matter of White Plains Water Com'rs, 176 N. Y. 239. Proceedings in this case were had to organize a water company to supply a village under the statutes of New York, and permission therefor was given by the local authorities subject to the following conditions: "The village shall at the end of five years and at the end of every five years thereafter have the right to purchase said water works in the manner as now provided for by law." The only method of acquisition of water works by villages provided by statute was by an application by the board of water commissioners of the village for condemnation and appraisal by appraisers appointed by the court. The permission so granted perfected the franchise or right of the company to construct and maintain water works for the use of the village. Shortly thereafter an agreement was entered into between the water company and the board of village trustees in which the village agreed to take water for municipal and fire purposes for a period of five years at a stipulated price. This contract contained also a stipulation that the village "reserves the right at the expiration of five years from the date of the completion of the works and at the expiration of every five years thereafter to purchase said works as they may then exist" upon notice and payment of the appraised value, the appraisal to be made by three persons one appointed by the board of trustees of the village, one by the company, and these two persons choosing a third. It was also provided that the valuation by the appraisers should in no case exceed the cost of the works more than ten per cent. It was held that inasmuch as the grant of the company's franchise was perfect prior to the making of the contract, and inasmuch as the sole authority to acquire the works was vested in the board of water commissioners and

not in the board of trustees of the village, the contract was without authority and *ultra vires* and could not be enforced by or against the village; and that the village could not claim the benefit of an appraisal upon the method prescribed in the contract. Matter of White Plains Water Com'rs, 176 N. Y. 239.

Authority to a village corporation to raise money to pay hydrant rentals and to support fire engines without power to raise money for any other purpose, does not authorize it to enter into a contract with a water company that, after a certain time, the village shall have the right to purchase the water company's entire plant at an appraisal, and, being *ultra vires*, such a contract will not be specifically enforced at the instance of the village. But the legislature may validate the contract, but in that event, in carrying out the statutory power so conferred, the village must follow the provisions of the statute. Phillips v. Phillips Water Co., 104 Me. 103; 71 Atl. Rep. 474. Where the power of a municipality to make a lighting contract was limited to a term "not exceeding twenty one years," it was held that a provision in a contract that *if the city should refuse to extend the franchise, at the end of the term of twenty-one years, it should purchase the works*, was void as by implication extending the contract beyond the prescribed term. Clay Center v. Clay Center Light & P. Co., 78 Kan. 390; 97 Pac. Rep. 377. If the city council had the absolute and unconditional statutory power to purchase the works or plant of the lighting company, *quære* whether the provision in the contract was void?

² Bristol v. Bristol & W. Water Works, 19 R. I. 413. Under a reserved option or power to purchase the works of the company upon payment of the value of its property, the municipality has no standing to object to the trans-

the charter of a water company contains a provision that the municipality which it is organized to furnish with water, shall have the right at any time during the continuance of the charter to *purchase the franchise and corporate property* and all rights and privileges of the corporation at a price to be mutually agreed upon, or in case of difference to be determined by commissioners appointed by the

fer on the ground that the city has, by legislation subsequent to the making of the contract, become disabled to take title to all the property constituting the water works system. *National Waterworks Co. v. Kansas City*, 62 Fed. Rep. 853, 10 C. C. A. 653.

Power conferred by statute upon a city and the board of directors of a gas light company to make any contract relating to the business of the company which they might deem proper, is sufficient to confer on the board of directors power to stipulate that *if the city will forego its right to purchase* at a date prescribed by statute, it shall have the right to exercise the same privilege at a later date which is fixed by the contract. *St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69, 98. By the charter of a gas light company granted in 1839, the city was given the right to purchase the plant in 1860 and 1865. In 1846 the city and the company made a contract whereby the city relinquished the right to purchase the gas works in 1860 and in lieu thereof obtained the right to purchase in 1870 or at the expiration of every five years thereafter. In 1859 the city passed a resolution to purchase the gas works under the charter power to purchase in 1860. The company, on being notified of the city's action, refused to sell on the ground that under the contract of 1846 the city had no right to buy at that time. Thereupon the city took no further steps to purchase at that time. It was held that the company was estopped by its conduct from asserting that the provision of the contract of 1846 giving the right to purchase in 1870 was *ultra vires*. *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69, 100.

After a water company had been authorized, but before it had been organized and while it had no property, a town was authorized by the legislature to subscribe to its stock on condition that *the town should have the right to acquire the water works* at an amount based on the cost thereof.

The town subscribed to the stock, and the subscription was accepted, but there was no other evidence of assent by the water company to the condition. It was held that the *condition* which was attached to the subscription by the legislature inhered in and qualified the right of the company when it accepted the subscription; that the condition operated as an *amendment of the company's charter* under the power to amend reserved therein; and that, by acceptance of the subscription, the company became bound to sell. The court declared that the obligation was contractual, and it was immaterial whether or not it was reasonable, as the parties might agree to hard bargains. *Southington v. Southington Water Co.*, 80 Conn. 646.

The *use to be made of water works purchased by a city* under a stipulation in the franchise reserving the right does not concern the company which cannot resist the purchase on the ground that the city intends to sell the plant again or turn it over to another company. *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. Rep. 640, 647. A contract between a village and a water company contained a provision giving the village at its option the right to purchase within a limited time all the property and corporate rights of the water company at a price to be agreed on or in case of failure to agree to be determined by appraisers. The water company furnished water to a few consumers outside the village limits. It was held that the fact that the exercise of the power to purchase might compel the village to assume the obligation of the water company to provide water to the *consumers outside the village limits* was merely *incidental and subsidiary* to the primary object of the furnishing of water to the village for public purposes, and that the fact that the village was obliged to assume these obligations formed no obstacle to its exercise of the power to purchase. *Mayo v. Dover & F. V. Fire Co.*, 96 Me. 539.

court on the application of either party, the authority conferred upon the municipality is *not a power* to take the property by an *exercise of the right of eminent domain*, although it is somewhat analogous to it. It is an authority to the municipality to determine absolutely by its own act that the property and franchises of the corporation should become its own. The legislature conferred upon the company the corporate franchise with a condition annexed in favor of the municipality. By accepting its charter, the *corporation impliedly agreed to sell* whenever the municipality by vote should decide to buy. The legal relation of the parties was as if the corporation had made in writing a continuing offer to sell at a price to be subsequently fixed by the parties, and, in default of agreement, to be fixed by the commissioners.¹

When the stipulation is that the municipality shall have the right to purchase the property and franchises of the company at a price to be agreed upon between the parties, or to be fixed in the manner prescribed, *affirmative action by the municipality electing to exercise the right* binds it, and it cannot thereafter withdraw from its agreement and attempt to rescind its action. Thus, where the statute provided that if a municipality determined by vote to construct its works, any corporation owning existing works might elect to sell and the municipality should thereupon be bound to purchase, the obligation of the municipality to purchase becomes absolute upon its voting to proceed to construct its own works, and it *cannot thereafter rescind its vote* and refuse to purchase the existing works.² Where the stipulation of the ordinance is that "at the

¹ *Montgomery Gas Light Co. v. Montgomery*, 87 Ala. 245, 255; *Valparaiso City Water Co. v. Valparaiso*, 33 Ind. App. 193; *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482. *Seem* that a *repeal* of a provision in the charter of the company giving the city the right to purchase, will not terminate the right of the city to purchase if it has the power to do so, when the company has derived its power to furnish the water to the city and its inhabitants from a grant, ordinance or contract made by or with the city, while the charter of the company was subject to the provision. *White v. Meadville*, 177 Pa. 643.

² *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219; *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482; *Citizens' Gas Light Co. v. Wakefield*, 161 Mass. 432; *Hudson Elect. L. Co. v. Hudson*, 163 Mass. 346. See also

Covington Gas Light Co. v. Covington (Ky.), 58 S. W. Rep. 805.

A city ordinance enacted pursuant to statute electing to *purchase* water works, *held to be binding* on the city and to constitute a contract from which the city could not be relieved. *Omaha Water Co. v. Omaha*, 162 Fed. Rep. 225. When the city has by ordinance and otherwise recognized the sources of supply as adequate and satisfactory, and has full knowledge as to these sources at the time when it elects to exercise its right to purchase, *it cannot afterwards repudiate its election* on the ground of the unsanitary condition of the water derived from the sources of supply, nor can it do so on the ground that the sources of supply have failed from natural causes after exercising its option. *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219. Sufficiency of warrant for *Massachu-*

expiration of " a specified term the city shall have the right or privilege of purchasing the works "at such price as may be ascertained and determined by " disinterested parties to be appointed by the joint action of the parties to the contract, the city is not entitled to have appraisers appointed before it has elected to accept the property at the price that may be fixed by the appraisers. In other words, the *city must agree to purchase before calling upon the company to take part in the appointment of appraisers*. To place any other construction upon the provision would be to leave the company under an obligation to sell, no matter what price might be fixed, whilst the city would not be bound to purchase unless the price fixed should prove to be acceptable to it.¹ But the fact that the grant of the franchise contains a stipulation that the municipal-

sets town meeting to vote on purchase of water works, see Revere Water Co. v. Winthrop, 192 Mass. 455.

¹ *Montgomery Gas Light Co. v. Montgomery, 87 Ala. 245.* An ordinance granting a franchise for water works for a term of twenty years provided, "The city shall have the right to purchase said water works and appurtenances at the expiration of fifteen years from the date of the commencement of the hydrant rental at their fair and equitable value." It also provided that if the city elected to purchase and the parties were unable to agree on the price, the case might be submitted to the district court for determination. The city having elected to purchase and the parties being unable to agree on the price, the question of value was submitted to the court. It was held that *the contract to purchase was complete when the city made its election*, and that the conveyance, when executed, would relate back to that time, and the rights of the parties should be adjusted as of that date. *Galena Water Co. v. Galena, 74 Kan. 644.*

Power reserved in grant of franchise to acquire water works construed to give the city the right to have an appraisal before being bound to exercise the option. *Eau Claire Water Co. v. Eau Claire, 132 Wis. 411.* Where the provision of the ordinance or contract is ambiguous and the parties by their acts have adopted the construction that appraisers should be appointed before the city is obliged to elect to purchase, this construction is in favor of the public and will be followed by

the court. *Livermore v. Millville, 71 N. J. L. 503.* Where the ordinance granting the franchise reserves the right to the city to purchase the water works at an appraised price at intervals of five years, *an attempted exercise of the power by obtaining an appraisal does not defeat the right to purchase it at the end of another quinquennial period.* *Eau Claire Water Co. v. Eau Claire, 132 Wis. 411.* See also *Covington Gas Light Co. v. Covington (Ky.), 58 S. W. Rep. 805.* When the ordinance or contract specifies a time at which the right to purchase shall be exercised, *e. g.*, at the end of twenty-five years, the right must be exercised within a reasonable time thereafter, assuming that the city has a reasonable time after that period in which to exercise it. An option to purchase is not exercised within a reasonable time when eight years have elapsed since the time fixed by contract. *Montgomery Gas Light Co. v. Montgomery, 87 Ala. 285.* An ordinance granting a franchise to a water company contained a provision as follows: "At any time after the expiration of fifteen years from the completion of said water works, the city shall have the right to purchase the same by giving the owners thereof one year's notice in writing." It was held that the city might elect to purchase and serve notice thereof *one year before the expiration of the period of fifteen years*, and that it was not obliged to wait until the expiration of the fifteen years period before taking any action upon its right to purchase. *Valparaiso City Water Works Co. v. Valparaiso, 33 Ind. App. 193.*

ity shall have the right to purchase the franchise and plant of the corporation *does not impose any duty on the municipality to purchase*, and does not justify the inference that the municipality can only provide itself with water works or a lighting plant by purchasing from the company.¹ When, by the charter of the company, the city or town has the right to take the works without giving any election to the company to sell or not as it pleases, the rights of the parties are fixed and determined by the vote of the city or town, to take the works. The taking by the municipality is complete when the vote therefor is passed, although payment may not have been made. Otherwise, in case of dispute as to the price, the right of the city or town to proceed with the purchase of the works, or to use them, would be suspended until the cost could be ascertained by a proceeding in court. It is also for the company's advantage to regard the title as passing by the vote, so as to give the right to the price at once. Otherwise it would be left to the action of the city or town, or to such remedy as it might have for neglect to carry out the bargain within a reasonable time. - Apart from the fact that the liability of the franchise to be taken is inherent in it by the terms of its creation, the security for payment is sufficient.² But when the pro-

¹ Colby University v. Canandaigua, 96 Fed. Rep. 449; Thomas v. Grand Junction, 13 Colo. App. 80; Long v. Duluth, 49 Minn. 280, 290; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 168; Skaneateles Water Works Co. v. Skaneateles, 161 N. Y. 154; Knoxville Water Co. v. Knoxville, 200 U. S. 22, where, during the contract term, the doctrine of strict construction was applied with great, if not extreme, rigor by the majority of the court.

² Rockport Water Co. v. Rockport, 161 Mass. 279. Upon a vote to purchase under a reserved option, the equitable ownership vests in the municipality. Bristol v. Bristol & W. Water Works, 25 R. I. 189. After the vote, the town may enjoin the water company from laying additional pipes. Rockport Water Co. v. Rockport, 161 Mass. 279. Where a town has by vote determined to exercise an option to purchase water works reserved to the town by the franchise of the water company, the company, after the vote, runs the works as the trustee of the town and on final settlement must account to the town for all profits. Pending this settlement, the company must take such care of the property as it would take of its own, but need not provide against deterioration by time and natural wear, or make improvements or additions. While it is its duty to repair leaks in the dams, it is not compelled to establish filters, or to acquire additional rights, to fence out cattle, or to deepen reservoirs. Bristol v. Bristol & W. Water Works, 25 R. I. 189. Water contract containing an option to purchase the works construed, and the title of the city held to accrue only on completion of the purchase and not on giving notice of its election to purchase. Jersey City v. Flynn, 74 N. J. Eq. 104; 70 Atl. Rep. 497. See also Jersey City v. Jersey City Water Supply Co., 70 N. J. Eq. 514.

A water works franchise contained a condition that the city might buy at its option at the end of ten years at a value to be fixed by appraisers, one to be named by each party and a third by the nominees. It was held that the city was estopped to object to the validity of the appraisal and the qualification of the appraisers by participating in the proceedings. Fayetteville v. Fayetteville Water, L. & P. Co., 135 Fed. Rep. 400. As to appraisal, the procedure therein, and the powers of appraisers, see Omaha Water Co. v. Omaha, 162 Fed. Rep. 225; Eau Claire

vision of the contract or ordinance is that the city shall only be entitled to possession of the works upon payment of their value, the city cannot claim possession from the water company without first paying or tendering the value of the works and improvements. *Payment is then a condition precedent* to the right of the city to possession.¹ And although the franchise and right of the company to maintain and operate its plant may have expired by lapse of the prescribed term, the title to the property and the right of possession do not pass to the city under a reserved power or option to purchase until the city has either paid or tendered the value or price of the plant.² When the stipulation is that the municipality may at its option purchase the water works and all the pipes, reservoirs, and appurtenances connected, used, or belonging therewith, the *res* to be bought by the town under this option is exactly what would be the subject of purchase by a third party who should offer to buy of the works from the company. It comprises the material plant and also

v. Eau Claire Water Co., 137 Wis. 517; 119 N. W. Rep. 555.

¹ *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368. At a time when the population of a city was small and its only water works consisted of a small line of wooden pipes drawing its supply from a river, it entered into a contract by which it agreed to deliver and concede to a water company the exclusive use, control, possession, and management of the city's water works, together with the right to sell and distribute water for domestic purposes for a term of thirty years. The contract provided that the water company should make extensive improvements in the works. The contract also stipulated that the company should "return the said water works" to the city at the expiration of the term of thirty years "in good order and condition, reasonable wear and the damage of the elements excepted, upon the payment to the company of the value of the improvements made after the approval of this contract" to be ascertained as therein provided. Provision was made for the appointment of arbitrators to ascertain the value of the works. The term of thirty years having expired, the city claimed possession of the works on the theory that the contract was a lease; that the term of the water company as tenant had expired, and that the water company was obliged to surrender possession without prepayment of the

value of the works and improvements.

It was held that the contract was not a lease, but was rather in the nature of a contract to purchase; that the rights of the parties at the expiration of the contract were fixed by its terms and not by legal implication; that the city was not entitled to reclaim possession of the works from the water company without first paying or tendering the value of the improvements; and that the city was not entitled to the appointment of a receiver of the water rates or to prevent the water company from receiving payment of the water rates after the expiration of the term fixed by the contract but before payment or tender of compensation. It was also said that the water company was substantially in the position of a mortgagee in possession having a lien on the property involved as security for the performance of the covenants of the city contained in the contract, and that without tender or payment its possession should not be disturbed or a receiver appointed. *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368. *Infra*, sec. 1315.

² *National Waterworks Co. v. Kansas City*, 62 Fed. Rep. 853, 10 C. C. A. 653. Construction of statutory provision requiring municipality to pay water company the total cost of its franchise, works, and property with interest thereon. *Tisbury v. Vineyard Haven Water Co.*, 193 Mass. 196.

the rights possessed by the company and exercised in the use of the works and plant; and it includes a franchise derived from the municipality as well as the physical property. The municipality has the option to buy, not to extinguish, the rights it has given, which, together with other property and rights, make up what the company owns. Hence, the *franchise is included* in the purchase and the company is entitled to compensation for it.¹ If the *plant of the company is mortgaged* to secure bonds which are not due, the sale to the city may be made subject to the mortgage when the bondholders are not parties to the proceeding.² When the manner in which the right of the municipality to purchase the plant is prescribed by ordinance or contract, the company is entitled to the intervention of a court of equity to prevent the city from taking the plant in any manner other than that prescribed by the contract; and, therefore, if an ordinance and contract between a public service corporation and a municipality contains a valid stipulation as to the manner in which the reserved power of the municipality to purchase the plant of the company shall be exercised, *e. g.*, if it contain a provision that the value of the property shall be fixed by appraisers, one of whom is to be appointed by the company, the legislature cannot by subsequent statute alter the manner of appraising the value in such a way as to deprive the company of a voice in the selection of the appraisers or commission. The manner of selecting the persons who are to decide the selling price is a substantial part of the contract, and is protected by constitutional provision against impairment.³

¹ *Bristol v. Bristol & W. Water Works*, 23 R. I. 274. When the purchase is to be made pursuant to reservation in the franchise ordinance at a fair and equitable price, the fact that the plant is an *established system and in operation and has an unexpired franchise, are elements of value in determining the price*. *Galena Water Co. v. Galena*, 74 Kan. 644. Under a stipulation that the municipality may at its option purchase the water works, and all the pipes, reservoirs, and appurtenances connected, used, or belonging therewith, the fact that the reservoir which supplies the water works for the town *also supplies the water works for another town*, does not render the system incomplete or prevent the company or the town from enforcing the stipulation, the supply being ample for the requirements of both; the town, however, is not com-

pelled to purchase the whole water supply which is beyond its needs, but the *reservoirs and water supply will be apportioned* by the court through a master. *Bristol v. Bristol & W. Water Works*, 23 R. I. 274.

² *Norwich Gas & Elect. Co. v. Norwich*, 76 Conn. 565. Under a statutory authority "to purchase, procure, provide, and contract for the construction of, and to construct and operate water works for the purpose of supplying" a city and its citizens with water, *the city may*, in the exercise of the discretion entrusted to it, *purchase a system of water works subject to a mortgage* to secure bonds not payable for more than twenty years. *State v. Topeka*, 68 Kan. 177.

³ *Leavenworth v. Leavenworth City & F. L. Water Co.*, 69 Kans. 82. See also *State v. McPeak*, 31 Neb. 139.

Where the reserved right of the city is to purchase at a price to be determined by appraisers to be selected by the parties, it has been held that *the city cannot enforce specific performance of the contract*, because it comes within the principle that an executory contract for the sale of property, by the terms of which the price to be paid for the whole subject matter is to be determined by appraisers to be selected directly or indirectly by the parties, cannot be specifically enforced in equity, so long as there is a failure from any cause to appoint referees or a failure of such referees after appointment to assess the value.¹ But, on the other hand, it has been pointed out that an agreement to sell at a price to be fixed by appraisers to be appointed by the parties is merely a subsidiary part of a much more extensive contract, — a contract by virtue of which the public service corporation has in the past enjoyed privileges in the streets and highways of the municipality, and collected large sums of money from its inhabitants, and by virtue of which it may continue, unless the sale can be consummated, or some other relief granted, to enjoy the same valuable franchises until the expiration of its franchise or in perpetuity, if its franchise be without limit. Therefore, it has been held that in such a case the manner of determining the price is a matter of form rather than of substance; and if it becomes evident that it cannot be determined in the manner provided for in the contract by reason of the refusal of one party to do what in equity he ought to do, the court will, if necessary to the purposes of justice, *determine it* upon the application of the other through a master, or in other competent form.²

¹ *Montgomery Gas Light Co. v. Montgomery*, 87 Ala. 245; *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69. See *Tscheider v. Biddle*, 4 Dill. C. C. R. 55, referred to *infra*. In answer to the argument that if specific performance cannot be maintained the company can defeat the right of the city to purchase by refusing to appoint arbitrators, it has been said that the city is not without remedy; that it might compel the appointment of arbitrators by *mandamus*, or the State might proceed by *quo warranto* to forfeit the charter of the gas light company for its refusal to comply with one of the conditions on which it accepted it. *St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69, 114.

² *Bristol v. Bristol & W. Water Works*, 19 R. I. 413; *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219. See *Tscheider v. Biddle*, 4 Dill. C. C. R.

55, where the leading English and American cases as to the *specific execution of agreements to refer or to arbitrate* are critically examined, and views similar to those in the text are expressed by the Circuit judge delivering the opinion of the court. In *National Waterworks Company v. Kansas City*, 62 Fed. Rep. 853, 10 C. C. A. 653, the court made a decree for the specific performance of an obligation by the city to buy and the company to sell at the fair and equitable value at the expiration of the term of a franchise. The agreement was that the transfer should be made at the "fair and equitable value" of the plant, &c. to be ascertained if the parties could not agree by the court or in such manner as the court might determine. The value of the property was ascertained by appointing two commissioners to examine the prop-

§ 1313. **Acquisition by Municipality of Works of Public Service Corporation under Power of Eminent Domain.**—Although the property and franchises of a public service corporation are held by it for public purposes, such property and franchises *are not exempt from the exercise of the power of eminent domain* by a municipality or other public body under statutory authority conferred upon it. The State, acting through the legislature, possesses, and has the right to exercise the power of eminent domain over all the private property and property rights within the limit of the State of whatever nature, corporeal and incorporeal, and by whomsoever owned, whether by individuals or corporations. The property of a corporation is not exempt from the exercise of this power, even though it may have been granted exclusive franchises and privileges. A legislature in granting a charter cannot, by express terms, however strong may be the language used, preclude another legislature, or even itself, from exercising the power of eminent domain over the charter thus granted and the property and rights acquired thereby.¹ A statute empowering a municipality to acquire a water or light plant by virtue of the power of eminent domain is not unconstitutional on the ground that it authorizes the condemnation of property which is already devoted to public use *without designating any different or larger public use* to which it is to be applied. A municipal corporation is a public and governmental agency; and it holds property for the general benefit with a larger scope of use and a wider purpose than a public service corporation does.² The fact that the public service corporation has made *valid and existing contracts for supplying water or light* to the municipality, and that a statute authorizing the condemnation of its property, if carried out, necessarily destroys its ability to keep its contracts with the municipality, does

erty and to estimate and fix the value of the works and system. The report of the commissioners was returned to the court and on the report and evidence the court fixed the fair and equitable value of the water works.

¹ *Kennebec Water Dist. v. Waterville*, 96 Me. 234; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 689. *Matter of Brooklyn*, 143 N. Y. 596. See *ante*, chapter on Eminent Domain.

² *Matter of Brooklyn*, 143 N. Y. 596, 619. See also *Mayo v. Dover & F. V. Fire Co.*, 96 Me. 539. *Kansas statute* authorizing municipalities having a population of 50,000 to condemn existing water works sustained as con-

stitutional. *Metropolitan Water Co. v. Kansas City*, 164 Fed. Rep. 738. The provision of the *New York* statutes requiring any municipal corporation, before acquiring lands for "new or additional sources of water supply" to submit maps to the State Water Supply Commission does not apply when the municipality seeks to condemn the water works and plant of a company organized to supply, and supplying water to the municipality and its inhabitants. *Waverly v. Waverly Water Co.*, 117 N. Y. App. Div. 336, *aff'd* 189 N. Y. 555. See also as to procedure under the *New York* statute, *Waverly v. Waverly Water Co.*, 127 N. Y. App. Div. 440.

not constitute any objection to the exercise of the power of eminent domain. The contracts are mere incidents to the tangible property; and while the company, by being deprived of its tangible property, is unable to perform its part of the contracts, and therefore can make no demand upon the municipality for performance of its part, the contracts are not the thing which is sought to be condemned, and their impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property. Furthermore, a contract is property, and like any other property, may be taken under condemnation proceedings for public use. Hence, the true view of proceedings by the municipality to condemn the property and franchises of a public service corporation, which is under contract with the municipality, is that the proceedings do not impair the contract or its obligation, but appropriate it, as they do the tangible property of the company, to public use.¹

§ 1314. **Compensation; Elements; Measure of Damages.** — In ascertaining the *compensation to be paid to a public service corporation* for the acquisition of its property and franchise by condemnation, many elements must be taken into consideration. The primary question for consideration is, of course, what is the fair value of the property taken by the municipality for public use. But the property so taken has a composite character. It includes real estate with expensive structures thereon, mains and pipes in the public streets, franchises, rights, and privileges to use the public streets, and a business as a going concern. In determining the value, all of these elements, unless otherwise provided by law or contract, must be taken into consideration. Upon the question of the value of the land and structures, the *original cost* of construction and the *cost at which they can be reproduced* at the present time, are elements which must be considered, but are not controlling.² When the property to be acquired is that of a *water company*, the quality of water

¹ Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 690, 691; Leavenworth v. Leavenworth City & Ft. L. Water Co., 69 Kan. 82.

² Kennebec Water Dist. v. Waterville, 97 Me. 185; Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371; Monongahela Water Co.'s Case, 223 Pa. 323. *Ante*, chapter on Eminent Domain. A right conferred by statute and by proceedings thereunder to use the waters of a great pond, which is held in trust by the

State for the benefit of the public, is a property right of a water company for which it is entitled to compensation. Gardner Water Co. v. Gardner, 185 Mass. 190. *Interest on the money invested in the plant during construction and before completion is a part of the cost of construction.* Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371. This is obviously correct and is, we believe, generally so regarded.

furnished, the character of the service rendered, and the fitness of the plant and of the source of supply to meet reasonable requirements in the present and future, are material considerations in determining the present value.¹ In addition to the present value of the physical property, some cases hold that the corporation is entitled to compensation for *the value of its privileges and franchises*,² and although these franchises and privileges may not be exclusive in law, yet if they are so in fact, the franchises and privileges must be valued as they then exist, and having due reference to their practically exclusive nature.³ If the franchises and privileges are not perpetual and irrevocable, but *are subject to legislative repeal*, that fact must be given its proper weight in determining the value of the property.⁴ In addition to these elements there is the fact that the taking of the property results in the destruction or transfer of a *going business*, and the property and franchises of the corporation must be given the value which they have as a part of a going concern, and not as separate and distinct therefrom.⁵ As a *going con-*

¹ Kennebec Water Dist. v. Waterville, 97 Me. 185.

² Kennebec Water Dist. v. Waterville, 97 Me. 185; Monongahela Water Co.'s Case, 223 Pa. 323. It is the franchise as it exists at the time of condemnation, which is to be taken and paid for; and *past neglect of duty* of the water company to furnish pure water at reasonable rates is not a proper matter for consideration in determining the value; nor is the *liability* of the company to *legal forfeiture* of its franchises on account of past unfaithfulness or misbehavior to be considered. Kennebec Water Dist. v. Waterville, 97 Me. 185.

³ Kennebec Water Dist. v. Waterville, 97 Me. 185. The element of *good will* of the business it was thought should not be considered if the system condemned is practically exclusive. Kennebec Water Dist. v. Waterville, 97 Me. 185; but see *infra* in this chapter. The *policy of the State* in dealing with public service corporations, in so far as that policy has been manifested by statute, may be considered. Norwich Gas & Elect. Co. v. Norwich, 76 Conn. 565.

⁴ Kennebec Water Dist. v. Waterville, 97 Me. 185.

⁵ Norwich Gas & Elect. Co. v. Norwich, 76 Conn. 565; Kennebec Water Dist. v. Waterville, 97 Me. 185; Brunswick & T. Water Dist. v. Maine

Water Co., 99 Me. 371. See opinion of Mr. Justice Brewer on the Circuit in National Waterworks Co. v. Kansas City, 62 Fed. Rep. 853, 866, quoted *infra*. In Bristol v. Bristol & W. Water Works, 23 R. I. 274 (a case of a purchase under a reserved option in favor of a town), the franchise of the company was exclusive. The appraisal included items for the unexpired term of the franchise, for the good will of the plant, and for enhanced value due to the fact that the plant was a running plant. The court held that the items for good will and enhanced value, due to the fact that the plant was a running plant, were included in the compensation for the franchise, and not the subject of separate consideration or additional allowance, saying: "The fact that the plant is a running plant and the probable retention of customers, which is what is meant by goodwill, are elements which are included in the valuation of the franchise. A monopoly has no good-will, for its customers are retained by compulsion, not by their voluntary choice. The laying of the pipes in their actual position, adapted to the use to be made of them, is the result of skilled labor, and the skill of arrangement, as well as the labor of laying and material, are all comprehended in the actual cost."

cern, consideration must be given to the present efficiency of the system, the length of time necessary to construct the same anew, the time and cost needed after construction to develop the new system to the level of the present one in respect to business and income, and the added net income and profits, if any, which by its acquisition would accrue to a purchaser during the time required for such new construction and for such development of business and income.¹

But overlying all these elements is the fact that the public service corporation whose property is sought to be acquired by the municipality *cannot*, under any conditions, *charge more than reasonable rates* for services rendered by it. The value of the property of the corporation must be fixed and determined with reference to that fact. In proceedings to acquire the property it therefore frequently becomes material to determine what are the reasonable rates for the service, whether these rates have been exceeded by the corporation in the past, or whether the existing rates of the corporation may be increased; and the value of the property of the corporation in itself, and as a going concern, must be determined rather with reference to such income as it can earn when reasonable rates are charged for the service rendered than such income as it has actually earned at rates which have had elements of unreasonableness.² But *the actual rates* which have been charged prior to condemnation *and the actual earnings* are both to be considered in determining the value of the property, the weight to be given to those considerations being dependent upon their reasonableness.³

¹ Kennebec Water Dist. v. Waterville, 97 Me. 185; Norwich Gas & Elect. Co. v. Norwich, 76 Conn. 565. Even when the *franchise* of the company has expired so that its franchise rights and privileges have no longer any value, the *value of the property of the company* should not be limited to the mere cost of reproducing the plant, but allowance should also be made for the fact that the plant has an added value created by the fact of connections with and supply of buildings, although the company does not own the connections. National Waterworks Co. v. Kansas City, 62 Fed. Rep. 853; 10 C. C. A. 653.

² Kennebec Water Dist. v. Waterville, 97 Me. 185; Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371. When the rates which furnish a basis for estimating value are earned in part by *property taken and*

in part by property not taken the appraisers must discriminate and so far as value may depend upon rates they should charge the property taken for only its fair proportion of earnings. Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371. But when the property is voluntarily tendered to the municipality under a statute giving the company the right to do so, and requiring the municipality to purchase, and the municipality is only required to make a compensation for the *physical property* of the company and not for its franchisees, the past earnings of the company are not evidence of the fair value of the property, and should be excluded. Newburyport Water Co. v. Newburyport, 168 Mass. 541; Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365.

³ Kennebec Water Dist. v. Water-

In *determining the value* all evidence should be received and considered so far as it is admissible under the general rules of law, and the value should be determined by the appraisers or commissioners upon the whole testimony before them.¹ They cannot adopt any arbitrary method of determining such value. The capitalization of income, even at reasonable rates, cannot be adopted as a conclusive test of present value, although the present and probable future earnings at reasonable rates may properly be considered.² When the compensation is to be determined, not under an exercise of the power of eminent domain, but under a statute which makes the exercise of the right of a city to construct and operate its own works conditional upon the refusal of an existing company to sell its works to the city, and which requires the city to pay to the company the value of the property "for the purpose of its use" by the city, the company cannot recover from the city any compensation for the right to lay and maintain pipes in the streets and for its right to collect water rates. Under such a statute, whatever the city purports to purchase, the right of the company to lay pipes in the streets is of no use to the city. The city had that right by virtue of the legislative authority to furnish water; and as soon as the city was authorized by the legislature to furnish water, no one could complain if it proceeded to lay pipes for that purpose; hence, the right of the company to lay pipes in the city streets did not add to the value of the property "for the purpose of the city," and was not under the circumstances a proper subject for compensation.³ When the value is to be determined for the purpose of carrying into effect a reserved right or option to purchase the property of the public service corporation and the franchise of the company has expired, the company cannot receive compensation for the value of the franchise, either directly by valuing it on the basis of a renewal, or indirectly by fixing an amount based upon the capitalization of the earnings.⁴

§ 1315. Rights of Municipality and Grantee at Expiration of Franchise. — On the expiration of a franchise to furnish water or

ville, 97 Me. 185. If the company has in the past actually received more than reasonable rates, the excess cannot be deducted from the amount to which it would otherwise be entitled. *Kennebec Water Dist. v. Waterville*, 97 Me. 185.

¹ *Kennebec Water Dist. v. Waterville*, 97 Me. 185. It is not necessary to specify separately each item of value which is included in the amount

fixed. *Norwich Gas & Elect. Co. v. Norwich*, 76 Conn. 565.

² *Kennebec Water Dist. v. Waterville*, 97 Me. 185.

³ *Newburyport Water Co. v. Newburyport*, 168 Mass. 541; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365.

⁴ *National Waterworks Co. v. Kansas City*, 62 Fed. Rep. 853, 10 C. C. A. 653.

light and to use the streets of the municipality in connection therewith, for a limited term, the rights of the grantee, unless so provided by law or contract, do not immediately and totally terminate, and the grantee does not become a trespasser on the city streets. A public service corporation has been engaged in the performance of a work of public utility. That service was, of necessity, of a nature which required the occupation of the streets with pipes buried in the soil, with connections therefrom of more or less permanence of character to the buildings and premises of consumers. These improvements could not be removed, nor to any extent interfered with, during the term of the franchise, without interrupting the service the corporation was bound to render; and it must be presumed, where the grant or contract is silent on the point, that it was contemplated by the parties that the corporation should remain in possession such *reasonable length of time after the expiration of the term* as might be necessary to negotiate an extension or renewal of the franchise, or, in default thereof, to close out its business without unnecessary sacrifice.¹ Even when *the franchise has expired* and the city has a reserved right or option to purchase the property of the company, the *title* to the water or lighting plant or system *does not vest in the city*, until the company has been paid or tendered the value thereof.² If the city continues to accept a service of water or light from the company and assumes to regulate the rates therefor, this *gives implied consent* to the continued possession of the streets and operation of the works until such time as the city shall, by reasonable notice, see fit to terminate the corporation's tenure of the privilege.³ And so long as the corporation continues to perform

¹ Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234. The fact that a municipality has made contracts for various terms, by which the company agreed to and did furnish water for municipal purposes, and by which the city agreed and paid therefor stipulated annual compensation, and that by reason of such contracts the company was obliged to incur large expense over and above what otherwise would have been necessary, does not create any obligation on the municipality to continue to receive water from the company after the contract or franchise has expired. Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. Rep. 232. Where the village authorities in *New York* granted a franchise for electric lighting purposes for a term of five years,

with a privilege of renewal unless the village should elect to purchase the plant, and the village has, after the expiration of the term, allowed the owners of the franchise to avail themselves thereof from year to year without formal renewal, the village cannot impeach the validity of the franchise on the ground that it was not formally renewed, and was enjoined from removing the wires from the streets. *Wakefield v. Theresa*, 125 N. Y. App. Div. 38.

² *National Waterworks Co. v. Kansas City*, 62 Fed. Rep. 853; *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368; *Stein v. McGrath*, 128 Ala. 175. *Supra*, sec. 1312.

³ *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234.

the service and the city continues to accept it, the obligation of the city and other patrons to pay a reasonable compensation therefor will continue.¹ If, after the expiration of the franchise, the city exercises its right to prescribe reasonable rates, it must do so under precisely the same limitations and conditions as to reasonableness which applied before the expiration of the franchise.²

§ 1316. **Contamination of Water Supply.**—A corporation organized for the purpose of distributing water for compensation is not a *guarantor of its quality*. It is not a commodity kept for sale in the strict sense of the term, but is free to every one in nature's reservoir; like light and air, it is taken directly or indirectly from a common source of supply. The immediate source is usually selected in advance and fixed by contract with the municipality, leaving the mere service of a carrier to be performed of taking the water from such source and distributing it to the consumers. To say that the person or corporation performing the service shall be burdened with an implied warranty of the quality of the thing carried and distributed would be treating the transaction as a sale strictly so called, and then applying an exception to the doctrine of *caveat emptor* not supported by sound reason or by authority.³ The obligation of a water company is not to provide water that is chemically pure, but water that is *ordinarily and reasonably pure*,⁴ and in the performance of that obligation it is only held to the exercise of *reasonable diligence*.⁵ If it is liable for impurity of the water, or for contamination which renders it unfit for domestic use, it must be on the ground of *actionable fraud or negligence* without contributory negligence on the part of the consumer.⁶ If the water

¹ Los Angeles City Water Co. v. Los Angeles, 103 Fed. Rep. 711; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234. See also Kimball v. Cedar Rapids, 100 Fed. Rep. 802. Acceptance of electric light service by a village after the expiration of a contract, does not, as matter of law, create an implied contract for another year, although the statutory authority of the village is to contract for lighting from year to year for a term not exceeding ten years. Howell Elect. L. & P. Co. v. Howell, 132 Mich. 117.

² Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234.

³ Green v. Ashland Water Co., 101 Wis. 258.

⁴ Brymer v. Butler Water Co., 172

Pa. 489. A stipulation in a contract with a municipality for a supply of water that the water shall be pure and wholesome and free from pollution deleterious for drinking and domestic purposes does not require absolute purity. This stipulation does not require that the supply shall be free from pollution at its source, but only that the water delivered shall be free from pollution. Jersey City v. Flynn, 74 N. J. Eq. 104; 70 Atl. Rep. 497.

⁵ Green v. Ashland Water Co., 101 Wis. 258.

⁶ Green v. Ashland Water Co., 101 Wis. 258. In Hughes v. Auburn, 161 N. Y. 96, rev'g 21 N. Y. App. Div. 311, it was held that in constructing and maintaining a sewer or drainage system, a city exercises a part of the gov-

company knows, or from the situation ought to have known, that the water it is distributing in a municipality is dangerous for domestic use from causes not ordinarily discoverable by the exercise of reasonable care, it owes the duty to its customers of disclosing that danger, and a failure so to do, knowing that such customers are liable to use the water through ignorance of its character, has been said to be a fraud in law, rendering the company liable to legal damages to any person injured by such fraud without any fault on his part, and has also been said to be a failure of duty amounting to actionable negligence to which the same liability is incident.¹ A cause of action for damages resulting from the impurity of the water sounds in tort in whatever way it may be regarded, and knowledge, or its equivalent, on the part of the company, and want of such knowledge, or its equivalent, on the part of the consumer damaged, is essential to legal liability in the one case as well as the other. Hence, where it was sought to render the company liable for the death of a consumer from typhoid fever said to have been contracted through the contamination of the water supply, the court held that if the deceased knew, or ought to have known, the dangerous condition of the water, yet used it with the consequence complained of, no legal responsibility attached to the water company by reason of the contributory negligence of the deceased in failing to take precautions to avoid disease resulting from the impure supply.²

ernmental powers of the State for the customary local convenience and benefit of the people; that while it may not conduct sewage into the house or upon the premises of an individual without liability for damages, the injury is one to property for which the owner alone may demand redress, and a member of his family has as such no special remedy against the municipality for personal suffering caused by its neglect of *sanitary precautions against disease*; and hence that an individual who, without any invasion of his property rights, has *suffered from disease* superinduced by the neglect of the authorities of a city to observe sanitary precautions in the construction and maintenance of a system of sewage cannot recover damages for the injury from the municipality. See also to the same effect, *Metz v. Asheville*, 150 N. Car. 748; 64 S. E. Rep. 881.

¹ *Green v. Ashland Water Co.*, 101 Wis. 258.

² *Green v. Ashland Water Co.*, 101

Wis. 258. In this case the action was brought to recover damages for the death of the plaintiff's intestate alleged to have been *caused by negligence* on the part of the water company in failing to secure water free from sewage contamination. It was claimed that the deceased used polluted water and in consequence was stricken with typhoid fever from which he died. At the trial the plaintiff recovered a judgment against the company. On appeal the judgment was reversed upon the ground that the trial court had practically made the water company a guarantor of the purity of the water supply; and it was also held that if the water company's source of supply had been contaminated with sewage for a long period of time causing epidemics of typhoid fever annually in the community for several years, and the facts in that regard were notorious in the community and a matter of common knowledge, the presumption was that mem-

After having secured a proper source of supply, the company is bound to exercise *diligence in the effort to preserve the water from pollution*, and deliver it to the public in no worse condition than that in which it is taken from the source of supply. If it neglects to perform this duty, or if by reason of the contamination of the source of supply from causes over which it has no control, the water is unfit for domestic or other uses, the company may, at the suit of a taxpayer, be restrained from collecting water rates, because it is inequitable that it should collect these rates when the consideration therefor has failed.¹ *Statutes prohibiting the discharge of sewage* or other polluting matter into the waters of the lakes, streams, and rivers of the State are constitutional. These laws are a proper exercise of the police power, and do not abridge the privileges or immunities of the citizens, nor do they deprive them of property without due process of law, or deny them the equal protection of the laws, because of legitimate exceptions.² For the purpose of pre-

bers of the community, of ordinary intelligence, had notice of that situation, and in the absence of evidence to the contrary that presumption was held to prevail, and precluded a recovery by a person injured by the use of such water because of his contributory negligence. In *Milnes v. Huddersfield*, L. R. 11 App. Cas. 511, a consumer brought an action against the defendant municipality to recover damages for sickness caused by lead poisoning through use of the municipal water supply. The water was pure in the mains, which were of cast iron, but by the by-laws of the municipality the consumer was required to bear the cost of making connections with the mains, and the by-laws prescribed that the connecting pipes should be of lead. By the statute and the by-laws or regulations of the municipality the connecting pipes, although owned by the consumer, were thus under the control of the municipality, and the consumer had no control over their construction or power to use any other than a lead pipe. The House of Lords held that the municipality was not liable to the plaintiff, the municipality, as undertaker of the public enterprise, having complied with its statutory duty which was only to supply water which was pure in the mains. (Earl of Selborne and Lord Watson, dissented.)

¹ *Brymer v. Butler Water Co.*, 172 Pa. 489. Action or proceeding under

the *Pennsylvania* statute to compel a water company to remove the sources of pollution and to furnish pure water. *Peffer v. Pennsylvania Water Co.*, 221 Pa. 578.

² *Commonwealth v. Emmers*, 221 Pa. 298. The legislature may prohibit, or may delegate the power to *prohibit, boating* on a lake or great pond which is the source of the water supply of a municipality. *Sprague v. Minon*, 195 Mass. 581. A statute prohibiting the discharge of the sewage into the stream from which a municipality is supplied with water and authorizing an injunction unless the matter discharged is purified by a method approved by the State Board of Health, is a constitutional exercise of the police power, and an injunction, as authorized by the statute, will issue in case of a violation. *Durham v. Eno Cotton Mills*, 141 N. Car. 615. Construction and enforcement of *New Jersey* statute against pollution of streams; *New Jersey Health Board v. Ihnken*, 72 N. J. Eq. 865; 67 Atl. Rep. 28. Of *North Carolina* statute, *Durham v. Eno Cotton Mills*, 144 N. Car. 705. As to enjoining a municipality from polluting a river with sewage, see *Doremus v. Paterson*, 70 N. J. Eq. 296. A riparian owner is entitled to the *ordinary and reasonable use of the water* adjacent to and covering part of his lands; and the rules and regulations of a State board of health for the protection from con-

venting a public wrong and enabling the community to obtain a proper supply of water, the State may, by virtue of its general visitatorial powers, intervene *by a suit in equity to compel the persons contaminating the water* to refrain from continuing so to do. The rights of a city with its thousands of inhabitants, and the duty of the city to protect them in the enjoyment of the necessities of life, and the preservation of health, stand on a higher ground than the rights of a private citizen, so far as the protection of its water supply from pollution is concerned and properly call for the intervention of the State, and perhaps of the municipality, in the public interests.¹

§ 1317. **Consumers; Duty of Municipality or Corporation to furnish Supply.** — So far as the consumption of water or light is concerned, it is immaterial to the consumer whether the supply be furnished by the municipality or by a public service corporation. As a general rule the obligations to the consumer are the same in either case. The organization supplying water or light, whether it be a municipal or a private corporation, is under a *duty to consumers to supply* the water or light *impartially to all reasonably within the reach of its pipes, mains, and wires*. The public character of the service, the obligation of the municipality to perform its duty towards all the inhabitants without discrimination, and the acceptance of a charter to perform a public service by a private corporation create this duty, which *must be exercised without discrimination* between persons similarly situated and under circumstances substantially the same. The organization furnishing a supply cannot act capriciously or discriminate against any one who is able to pay for the service furnished. The law will not permit any undue advantage to be given to a consumer by doing for him what is not done for others under circumstances substantially the same. Therefore, whether the supply be furnished by a municipal or by a private corporation, the water or the light *must be furnished to all who apply therefor, and offer to pay the rates and abide by such reasonable rules*

tamination of the public supply of a municipality, adopted pursuant to statutory authority, cannot deprive the riparian owner of this right without compensation. *George v. Chester*, 59 N. Y. Misc. 553; *Heaton v. Chester*, 59 N. Y. Misc. 558.

¹ *Commonwealth v. Russell*, 172 Pa. 506. Indictment of borough for creating a nuisance by depositing sewage in a stream. *Commonwealth*

v. Ashley, 37 Pa. Super. Ct. 254. The fact that the supply of water received from an existing water company is contaminated and unfit for use does not justify the municipality in proceeding to erect its own works when the franchise of the company is exclusive. It must find its relief by taking steps to compel the furnishing of a proper supply. *Bennett Water Co. v. Millvale*, 202 Pa. 616.

and regulations as may be made as a condition of rendering the service.¹ The company or city cannot escape from its duty to

¹ *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 411; *Wiemer v. Louisville Water Co.*, 130 Fed. Rep. 251; *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379; *Mahoney v. American Land & Water Co.*, 2 Cal. App. 185; *Freeman v. Macon G. L. & Water Co.*, 126 Ga. 843; *Bothwell v. Consumers' Co.*, 13 Idaho, 568; *Peoples' Gas Light & Coke Co. v. Hale*, 94 Ill. App. 406; *Snell v. Clinton El. L., H. & P. Co.*, 196 Ill. 626, rev'g 95 Ill. App. 552; *Chicago v. Northwestern Mut. L. Ins. Co.*, 218 Ill. 40, 43; *Kerz v. Galena Water Co.*, 139 Ill. App. 598; *Rushville v. Rushville Nat. Gas Co.*, 132 Ind. 575; *Portland Nat. Gas & Oil Co. v. State*, 135 Ind. 54; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655; *State v. Portland Nat. Gas & Oil Co.*, 153 Ind. 483; *State v. Consumers' Gas Trust Co.*, 157 Ind. 345; *Indiana Nat. & Oil Gas Co. v. State*, 162 Ind. 690; *Greenfield Gas Co. v. Trees*, 165 Ind. 209; *Wood v. Auburn*, 87 Me. 287; *Gas Light Co. v. Colliday*, 25 Md. 1; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Young v. Boston*, 104 Mass. 95; *Williams v. Mutual Gas Co.*, 52 Mich. 499; *Gordon v. Doran*, 100 Minn. 343; *State v. Joplin Water Works*, 52 Mo. App. 312; *Vanderberg v. Kansas City Mo. Gas Co.*, 126 Mo. App. 600; *State v. Butte City Water Co.*, 18 Mont. 199; *American Water Works Co. v. State*, 46 Neb. 194; *Sammons v. Kearney Power & Irr. Co.*, 77 Neb. 580; *Public Service Corporation v. American Lighting Co.*, 67 N. J. Eq. 122; *Washington v. Washington Water Co.*, 70 N. J. Eq. 254; *Olmsted v. Proprietors of Morris Aqueduct*, 47 N. J. L. 311; *People v. Manhattan Gas Light Co.*, 45 Barb. (N. Y.) 136; *Armour Packing Co. v. Edison Elect. Ill. Co.*, 115 N. Y. App. Div. 51; *Griffin v. Goldsboro Water Co.*, 122 N. C. 206; *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 336; *Haugen v. Albina Light & Water Co.*, 21 Oreg. 411; *Mercur v. Media El. L., H. & P. Co.*, 19 Pa. Super. Ct. 519; *Baily v. Fayette Gas Fuel Co.*, 193 Pa. 175; *Crumley v. Watauga Water Co.*, 99 Tenn. 420; *Harbison v. Knoxville Water Co. (Tenn. Ch. App.)*, 53 S. W. Rep. 993; *Charleston Nat. Gas Co. v. Lowe*, 52 W. Va. 662, *Pater-*

son Gas Light Co. v. Brady, 27 N. J. L. 245, which holds that a gas company is not, upon the general principles of law, bound in the absence of an express statute or contract to furnish gas to all buildings on the lines of its main pipes, upon being tendered the fixed price or a reasonable compensation, is disapproved and overruled in *Olmsted v. Proprietors of Morris Aqueduct*, 47 N. J. L. 333.

A gas company cannot impose a discrimination in the price of its product based solely on the value of the service to the consumer. *Baily v. Fayette Gas Fuel Co.*, 193 Pa. 175. The "class of people" to whom the service is rendered is not material; the condition and character of the service required in view of location, extent, volume, &c., controls. *Mercur v. Media Elect. L., H. & P. Co.*, 19 Pa. Super. Ct. 519. But it has been held that a city in furnishing water may classify its consumers with reference to the line of business in which they are engaged. *Woodruff v. East Orange*, 71 N. J. Eq. 419. The fact that one receives an equal amount of electrical current for less money than his neighbor, is not conclusive evidence of discrimination. It must be shown that it is under the same circumstances and conditions; and to do this the current must be furnished during substantially the same hours and at substantially the same amounts. *Graver v. Edison Elect. Ill. Co.*, 126 N. Y. App. Div. 371. An electric lighting company may make experimental contracts to reach a basis for future charges, although this results in giving for a limited time a better rate to a few customers than is given to others. *Graver v. Edison Elect. Ill. Co.*, 126 N. Y. App. Div. 371.

The imposing of a meter rate for boarding houses is not unjust discrimination, although a flat rate or fixture rate be applied to dwelling houses. *Woodruff v. East Orange*, 71 N. J. Eq. 419. Under an ordinance granting a franchise for water purposes, a boarding house was held to be a dwelling house, and not a hotel. *Birmingham v. Birmingham Water Works Co.*, 152 Ala. 306. But in another case a boarding house, although occupied by the tenant and his family,

furnish a direct supply to an applicant on demand, merely because the applicant is already in receipt of a supply indirectly through the medium of another consumer with whom the applicant has made an arrangement; the owner or occupant of the building has the right to deal directly with the company or city at the price at which the law may require the company or city to sell light or water.¹ But the right to a supply is not absolute. It is limited by the uses to which it is intended to be put and by the residence or business of the persons demanding a supply. It cannot be contemplated that the municipality or the public service corporation should be required to supply light or water for every conceivable purpose, but rather only for those ordinary and natural uses which are incident to the daily needs and wants of the municipality and its inhabitants.² If the public interests require it, a public service

was held *not to be a "dwelling house"* containing a family within the provisions of a water contract fixing the rate for dwelling houses containing families. *Robbins v. Bangor R. & E. Co.*, 100 Me. 496. A water company may revise and change its schedule of rates if no contract prevents, provided the new rates are reasonable and do not discriminate. Within these limitations it may change a rate from an annual or flat rate to a meter rate. *Robbins v. Bangor R. & E. Co.*, 100 Me. 496.

It has been held that there is no discrimination in charging one price for gas for fuel purposes and another for gas for power purposes. *Boerth v. Detroit City Gas Co.*, 152 Mich. 654. But on the other hand it has been held that a natural gas company engaged in furnishing gas for heat and light cannot charge a higher price for gas for light than for heat, there being no difference in the gas supplied, nor in the nature of the service. *Baily v. Fayette Gas Fuel Co.*, 193 Pa. 175. Gas company held not to be entitled to refuse a supply of fuel gas to a consumer having one set of pipes only, under a regulation or practice requiring two distinct sets of pipes for illuminating and fuel gas respectively. *State v. New Orleans Gaslight Co.*, 108 La. 67. A stipulation in a contract with a water company that the company will not sell water for power to any other person or corporation intending to compete with the contracting consumer, is discriminatory and void. *Sammons v. Kearney Power & Irr. Co.*, 77 Neb.

580. In *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206, the complaint alleged that, to prevent competition, the defendant reduced its rates largely to parties who threatened to establish a rival company, but did not make a corresponding reduction to the plaintiff and other consumers, but proposed to put in meters whereby the rates to plaintiff and others would be greatly increased, and threatened to cut off the supply of the plaintiffs, if they did not pay the increased rates. It was held that the defendant had no right to discriminate between consumers, and that the complaint made out a *prima facie* case of unlawful discrimination justifying the issuance of a temporary injunction.

¹ *Jones v. Rochester Gas & Elect. Co.*, 168 N. Y. 65. In an action against a gas company for a statutory penalty for failure to furnish gas on demand, the defendant is not relieved from liability by the fact that plaintiff obtained gas by an arrangement with one of his tenants who was a customer of the defendant, since under such circumstances the gas cannot be considered as having been supplied by the defendant pursuant to its obligation to furnish to all proper applicants on demand. *Jones v. Rochester Gas & Elect. Co.*, 168 N. Y. 65.

² In *Public Service Corp. v. American Lighting Co.*, 67 N. J. Eq. 122, it was held that a foreign corporation, a non-resident, whose sole business is the manufacture of gas burners, cannot make a contract with a city to affix its burners to street lamps,

corporation may be authorized by the municipality, to remove its mains from a sparsely populated district for the purpose of relaying them in a more thickly populated district and improving the service thereby, although individual consumers who have already been supplied with water are thereby deprived of a supply.¹ The principle that the city or the company must supply all impartially and without discrimination does not prevent it from entering into reasonable special arrangements or agreements with consumers growing out of special circumstances, and the fact that by reason of

and to furnish gas therefor for a limited time, and then compel the gas company to furnish it with the gas which it needs to light the lamps. *Pitney*, V. C., said that the obligation of the gas company extends only to resident citizens and to the municipality. See also *American Lighting Co. v. Public Service Corp.*, 132 Fed. Rep. 794. The use of water for sprinkling streets is a proper use for the benefit of the inhabitants; and a water company cannot refuse to supply water to one engaged in the business of sprinkling streets, merely because he is not himself an "inhabitant" of the city or because the water is not supplied directly to the persons benefited by the sprinkling. *Wierner v. Louisville Water Co.*, 130 Fed. Rep. 251.

A water company contracted to supply a town with water "for domestic purposes, the extinguishment of fires and other lawful uses." By the *New Jersey* statute, the consent of the town was necessary both for the incorporation of the company and for the use of the streets. It was held that the town had a *first lien or right to use the water* for the purposes specified in the contract in preference to any use by other purchasers for mere mechanical or manufacturing purposes, and that the company could not excuse its failure to furnish adequate pressure for fire protection on the ground that the water was required and used for driving printing presses, fans, and for other mechanical purposes, and to supply railroad engines. *Boonton v. United Water Supply Co.*, 70 N. J. Eq. 692, aff'g 69 N. J. Eq. 23.

¹ In *Asher v. Hutchinson Water, Light & Power Co.*, 66 Kan. 496, it was held that a contract by ordinance between a city and a water company that the latter would lay water mains and supply the inhabitants with water on certain streets of the city might,

after such mains were laid, be so modified and changed by the city and water company as to permit the latter to remove its mains from certain streets where in the judgment of the city council public necessity no longer required their continuance, to other portions of the city where public necessity required mains to be laid, although the removal of the mains would deprive an individual of a supply of water and greatly decrease the value of his property. The duty of *extending the mains* of a city water supply is discretionary with the local authorities, and cannot be enforced by *mandamus* at the instance of one who is taxed for water and light purposes. *Moore v. Harrodsburg (Ky.)*, 105 S. W. Rep. 926.

The State of *Massachusetts* has adopted the policy of *legislative regulation and control of gas and electric lighting companies* rather than the encouragement of competition for protection against the evil effects of a *monopoly*. An electric light or gas company which has a franchise covering a city or town in which another similar company has a franchise, if the public interest is not affected thereby, *can lawfully arrange* with the other company to extend its lines into one part of new territory that is being developed, and to leave the other company to extend its lines to another part of such territory, so that *neither company will duplicate lines* in streets where the other is serving the public. This is a detail of administration which is not an illegal parting with a portion of the company's franchise. Such arrangement may be upheld, although certain streets in which both companies have previously run lines are included in it. *Weld v. Gas & Elect. Light Com'rs*, 197 Mass. 556.

such special circumstances a reduced rate, reasonable under the circumstances, is given to particular individuals does not affect the validity of the arrangement.¹ But this is delicate ground, and the rates we think must be the same unless the circumstances are substantially dissimilar and reasonably justify a difference. Questions arise as to the rights of consumers growing out of the *number and character of the buildings* supplied; and it sometimes becomes important to determine whether each building owned by a consumer is to be treated separately in determining the rights and relations of the parties, or whether the fact that they are all owned by one person is to control.² But such questions depend on the special circumstances of each case, and in the nature of the case it is difficult to deduce any general rule from the decisions. The basis of the decisions is what in each case is just and reasonable, and custom or usage will be given due weight.

¹ Under a statute requiring an electric company to supply every person on the same terms on which any other person "is entitled under similar circumstances to a corresponding supply," a latitude is given to the company to make bargains with its consumers where the circumstances differ, or the supply does not correspond. The fact that supply is required by day was held to justify a lower charge than for a supply by night. *Metropolitan El. Supply Co. v. Ginder*, 2 Ch. Div. 799. A contract by which a water works company agrees to furnish water to a consumer at a greatly reduced rate, the consumer agreeing to lay his own pipe and put in his own fixtures, and to allow the company to tap his pipes for the purpose of supplying other consumers with water, was held to be valid, although the consumer was under no obligation to continue to take the water for any given length of time. *Milledgeville Water Co. v. Edwards*, 121 Ga. 555.

² See *Young v. Boston*, 104 Mass. 95. A water works ordinance provided that the company should furnish water to citizens residing along the line of its mains at certain rates, and at a tariff for dwelling houses according to the number of rooms. The tariff also prescribed rates for other buildings of different kinds. The United States Reservation known as "Fort Omaha" contained dwellings for officers and other buildings. The United States claimed the right to be furnished as a single customer for the entire reserva-

tion including all its buildings. It was held that the company had the right to treat each building separately. *United States v. American Waterworks Co.*, 37 Fed. Rep. 747. A city may be authorized to deal exclusively with the owner of the building; and when that is the case the owner cannot impose upon the water board the duty of furnishing water separately to each tenant of the building and collecting rates from each as a separate consumer by furnishing at his own expense for each room shut off with locks and keys and then tendering the keys to the water commissioners. *Kelsey v. Marquette Fire and Water Com'rs*, 113 Mich. 215.

A city ordinance that city water supply to one or more persons through a single tap shall be charged to the owner of the estate, and that in case of non-payment the water shall be shut off, is not unreasonable, and is valid as against a tenant of a room who has paid the water rate to the landlord, who has failed to pay the city. *Cox v. Cynthiana*, 123 Ky. 363. Where a tenant and a sub-tenant occupied different parts of a building, divided by a partition, and each used water separately, each was a separate consumer within the meaning of an ordinance providing for the installation of water meters by the water supply company. The company was not obliged to furnish a meter for joint use. *Nogales Water Co. v. Neumann*, (Ariz.) 100 Pac. Rep. 794.

Acceptance by the city or by a public service corporation of an application for a service of water or light, and *compliance* on the part of the consumer with the *reasonable rules and regulations*, creates an implied contract under which the city or the corporation by implication agrees to furnish a sufficient supply for the ordinary uses of the consumer.¹

For a *failure or refusal* without lawful cause to furnish a service of water or light the consumer is *entitled to any of several remedies* at his election. The duty to furnish the service to an applicant may be enforced by *mandamus*;² or if the supply be impure and unfit

¹ *Whitehouse v. Staten Island Water Co.*, 101 N. Y. App. Div. 112; *McEntee v. Kingston Water Co.*, 165 N. Y. 27; *Merrimack River Savings Bank v. Lowell*, 152 Mass. 556. The obligation of a municipality to furnish the supply under these conditions is contractual in its nature and does not arise from any governmental duty or function; and if the municipality fails to furnish a reasonable supply, its liability to the consumer is the same as that of a private corporation, and not of a governmental agency. *Merrimack River Savings Bank v. Lowell*, 152 Mass. 556. The obligation of a public service corporation is not to provide water that is chemically pure, but water that is *ordinarily and reasonably pure*; and after having secured a proper source of supply, the corporation is bound to exercise diligence to preserve the water from pollution and to deliver it to the consumer in no worse condition than that in which it is taken from the source of supply. *Brymer v. Butler Water Co.*, 172 Pa. 489. See *supra*, § 1316.

In *Jackson v. Farnham Water Co.*, 3 Law Times Rep. 632, a consumer brought an action against a water company to recover the amount of a water rate paid by him on the ground that the company had failed to give him a sufficient supply of water. It appeared that there were no cisterns in the plaintiff's premises or facilities for storing water, and that the supply only continued from an early hour in the morning until ten o'clock in the forenoon, when it was shut off. The court held, *per Lord Coleridge*, that the company was not liable; that the implied contract between the parties was to be inferred from the circumstances; that regard being had to the circumstances, the obligation of the company

was to supply its customers with a reasonable supply of water, but that this obligation was to be construed with reference to the company's power of supply; and that a reasonable supply was that which was reasonable with reference to the extent to which the company had water to supply the consumers.

² *Wiemer v. Louisville Water Co.*, 130 Fed. Rep. 251; *Price v. Riverside L. & Irr. Co.*, 56 Cal. 431; *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, 708; *Fellows v. Los Angeles*, 151 Cal. 52; *People v. Farmers' & C. Reservoir Co.*, 25 Colo. 202; *Portland Nat. Gas & Oil Co. v. State*, 135 Ind. 54; *Greenfield Gas Co. v. Trees*, 165 Ind. 209; *State v. Consumers' Gas Trust Co.*, 157 Ind. 345; *State v. New Orleans Gaslight Co.*, 108 La. 67; *Robbins v. Bangor R. & E. Co.*, 100 Me. 496; *State v. Joplin Water Works*, 52 Mo. App. 312; *American Water Works Co. v. State*, 46 Neb. 194; *Johnson v. Atlantic City Gas & Water Co.*, 65 N. J. Eq. 129; *Public Service Corp. v. American Lighting Co.*, 67 N. J. Eq. 122; *People v. Manhattan Gas Light Co.*, 45 Barb. (N. Y.) 136; *People v. N. Y. Suburban Water Co.*, 38 N. Y. App. Div. 413; *People v. Green Island Water Co.*, 56 Hun (N. Y.), 76; *Haugen v. Albina Light & Power Co.*, 21 Oreg. 411; *Mackin v. Portland Gas Co.*, 38 Oreg. 120; *Poole v. Paris Mountain Water Co.*, 81 S. Car. 438. But a peremptory writ of *mandamus* will not issue if it appears that there is a controversy as to the correctness of a bill for a supply of gas which has not been paid, as the right to the writ must be clearly established. *Mackin v. Portland Gas Co.*, 38 Oreg. 120. Construction of *English* statute imposing a penalty for omission to supply water, see *Simpson v. South Oxfordshire*

for use, he may, when so permitted by statute, enjoin the city or public service corporation from collecting rates therefor,¹ or for a wrongful refusal to furnish a supply or for an insufficient or defective supply, the consumer may recover damages.² If a consumer *involuntarily pays* to a municipality or public service corporation rates in excess of those prescribed by law, the excess may be recovered back although a right of action therefor is not expressly conferred by statute or ordinance.³ If the consumer is in the receipt

Water & Gas Co., L. R. [1908] 1 K. B. 917.

¹ *Brymer v. Butler Water Co.*, 172 Pa. 489.

² *Freeman v. Macon G. L. & W. Co.*, 126 Ga. 843; *Milledgeville Water Co. v. Fowler*, 129 Ga. 111. Where the consumer has been obliged to draw water from another source, his damages for failure to furnish a sufficient supply are the fair value of the labor employed. *Whitehouse v. Staten Island Water Supply Co.*, 101 N. Y. App. Div. 112. Where water was shut off prior to the year during which the contract was deemed to run, it was held that the damages to which the consumer was entitled were the *value of the water* of which he was deprived for the unexpired portion of the contractual year. *Van Alstyne v. Morrison*, 33 Tex. Civ. App. 670; 77 S. W. Rep. 655. Where water mains are laid in a street and connected with private houses, the owner paying the city for laying the mains and also the water rents, and in consequence of the negligent manner in which the mains are laid, the water freezes, whereupon the tenants abandon possession of the property, the owner of the property can only maintain an action to *recover back the water rents paid* and cannot recover against the city for damages. *Smith v. Philadelphia*, 81 Pa. 38. In an action against a gas light company for wrongfully refusing to furnish plaintiff's store with gas, it was held that *the evidence of the nature and extent of plaintiff's business*, that it was inconvenient and difficult to transact it without gas, and that the want of gas made his store less attractive to customers and tended to diminish his business, was admissible. It was held, also, that an instruction to the jury that the plaintiff should have such damages as would compensate him for the pecuniary loss, and also for the inconvenience and annoyance ex-

perienced by him in his mercantile business arising out of the defendant's refusal to furnish gas to him was not erroneous. *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318.

In estimating the damages resulting from wrongfully cutting off gas from a store and business property, it was held that the jury might consider the *deterioration*, if any, *in the value of the premises for sale or for rental*, and the cost of removing the gas fixtures and restoring the premises. *Gas Light Co. v. Colliday*, 25 Md. 1. A city under contract with the owner of a greenhouse to supply him with water for steam heating and for his plants, in constructing a sewer in his street, caused the supply pipe to be uncovered and negligently exposed to the cold, so that the water in the pipe was frozen and his supply cut off. The owner could not with reasonable diligence obtain his supply of water or heat from other sources and his plants were destroyed. It was held that he was entitled to recover from the city for the damage. *Stock v. Boston*, 149 Mass. 410. Failure to furnish gas for fuel during cold weather was held to be proximate cause of relapse and death of plaintiff's sick children, and complaint sustained as stating cause of action. *Coy v. Indianapolis Gas Co.*, 146 Ind. 655.

³ *Chicago v. Northwestern Mut. L. Ins. Co.*, 218 Ill. 40; *Pingree v. Mutual Gas Co.*, 107 Mich. 156; *Panton v. Duluth Gas & Water Co.*, 50 Minn. 175; *St. Louis Brewing Assoc. v. St. Louis*, 140 Mo. 419. Index, *Voluntary Payment*. Where an ordinance provides that a gas company shall not charge consumers more than an average of the rates charged in certain other cities, payment of a charge in excess of such rate made in ignorance of the fact that it is excessive, is *not to be regarded as voluntary*, although the consumer may have been negligent in not

of a supply and the municipality or corporation *threatens to deprive him* thereof without right, the consumer may maintain a suit for an *injunction to restrain* the corporation or municipality *from cutting the connections* or otherwise terminating the supply.¹ It is not uncommon to find statutes intended to enforce the duty of the municipality or corporation to furnish a supply *by imposing penalties* for the failure to do so on demand.²

§ 1318. **Consumers; Reasonableness of Rates.** — Independently of any statutory restriction or regulation of the rates which may be charged by a public service corporation, it *cannot exact* from consumers for the service rendered to them a *compensation in excess of a reasonable rate*.³ But in determining *what is a reasonable*

ascertaining the fact. *Pingree v. Mutual Gas Co.*, 107 Mich. 156. To the same effect, *Armour Packing Co. v. Edison Elect. Ill. Co.*, 115 N. Y. App. Div. 51.

¶ *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699; *Edwards v. Milledgeville Water Co.*, 116 Ga. 201; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568; *Graves v. Key City Gas Co.*, 83 Iowa, 714; *Brown v. Frankfort (Ky.)*, 9 S. W. Rep. 384; *Callery v. New Orleans Water Works Co.*, 35 La. An. 798; *Gordon v. Doran*, 100 Minn. 343; *Sedalia Brewing Co. v. Sedalia Water Works Co.*, 34 Mo. App. 49; *Horsky v. Helena Consolidated Water Co.*, 13 Mont. 229; *Public Service Corporation v. American Lighting Co.*, 67 N. J. Eq. 122; *McDowell v. Avon-by-the-Sea Land & Imp. Co.*, 71 N. J. Eq. 109; *Sickles v. Manhattan Gaslight Co.*, 64 How. Pr. (N. Y.) 33; *McEntee v. Kingston Water Co.*, 165 N. Y. 27; *Corbet v. Oil City Fuel Supply Co.*, 21 Pa. Super. Ct. 80; *Whiteman v. Fayette Fuel Gas Co.*, 139 Pa. St. 492.

² By statute gas and electric companies were required, on application in writing, to furnish light, and, if for ten days after application, the corporation refused or neglected to supply light as required, it was provided that the corporation should forfeit and pay to the applicant the sum of ten dollars and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue. It was held that the penalty imposed for a default was single and indivisible, though it might be continuous; that but one recovery could be had therefor; and that the applicant could not

sue on three separate causes of action for different premises under different applications. *Jones v. Rochester Gas & El. Co.*, 168 N. Y. 65, rev'g 45 N. Y. App. Div. 629.

³ *Capital City G. L. Co. v. Des Moines*, 72 Fed. Rep. 829; *Wagner v. Rock Island*, 146 Ill. 139; *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa, 348; *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532; *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 201; *Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249. Although a maximum rate may be prescribed by the ordinance granting the franchise, and although that rate is binding upon the corporation because the franchise is granted upon that condition, it has been said that these rates are not binding upon consumers who have a right to the protection of the courts against unreasonable charges. Hence, notwithstanding the provisions of the ordinance, consumers may still attack rates which are within the franchise limit upon the ground that they exceed a reasonable rate for the services rendered. *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206. But see further on this subject, *post*, § 1326. Although a contract with a municipality fixed the rates for *domestic purposes*, a water company was held to be entitled to extra compensation for *sprinkling lawns*. *Ward v. Birmingham Water Works Co.*, 152 Ala. 285.

Pressure for automatic sprinklers as a protection against fire is a service for which the municipality may charge a rate, although no water may be used. *Gordon v. Doran*, 100 Minn. 343. The fact that the water company has con-

rate to be charged to the consumer the public service corporation or the municipal authorities are necessarily clothed *with a certain degree of discretion*. The rate is compensation for the service rendered and an equitable determination of the price to be paid does not look alone to the quantity used by each consumer. The nature of the use, and the benefit obtained from it, the number of persons who want it for such use, and, in the case of a city, the effect of a certain method of determining prices upon the revenues to be obtained by the city and upon the interests of property holders are all to be considered.¹ And hence, it may be reasonable and necessary to charge the inhabitants of outlying sections of the city as much for the water they use in only a part of the year as the inhabitants of the centre of the city are charged for the water used by them during the whole year. The cost of extending the system to the outlying locality, the fact that, even if water is wanted there for less than a year, as a rule the interest on the cost of the necessary special construction and on the construction of the works each year runs throughout the year, and the fact that there are but few persons who take water in this section compared with the cost of extending the system to it, are all matters which can be taken into account in fixing the reasonable rate.² The fact that the rate charged to large consumers is lower than that exacted where a small quantity is consumed does not necessarily render either rate unreasonable.³ The

tracted with the municipality to furnish, *free of charge, water for the purpose of extinguishing fires*, does not entitle the owner of property to *exemption from a charge* for pressure for an automatic sprinkler system. *Cox v. Abbeville Furniture Co.*, 75 S. Car. 48; *Loveman v. City Water Co.*, 1 Tenn. Ch. App. Rep. 596. In *Indiana*, *prior demands of existing customers* have been held to be insufficient ground for refusing a supply; a consumer is entitled to the same supply as existing consumers, although a *natural gas company* may be unable to procure a supply of gas beyond what is required to supply its customers already connected with its mains. *State v. Consumers' Gas Trust Co.*, 157 Ind. 345; *Indiana Nat. Gas, &c. Co. v. State*, 162 Ind. 690.

¹ *Souther v. Gloucester*, 187 Mass. 552; *Ladd v. Boston*, 170 Mass. 332.

² *Souther v. Gloucester*, 187 Mass. 552. See also *Mercur v. Media Elect. L., H. & P. Co.*, 19 Pa. Super. Ct. 519. But when there are no special circum-

stances justifying a charge for the entire year, the consumer can only be charged for the time during which he intends to use the water. *Rockland Water Co. v. Adams*, 84 Me. 472. Under a statute which entitles the owner or occupant of any building or premises within one hundred feet of the wires of any electric light company to require a supply of electric light, and imposes a penalty on the company for refusal to supply, an electric illuminating company which has a wire carrying a current too powerful to be used for house lighting within one hundred feet of a dwelling, but which has no wire suitable for house lighting within seventeen hundred feet of such dwelling, is not liable for the penalty because of a refusal to light the dwelling by electricity upon the written request of the owner. *Moore v. Champlain Elect. Co.*, 88 N. Y. App. Div. 289.

³ *Wilson v. Tallahassee Water Works Co.*, 47 Fla. 351; 36 So. Rep. 62; *Wagner v. Rock Island*, 146 Ill. 139; *St. Louis Brewing Assoc. v. St.*

fact that charges for the service are not enforced in the same manner upon all consumers of the same class affords no ground for restraining by injunction the enforcement of the rates against one of the same class, so long as the rates charged the latter are reasonable.¹ Similarly, when the rates paid by consumers are reasonable they cannot complain of them as inequitable because the city officers whose duty it is to fix the rates on an equitable basis have supplied water, either free or at nominal rates, to various city departments and to charitable and educational institutions in which the public are interested.² How far under varying circumstances as to the legislation involved, and whether the works are owned by the municipality or by a public service corporation, it is allowable to charge current or present consumers a sum plus repairs, maintenance, cost of operation, &c. in order to raise a surplus by the creation of a sinking fund or otherwise to pay or extinguish the cost of the permanent plant, presents questions perhaps not yet settled which may have a material bearing upon the reasonableness or unreasonableness of a given rate fixed by the municipality or by the public service corporation. Bearing upon this subject, it has been held that when the works devoted to the public service *are owned by the municipality* it is not obliged by reason of its ownership to restrict the charge to consumers to a compensation for the expense of operating the works irrespective of the cost of construction. It may properly derive a profit from the consumers which may be applied in payment of the cost of the plant.³

§ 1319. **Consumers; Rules and Regulations.**—Both the municipality and the public service corporation have the right, in their own protection and for the protection of the public interests, to *make all needful rules and regulations* for the safety and efficiency of the service, and the convenience of the public, and the consumer may be required to promise conformity thereto; but these *rules must*

Louis, 140 Mo. 419; *Silkman v. Yonkers Water Com'rs*, 152 N. Y. 327. The fixing of a minimum charge for service to small consumers in excess of the ordinary price of the quantity of water or gas consumed by them is not in itself necessarily unreasonable. *Wilson v. Tallahassee Water Works Co.*, 47 Fla. 351; *State v. Sedalia Gas Light Co.*, 34 Mo. App. 501; *Louisville Gas Co. v. Dulaney*, 100 Ky. 405.

¹ *Wagner v. Rock Island*, 146 Ill. 139.

² *Preston v. Detroit Water Com'rs*, 117 Mich. 589.

³ *Wagner v. Rock Island*, 146 Ill. 139; *Preston v. Detroit Water Com'rs*, 117 Mich. 589. The fact that the city has in the past furnished water to its inhabitants at the mere cost of maintaining and operating the works, does not oblige it to persist in that policy, and it may abandon it at any time, and impose reasonable rates and charges, thereby raising a surplus revenue. *Wagner v. Rock Island*, 146 Ill. 139.

be reasonable and just, and must not operate harshly or oppressively upon the consumer.¹ It is a condition of the implied contract between the corporation and the consumer that the latter will comply with the rules and regulations so adopted, and if the consumer fails so to do, he is in default under the terms of the implied contract. Therefore, upon a breach of the rules, the supply may be shut off as a penalty for a violation thereof, and as a means of enforcing compliance.² But compliance with the rules and regulations of the

¹ Pocatello Water Co. v. Standley, 7 Idaho, 155; Shiras v. Ewing, 48 Kan. 170; Specht v. Louisville Water Co., 117 Ky. 414; Wood v. Auburn, 87 Me. 287; Robbins v. Bangor R. & E. Co., 100 Me. 496; State v. Sedalia Gas Light Co., 34 Mo. App. 501; Vanderberg v. Kansas City Mo. Gas Co., 126 Mo. App. 600; Dayton v. Quigley, 29 N. J. Eq. 77; Watauga Water Co. v. Wolfe, 99 Tenn. 429; Jones v. Nashville, 109 Tenn. 550; Shepard v. Milwaukee Gas Light Co., 6 Wis. 539; Wendel v. State, 62 Wis. 300. See also Shepard v. Milwaukee G. L. Co., 11 Wis. 234; 15 Wis. 318.

The by-laws of municipal corporations and the rules and regulations of public service corporations are governed by the same principles in determining their reasonableness. Jones v. Nashville, 109 Tenn. 550. A rule of a public service corporation against the unnecessary and useless waste of the water supply is reasonable. Shiras v. Ewing, 48 Kan. 170. Where the lateral connections are owned by the consumer, the obligation to maintain such connections rests upon the consumer, and a refusal by the consumer to pay the cost of repairing a break in the lateral service justifies the city authorities in shutting off the water, although the term for which he has paid his water rates has not expired. Jackson v. Ellendale, 4 N. Dak. 478. Where the expense of sprinkling the streets of a city is borne by the owners or occupants of abutting lots, and the work is done by different persons in different localities who are required to obtain a license to do the work from the water company, a rule of the water company to the effect that when there are several applicants for the license to do the work in the same street or locality, it should be given to the one who produces the largest list of petitioning owners of abutting lots within the street to which the application applies,

is reasonable and within the powers of the company. Louisville Water Co. v. Wiemer, 130 Fed. Rep. 257.

A rule requiring a consumer in default for water rents to pay one dollar as a charge for turning the water off and on, and as a condition precedent to his right to be again furnished with water held unreasonable, discriminatory, and void. American Water Works Co. v. State, 46 Neb. 194. See also Smith v. Birmingham Water Works Co., 104 Ala. 315. In Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, it was held that the following rules of the Gas Company were unreasonable: (1) giving the company free access at all times to buildings and dwellings to examine the whole apparatus; (2) permitting the removal of meter and service pipes at any time within the company's discretion; (3) reserving the right to the company at all times to cut off the supply to protect the works against abuse and fraud; this rule permitted the company to decide upon the question of abuse or fraud without notice and without trial; (4) that after the admission of gas into the fittings they must not be disconnected or opened for alteration, repairs, or extensions without a permit from the company, and imposing a penalty on any gas fitter or other person who might violate the rule; (5) reserving the power to make any other rules or regulations from time to time. A regulation of the municipal authorities requiring the consumer to release the city from its obligation to furnish water of wholesome quality and sufficient quantity, or to supply water in case of fire is unreasonable and void. Dittmar v. New Braunfels, 20 Tex. Civ. App. 293.

² Shiras v. Ewing, 48 Kan. 170. The legislature may confer authority on municipal water authorities to enforce compliance with their rules by cutting off the supply of water. Brass v. Rathbone, 153 N. Y. 435. Where

company *may be waived* by its conduct and dealings with consumers.¹ And a mere technical failure to comply with the rules and regulations does not justify a refusal to continue to supply a consumer. He must be given an opportunity to remedy any omissions or informalities in his application.² The rules and regulations of the municipality or corporation are usually reinforced and supplemented by *statutory provisions imposing penalties and forfeitures* for wrongful acts on the part of consumers and others interfering or meddling with the works, pipes, and appliances without the consent of the company or municipality, or contrary to its rules and regulations. These statutes are generally recognized as constitutional and valid.³

§ 1320. **Consumers; Meters.** — The municipality or public service corporation may reasonably and properly require that the *charge* for water or light supplied *shall be based upon and governed by the quantity used as indicated by meter*; ⁴ and on the other hand

several contracts for gas light were made between the same parties for different pieces of property, each requiring its own meter, it was held that a failure to comply with any terms in relation to one furnished no ground to the gas company to withhold the gas from the other, and that the company was liable for wrongfully cutting off the supply of gas from the latter. *Gas Light Co. v. Colliday*, 25 Md. 1. See also *Lloyd v. Washington Gaslight Co.*, 1 Mackey (D. C.) 331. The municipal authorities cannot shut off water supply upon the ground that the consumer is draining the water into the street and creating a nuisance. *Van Alstyne v. Morrison*, 33 Tex. Civ. App. 670; 77 S. W. Rep. 655. When the rules and regulations of a board of health as to open plumbing do not specifically attach the penalty of having the water cut off for a breach thereof, and the municipal works are under other independent municipal authority, a supply of water cannot be cut off for failure to comply with the rules and regulations of the board of health. *Johnson v. Bellmar*, 58 N. J. Eq. 354. *Leakage of water* and refusal of consumer to repair connections held to justify company in cutting off supply. *Grand Junction Water Works Co. v. Rodocanachi*, L. R. [1904] 2 K. B. 230.

¹ The failure to obtain the written permission of a gas company to make connections with its service pipes may

be waived by the company by demanding and accepting payment for the gas consumed. *Citizens Gas & Oil Min. Co. v. Whipple*, 32 Ind. App. 203.

² *Wiemer v. Louisville Water Co.*, 130 Fed. Rep. 251. Failure to pay an extra charge for an additional supply held not to justify the municipal authorities in shutting off the water without giving the consumer an opportunity to pay the additional charge. *Van Alstyne v. Morrison*, 33 Tex. Civ. App. 670; 77 S. W. Rep. 655.

³ A statute imposing a penalty for turning on the water of a water company without authority is a proper exercise of the police power of the State. *Tyrone Gas & Water Co. v. Burley*, 19 Pa. Super. Ct. 348. Under the *Indiana* statute, it is unlawful for a person to turn off any valve belonging to any person furnishing gas to consumers without permission of the owner, without regard to the intent of the person doing the act. *State v. Moore*, 27 Ind. App. 83.

⁴ *Sheward v. Citizens' Water Co.*, 90 Cal. 635; *Wagner v. Rock Island*, 146 Ill. 139; *Public Works Co. v. Old Town*, 102 Me. 306; *Robbins v. Bangor R. & E. Co.*, 100 Me. 496; *Exchange & B. Co. v. Roanoke Gas & Water Co.*, 90 Va. 83. But a meter rate *cannot be charged to one person only*, if substantially higher than the flat rate. *Indiana Nat. & Ill. Gas Co. v. State*, 158 Ind. 516.

A rule designed to continue the use

the authorities may in their discretion dispense with meters and insist that the rate be determined by the number and nature of the fixtures.¹ If the meter be supplied by the municipality or corporation, it has the right, in the absence of statute provision to the contrary, ordinarily to charge reasonable rent for the meter.² Or it may, in proper cases, require that consumers shall at their own expense provide meters and keep them in repair.³ But it is within the power

of meters by *prohibiting consumers from interfering* with or removing them when they have been attached without first receiving permission from the board of water commissioners, was held to be reasonable. *Powell v. Duluth*, 91 Minn. 53. Water rate based on the *size of the connection* with the premises sustained. *Goebel v. Grosse Pointe Waterworks*, 126 Mich. 307. A city ordinance provided that the rates for water "for all manufacturing purposes" should be one and one quarter cents per 100 gallons, if the amount used annually was less than 50,000,000 gallons and one cent if over that amount. Plaintiff owned sixteen breweries within the city limits. It was held that under the ordinance plaintiff was entitled to have its water at one cent per 100 gallons if the amount used in all its breweries exceeded 50,000,000 gallons, and was not obliged to pay a rate based upon the amount used in each of the various breweries. *St. Louis Brewing Assoc. v. St. Louis*, 140 Mo. 419. A municipality supplying water may designate the *character of the meter* to be used by consumers. *Anderson v. Berwyn*, 135 Ill. App. 8. Construction of ordinance regulating charges for water according to meter, *Charleston L. & P. Co. v. Lloyd Laundry Co.*, 81 S. Car. 475. Under the *New York City charter*, although a consumer has paid water rent for the current year upon a scale of prices based on a classification of buildings, &c., there is no *contract which prevents* the municipality from exercising its statutory authority to require the installation of a meter. *Swanberg v. New York City*, 123 N. Y. App. Div. 774. It is a *technical trespass* for employees of a lighting company to enter a tenant's premises for the purpose of changing meters without the permission of tenant, and without complying with the requirements of a statute in respect thereof. *Fortescue v. Kings County Lighting Co.*, 128 N. Y. App. Div. 826.

¹ *Ladd v. Boston*, 170 Mass. 322.

² *Sheward v. Citizens' Water Co.*, 90 Cal. 635; *Smith v. Capital Gas Co.*, 132 Cal. 209. Although a gas company has ordinarily received compensation for the meter from the payment for gas consumed, and has not exacted *specific rental for meters* from its other customers, it may, under special circumstances, require the payment of such rental, — *e. g.*, where the value of the gas consumed the previous year was not equal to a sixth part of the annual expense of the meter, — without being open to the charge of unjust discrimination. *Smith v. Capital Gas Co.*, 132 Cal. 209. But compare *Buffalo v. Buffalo Gas Co.*, 81 N. Y. App. Div. 505. As to the relative rights of gas company and consumer in the meter, and as to *right of consumer to affix* thereto an appliance called a *governor* for the purpose of regulating the pressure of gas in the meter, see *Blondell v. Consolidated Gas Co.*, 89 Md. 732; *Laclede Gas Light Co. v. Gas Consumers' Assoc.*, 127 Mo. App. 442.

³ *Anderson v. Berwyn*, 135 Ill. App. 8; *Shaw Stocking Co. v. Lowell*, 199 Mass. 118; *Swanberg v. New York City*, 123 N. Y. App. Div. 774; *State v. Gosnell*, 116 Wis. 606; *Sheffield Waterworks Co. v. Bingham*, L. R., 25 Ch. Div. 443. But see *contra* *Red Star Steamship Co. v. Jersey City*, 45 N. J. Law, 246; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286. See further as to the power of the company to compel consumer to furnish a meter under the *English Waterworks Clauses Act*, 1863, *Sheffield Waterworks Co. v. Carter*, L. R. 8 Q. B. Div. 632. A gas company has the *right to remove its meter* from a consumer's premises where the consumer *refuses to pay* the cost of the service pipe in accordance with the agreement under which the meter was put in place, and may maintain replevin, if delivery of the meter is refused. *Detroit Gas Co. v. Moreton Truck & Storage Co.*, 111 Mich. 401.

of the legislature to provide that the compensation for the service rendered and for water and light supplied shall be confined solely to the reasonable and proper rates therefor, and that the corporation shall not charge or collect rent on its meters in addition thereto either directly or indirectly.¹ And it has been held that when the charter of a gas company provides that it shall furnish gas to consumers under reasonable rules and regulations to be prescribed by the company at rates not exceeding a prescribed maximum price, the company cannot impose upon the consumer a *charge for meter rent* in addition to the charge for his gas. Such charge is not justified by the power of the company under its charter to make reasonable rules and regulations.² An agreement to pay for gas, water, or electricity supplied according to the meter reading presupposes that the meter is reliable, and if it be shown that the meter does not register truly, the consumer will not be held to the letter of his contract, but will only be required to pay the reasonable value as ascertained from such facts as are available.³

¹ *Buffalo v. Buffalo Gas Co.*, 81 N. Y. App. Div. 505. A statutory provision that no gas company shall have the right to charge rent for meters, when five hundred cubic feet per month are consumed, is a proper exercise of the power of the legislature to regulate the rates and charges of gas companies. *State v. Columbus Gas Light & Coke Co.*, 34 Ohio St. 573. If a gas company adopts the practice of rendering a maximum gas or service bill for each meter on its books, evidence that such maximum charge varies in proportion to the size of the meter justifies a finding that the charge is intended to cover the rental of the meter and not simply the expenses of the company, independent of the meter rental, in carrying the customer on its books, collecting bills, reading his meter, &c. *Buffalo v. Buffalo Gas Co.*, 81 N. Y. App. Div. 505.

² *Louisville Gas Co. v. Dulaney*, 100 Ky. 405; *Capital Gas & Elect. L. Co. v. Gaines* (Ky.), 49 S. W. Rep. 462. In *State v. Sedalia Gas Light Co.*, 34 Mo. App. 501, the company required the payment by the consumer of \$1.25 per month when the amount of gas used was less than 500 cubic feet and this sum was designated "rent of meter." It was held that the charge was unreasonable and that although the sum charged was described as meter rent, it was, in effect, payment

for all gas consumed to the extent of 500 cubic feet. A water company held to be entitled to make a *reasonable charge for inspection of meter* in addition to water rate for water used. *Carney v. Chillicothe Water & Light Co.*, 76 Mo. App. 532. It has been held that the company must pay the *cost of making the connection* with the consumer's fixtures at the lot line. It cannot make a charge therefor in addition to the rate for the supply. *Bothwell v. Consumers' Co.*, 13 Idaho, 568.

³ *Souther Iron Co. v. Laclede Power Co.*, 109 Mo. App. 353; *New York & Q. Elect. L. & P. Co. v. Long Island Mach. & Mar. Const. Co.*, 123 N. Y. App. Div. 552. A hotel had its own water supply. A city supply pipe was metered, and was used only occasionally. Alterations were made on the hotel, and the meter was removed from the city pipe without the knowledge of the proprietors. Thereupon the city demanded a *flat rate* from the hotel according to the number of taps or faucets, the total demand amounting to upwards of \$6000. It was held that the claim was inequitable, and that the city was only entitled to the fair value of the water supplied to be reasonably estimated on such *data* as were available. *Hoover v. Deffenbaugh*, 83 Neb. 476; 119 N. W. Rep. 1130.

Under a provision in the New York

§ 1321. **Consumers; Failure to pay for Service.** — A rule or regulation requiring those who use the public service of water or light to give security for payment, or to deposit a fair sum in advance has been held to be reasonable and enforceable;¹ and if the consumer be in arrears in respect of the premises, the municipality or the public service corporation is justified in refusing to furnish any service.² The condition of the service is that the consumer shall pay therefor the reasonable value. If the consumer does not perform his part of the contract by paying the consideration for the service as it becomes due, the contract is broken by him, and the organization furnishing the supply may refuse to continue the service

City charter that persons taking water under the meter system shall be charged only for the quantity of water actually used "as shown by said meter," no charge can be made when a meter has become out of order and has failed to register water through the negligence of the city's employees. Although the water was actually used during the time the meter did not operate, it was held that there can be no charge based on the average of future consumption. *People v. New York City*, 129 N. Y. App. Div. 551. To relieve a consumer of water in New York City from paying the amount registered by his meter, the evidence must satisfactorily establish the fact that the meter was out of order and did not register truly. *Pabst Brewing Co. v. Oakley*, 115 N. Y. App. Div. 215.

¹ *Hieronymus v. Bienville Water Supply Co.*, 131 Ala. 447; *Robbins v. Bangor R. & E. Co.*, 100 Me. 496; *Turner v. Revere Water Co.*, 171 Mass. 329; *Williams v. Mutual Gas Co.*, 52 Mich. 499; *State v. Butte City Water Co.*, 18 Mont. 199; *Harbison v. Knoxville Water Co.* (Tenn. Ch. App.), 53 S. W. Rep. 992. A regulation requiring consumers to pay for one year in advance regardless of the period during which they intend to use the water was held unreasonable and void. *Rockland Water Co. v. Adams*, 84 Me. 472.

When, by statute, a gas company is authorized to require the deposit of a reasonable sum of money according to the lights proposed to be used, the presumption is that the required deposit is reasonable, unless it is so extravagant as to be unreasonable on its face, and the consumer must overcome that presumption. Evidence that five dol-

lars was the lowest deposit required by the gas company in a city held to be sufficient to authorize a finding that the amount was reasonable in the absence of evidence that objection had ever been made to it by any other person. *Bennett v. Eastchester Gaslight Co.*, 40 N. Y. App. Div. 169. A gas company may, in the absence of any statutory prohibition, adopt a rule requiring consumers to sign a contract agreeing that the supply may be cut off on non-payment for ten days, and that a penalty of three per cent may be added in the event of failure to pay within five days. *Bower v. United Gas Imp. Co.*, 37 Pa. Super. Ct. 113. A rule that gas supplied by a city shall be charged at the rate of seventy-five cents, if paid by a certain date, and at ninety cents when paid thereafter, held to be reasonable and valid. *State v. Duluth Water & Light Com'rs*, 107 Minn. 472; 117 N. W. Rep. 827.

² *Hieronymus v. Bienville Water Supply Co.*, 131 Ala. 447. Under charter authority authorizing the shutting off of water from any building in case prompt payment is not made and permitting the water commissioners to refuse a supply until all arrears have been paid, the commissioners may lawfully demand, as a condition precedent to again supplying with water any premises from which it has been shut off for non-payment of the proper charges, the payment thereof with interest by the person desiring the water to be turned on, although such person may not be in arrears for water charges; the arrears having been incurred by a former occupant. *Atlanta v. Burton*, 90 Ga. 486.

and may cut off the supply.¹ The right of a city or public service corporation to refuse to furnish or to cut off the supply has sometimes been sustained as against owners, lessees, or occupants of premises for *defaults* in payment of charges incurred by predecessors in title or by *previous tenants* or occupants.² But in order to charge an incoming tenant with responsibility for *default of a previous occupant*, there must be notice to or knowledge on the part of the incoming tenant of the rule or ordinance permitting the stopping of the supply unless all arrearages are paid, whether owing by the tenant

¹ Hieronymus v. Bienville Water Supply Co., 131 Ala. 447; Sheward v. Citizens Water Co., 90 Cal. 635; People v. Manhattan Gas Light Co., 45 Barb. (N. Y.) 136; State v. Duluth Water & Lt. Com'rs, 105 Minn. 472; 117 N. W. Rep. 827; Commonwealth v. Philadelphia, 132 Pa. 288; Poole v. Paris Mountain Water Co., 81 S. Car. 438; Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. 316. A water company may refuse to furnish water to a borough and cut off the supply, on the refusal of the borough to pay the rate fixed by the company and to take steps under the statute to have the rate adjusted by the court. Tyronne Gas & Water Co. v. Burley, 19 Pa. Super. Ct. 348.

When the consumer has made a stipulation in a written agreement that the gas company may enter to remove meter and sever connection upon a failure to comply with any of the rules of the company, an entry by the company thereunder is by virtue of a license, and an action of tort as for trespass q. c. f. will not lie against it. Hitchcock v. Essex & H. Gas Co., 70 N. J. L. 492, aff'd 71 N. J. L. 565. Although a statute fixes the price of gas and the validity of the statutory regulation is in dispute, a consumer who refuses to make such deposit by way of security as the company reasonably requires, is not entitled to an injunction restraining the company from cutting off the supply. Pollitz v. Consolidated Gas Co., 118 N. Y. App. Div. 92.

² In Girard Life Ins. Co. v. Philadelphia, 88 Pa. St. 393, an ordinance provided that if water was turned off for non-payment of arrears, it should "not again be supplied" to the said premises except upon payment of all arrears of water-rent and the sum of two dollars for expenses incurred." The validity of the ordinance was con-

ceded, and the court held that the plaintiff, the purchaser of the property at a foreclosure sale, was obliged to pay three years rates due from the former owner, instead of the rates for one year, of which it had made a tender. See also Commonwealth v. Philadelphia, 132 Pa. 288 (gas case); Brumm's Appeal, 22 W. N. C. (Pa.) 137; 12 Atl. Rep. 855. In Atlanta v. Burton, 90 Ga. 486, the power to refuse a supply of water for the default of a previous occupant was sustained. The city charter provided that the board of water commissioners should have power to require "the payment in advance for the use or rent of water furnished by them in or upon any building, place, or premises, and in case prompt payment is not made they may shut off the water from such building, place, or premises, and shall not be compelled again to supply said place, building, or premises with water until said arrears with interest thereon shall be fully paid." It was held that the charter did not contemplate a personal credit; and that the water was not furnished to persons but to buildings, the court saying, "The charter did not contemplate nor intend that the water should be furnished upon individual or personal credit, but that the supply should be made a charge upon the property to which the water was conveyed."

In Minnesota, it was held that a statute which makes the owner of property liable to the city for water and light furnished as well as the tenant to whom it is furnished, is not unconstitutional as taking the property of the owner without due process of law, or as causing one person to pay the debt of another. In theory, the owner contracts to pay for the supply by connecting his premises with the supply. East Grand Forks v. Luck, 97 Minn. 373.

in person or his predecessors.¹ The decisions holding that an applicant may be refused a supply for the default of a previous owner or occupant of the premises have, however, been distinguished upon the ground that in those cases the legislature had either given a lien upon the land to the city or to the water or gas company for unpaid dues, or used words equivalent to giving a lien or creating a charge, on the real estate.² And it has been held *in the absence of any such lien or charge*, a water company has no right to refuse to supply water to the lessee of a house connected with its system on the ground that the owner of the house has not paid the rates for the previous year.³ But *the right to cut off the supply for arrears* is not

¹ *Miller v. Wilkes-Barre Gas Co.*, 206 Pa. 254. In *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, a city ordinance provided that in case water was cut off for non-payment of rates "it should not be put on either for the present or any subsequent occupant" except upon payment of the amount due. The court held that if the city has received the money for a year's use of the water, it could not cut it off during the year because a former occupant had not paid his bill.

² *Turner v. Revere Water Co.*, 171 Mass. 329.

³ *Covington v. Ratterman*, 128 Ky. 336; 108 S. W. Rep. 297; *Turner v. Revere Water Co.*, 171 Mass. 329; *Burke v. Water Valley*, 87 Miss. 732; *McDowell v. Avon-by-the-Sea Land & Imp. Co.*, 71 N. J. Eq. 109; *Poole v. Paris Mountain Water Co.*, 81 S. Car. 438; *Sheffield Waterworks Co. v. Wilkinson*, L. R. 4 C. P. Div. 410.

A regulation of a water company that "in all cases of non-payment of rates fifteen days after same are due the water may be shut off without further notice and shall not be again turned on until rates are paid," so far as it may be construed as giving the right to shut off the water because of the default, not of the lessee and applicant, but of the owner or former occupant, is unreasonable and void. *Turner v. Revere Water Co.*, 171 Mass. 329. A supply cannot be refused on the application of the owner, on the ground that the tenant was in arrears for water supplied him while he occupied another house owned by another landlord. *Dayton v. Quigley*, 29 N. J. Eq. 77. A gas company refused to supply the defendant with gas unless he paid an unpaid bill contracted by a former owner of the building. He promised

to do so in order to obtain the gas. The gas company turned on the gas, and afterwards sued defendant on his promise to pay the amount due from the former owner. The court held that the promise was void, and that the plaintiff had no right to require such a payment. *New Orleans Gas Light & B. Co. v. Paulding*, 12 Rob. (La.) 378. If gas is supplied to the owner of two houses under separate contracts, *failure to pay the gas bill for one house* does not authorize the cutting off of the gas in the other. *Gas Light Co. v. Colliday*, 25 Md. 1. See also *Lloyd v. Washington Gaslight Co.*, 1 Mackey (D. C.), 331. A lessee of premises, the lessor of which has refused to be responsible for water rents, has the right to a water supply upon paying or tendering in advance the amount of the water rent; and a rule of the company not to supply water to rented premises except on the personal responsibility of the owner is unreasonable and valid. *State v. Butte City Water Co.*, 18 Mont. 199. An ordinance provided that all water rents for water supplied by the city water works should be payable semi-annually in advance. "In case the same is not paid when due, the water will be turned off until all back rents are paid, and one dollar for turning the water off and on." Plaintiff purchased certain premises not knowing that the rents were in arrears. He applied for water, but the city authorities refused to make the connection, unless he paid back rents incurred by a former owner or occupant of the premises. It was held that the rent was not owing by or chargeable against the building, but by the persons by whom the supply was ordered, and that the city could not refuse to furnish the water. *Covington v. Ratterman*, 128

absolute. It cannot be asserted unless the arrears are actually due; and if the debt be disputed, the consumer is not without remedy. If an intention be announced of cutting off the supply for a failure to pay rates or rents which are excessive, the body furnishing the supply *may be enjoined* from cutting off the supply.¹ The public service corporation or the municipality *may also waive its right to cut off the supply* for the payment of arrears. For example, if it has received payment in advance for a current supply, it cannot shut off the supply for the purpose of compelling the consumer to pay

Ky. 336; 108 S. W. Rep. 297. Under a statutory provision that a gas company may stop the gas from entering the premises of any person who neglects or refuses to pay the amount due for gas previously supplied to him, but that such company shall not refuse a supply to the occupant of a building because gas remains unpaid by a previous owner or occupant, an assignee of a corporation under a voluntary assignment for the benefit of creditors takes under a new title, and *cannot be refused gas because of the default of the corporation*. *Cox v. Malden & M. Gas Light Co.*, 199 Mass. 324.

In *Montreal Gas Co. v. Cadieux*, [1899] L. R. App. Cas. 589, a statute of the Province of Canada, provided that "if any person supplied with gas by the company shall neglect to pay any rate, rent, or charge due to the company at any of the times fixed for the payment thereof, it shall be lawful for the company on giving twenty-four hours' previous notice to stop the gas from entering the premises, service pipes, or lamps of any such person by cutting off the said service pipe or pipes or by such other means as the company shall think fit." A consumer was in default for non-payment of gas supplied to one of his buildings, and the company cut off the gas from it. This measure had no effect in producing payment. The company then gave notice that unless the bill was paid it would cut off the gas from his residence on another street, and upon his failure to make payment did so. The consumer thereupon brought an action to compel the company to continue the supply of gas at his residence. The House of Lords held that the company was authorized to cease supplying the consumer with gas at any of his houses on his neglect to pay the

bill for any one of them, holding that the statute by its terms applied to any consumer in default, and there was nothing in it to limit the right of the company to cut off the supply of the defaulter in the particular building in respect of which the default had been committed. See also *Mackin v. Portland Gas Co.*, 38 Oreg. 120; *People v. Manhattan Gas Co.*, 45 Barb. (N. Y.) 136. Municipal authorities cannot refuse to supply water to the receiver of a railroad company on the ground that water rates incurred by the company are unpaid. *Coe v. N. J. Midland R. Co.*, 30 N. J. Eq. 440.

¹ *McEntee v. Kingston Water Co.*, 165 N. Y. 27; *McGregor v. Case*, 80 Minn. 214. See also *School Dist. v. Ohio Valley Gas Co.*, 154 Pa. St. 539. If the payment of a bill rendered by the corporation is refused in good faith on the ground that the company has failed to furnish a reasonable and adequate supply, *the company cannot act as judge in its own cause* by cutting off its supply, and threatened action in that respect will be restrained. *McEntee v. Kingston Water Co.*, 165 N. Y. 27. Where a contract between a water company and a borough had expired, and water had been furnished to the borough without any agreement as to the price to be paid therefor, and the company threatened to cut off the supply of water unless the borough paid a sum for past service which the borough claimed to be unreasonable, it was held that a court of equity might, on such conditions as are fair, enjoin the cutting off of the supply until the amount payable for the past supply should be determined in an action at law. *Washington v. Washington Water Co.*, 70 N. J. Eq. 254.

an old debt for service furnished previously.¹ If an excessive charge is demanded in respect of past service and a threat is made to cut off the supply if it be not paid, the consumer *may pay the amount demanded under protest*, and such payment will be regarded as made under duress giving him a cause of action to recover back the excess.²

§ 1322. **Consumers; Clandestine Abstraction of Water.**—A municipal corporation authorized by law to maintain water works and to furnish water to private consumers has the right to sue and recover for water taken and not paid for, the same as an individual or private corporation. Hence, although a city has established water rates and is empowered to collect such rates as taxes are collected, it may nevertheless *recover the value of water clandestinely taken from the mains* in an action for conversion. The water in its pipes is property; it belongs to the city; it is of some value; and the city is entitled to recover the value thereof, when it is taken without its consent or contrary to its rules.³ The city may render a bill for water so abstracted, and, if it be not paid, may cut off the water supply of the owner of the property for his failure to pay.⁴

¹ Wood v. Auburn, 87 Me. 287; Merrimack River Savings Bank v. Lowell, 152 Mass. 556; Crumley v. Watauga Water Co., 99 Tenn. 420; Jones v. Nashville, 109 Tenn. 550. The fact that a gas light company has furnished gas to an individual on his application without objection on account of a previous indebtedness will not prevent it from rejecting a subsequent application on the ground of such indebtedness. People v. Manhattan Gas Light Co., 45 Barb. (N. Y.) 136. Though a city ordinance provides that water rates must be paid in advance by the tenth day of the month, and that the water will be shut off for default in payment, a tender of the rates before the actual shutting off of the water, although after the tenth day of the month, terminates the right of the city to shut off the water. Royal v. Cordele, 132 Ga. 125; 63 S. E. Rep. 826.

² Panton v. Duluth Gas & Water Co., 50 Minn. 175.

³ Milwaukee v. Herman Zoehrlaut Leather Co., 114 Wis. 276. *Water in the pipes and mains of a water company may be the subject of larceny.* Ferens v. O'Brien, L. R. 11 Q. B. Div. 21; 15 Cox Crim. Cas. 332. *Illuminat-*

ing gas in pipes and mains may be the subject of larceny. Woods v. People, 222 Ill. 293; Commonwealth v. Shaw, 4 Allen (Mass.), 308; State v. Wellman, 34 Minn. 221; Regina v. Firth, L. R., 1 C. C. 172; Regina v. White, 6 Cox Crim. Cas. 213. A person who voluntarily obtains and uses gas for heating or illuminating purposes without paying therefor, by so connecting or arranging the pipes as to cut off the water meter, may be convicted of larceny under the Illinois criminal code, and need not necessarily be indicted thereunder for tampering with or obstructing the action of the meter. Woods v. People, 222 Ill. 293.

⁴ Krumenaker v. Dougherty, 74 N. Y. App. Div. 452. But the city cannot cut off the water if it is unable to prove that the consumer was actually responsible for the abstraction. Upon an examination of a water meter it was found that eight of ten teeth that worked the dial had been filed off, so that the meter could only register one fifth of the amount of water used. Upon discovering this fact the water department presented a bill to the occupant charging him with five times the amount of water registered upon the meter. The occupant having re-

§ 1323. **Water Rates; Lien.**—Water rates or rents are imposed and collected as the compensation or equivalent to be paid by those who choose to receive and use the water. No one is compelled to receive or use it, so as to be under obligation to pay for it, but by receiving and using it with knowledge of the rates charged by the city or the public service corporation, *the consumer by implication contracts* and agrees to pay the rates, and his obligation to make payment rests upon contract rather than upon an exercise of the taxing power.¹ Such *rates or rents are not taxes* in such sense that the owners against whom they are charged are entitled to notice and an opportunity to be heard before they are established.² But *there is a clear distinction* between rents paid for water actually furnished by the municipality or by a public service corporation and used by an individual, and the payment of a sum in the nature of a tax for an anticipated general benefit arising from the presence of the water in the city. Where an assessment is made for a supposed benefit arising from the presence of a public service of water as distinguished from its private use by the individual, such an assessment may be in the nature of a tax, and it may be that in such cases notice and an opportunity to be heard are essential to the validity of the tax.³ Such an assessment if made must conform to the general rules regulating the assessment of taxes; and it must be determined either by the special benefit derived, or by a valuation of the property under the general principles applicable to the

fused to pay the department attempted to shut off the water. The occupant did not take possession of the premises until some time after the meter had been installed, and so far as appeared he had not tampered with the meter and was not guilty of any fraud. It was held that under the provisions of the New York Charter it was contemplated that in making a charge for water the city should be bound by the amount registered by the meter, and in the absence of any evidence to connect the consumer with the defective condition of the meter, it could not cut off the consumer's supply by reason thereof. *Healy v. New York City*, 90 N. Y. App. Div. 170.

¹ *Wagner v. Rock Island*, 146 Ill. 139; *Jones v. Detroit Water Com'rs*, 34 Mich. 273; *Preston v. Detroit Water Com'rs*, 117 Mich. 589; *Powell v. Duluth*, 91 Minn. 53; *St. Louis Brewing Assoc. v. St. Louis*, 140 Mo. 419; *Silkman v. Yonkers Water Com'rs*,

152 N. Y. 327; *Brass v. Rathbone*, 153 N. Y. 435. See also *Chicago v. Northwestern Mut. L. Ins. Co.*, 218 Ill. 40. In *Merrimack River Savings Bank v. Lowell*, 152 Mass. 556, the court said: "Special payments are made by individuals only when they are supplied with water at their request; and then only for what is furnished, and for the time it is furnished. While these may be called special assessments for the use, by individuals, of particular privileges, which are part of a general provision for all the people, it seems to be more consistent with the nature of the transactions to consider them as payments of the price of a commodity, sold under a general authority to provide for the public, and to sell upon request, in a reasonable way, to the persons who constitute the public."

² *Silkman v. Yonkers Water Com'rs*, 152 N. Y. 327.

³ *Silkman v. Yonkers Water Com'rs*, 152 N. Y. 327.

assessment of taxes. If it be imposed upon property, *e. g.*, on vacant lots, according to rates determined by the local authorities in their discretion without regard to special benefits or valuations, such an assessment under the rule in New Jersey is invalid.¹ For these reasons, too, an assessment for a general water tax *upon vacant lots made upon the basis of their frontage* cannot be authorized by the legislature when the Constitution requires uniformity of taxation according to the cash value of the property.²

A water rate or rent for water actually consumed on the premises *may by statute be made a lien upon the property* prior to all encumbrances in the same manner as taxes and assessments, and as such may take priority over a mortgage made after the passage of the statute creating the lien, whether the water was brought into the property and used before or after the making of the mortgage.³ The contract or obligation to pay water rates is to be construed with reference to the power to fix and regulate such rates, and an application for water merely binds the consumer to pay the rates in exist-

¹ Provident Inst. for Sav. *v.* Allen, 37 N. J. Eq. 36; Jersey City *v.* Vreeland, 43 N. J. L. 638, aff'g 43 N. J. L. 135; Culver *v.* Jersey City, 45 N. J. L. 256; Remsen *v.* Wheeler, 105 N. Y. 573. See more fully chapter on "Taxation," as to the rule in *New Jersey*. As to assessment of cost of supplying streets and property thereon with water as for a local improvement, see Parsons *v.* District of Columbia, 170 U. S. 45; Allentown *v.* Henry, 73 Pa. 404; Allen *v.* Drew, 44 Vt. 174; Hughes *v.* Mومence, 163 Ill. 535; Batterman *v.* New York, 65 N. Y. App. Div. 576; Smith *v.* Seattle, 25 Wash. 300; Vreeland *v.* Tacoma, 48 Wash. 625.

² Jones *v.* Detroit Water Com'rs, 34 Mich. 273.

³ Provident Inst. for Sav. *v.* Jersey City, 113 U. S. 506; Vreeland *v.* O'Neil, 36 N. J. Eq. 399; Vreeland *v.* Jersey City, 37 N. J. Eq. 574; Howe *v.* Orange, 70 N. J. Eq. 648. A statute creating a lien and giving it priority over mortgages and encumbrances does not, as in a case with the holder of a mortgage subsequently made, violate the Fourteenth Amendment to the Federal Constitution, whatever its effect may be on mortgages previously made. Provident Inst. *v.* Jersey City, 113 U. S. 506. A lien for a water rate is really a lien for an indebtedness. Jones *v.* Detroit Water

Com'rs, 34 Mich. 273. It has been held that a statutory provision that the price or rent of water "shall be a lien upon said house, tenement, or building lot until the same shall be paid or satisfied" without any express provision that the lien shall take priority over mortgage debts, contemplates that the lien shall only apply to the estate or interest of the person who contracts the debt, and that it confers no priority over the lien of mortgages on the premises when the water is supplied. Hudson Trust & Savings Inst. *v.* Carr-Curran Paper Mills Co., 58 N. J. Eq. 59. Notice by the mortgagee to the city calling attention to arrears of water rent and requesting that further supply be cut off from the mortgaged premises held to preclude the city from claiming priority for water supplied thereafter over the lien of the mortgage. Hudson Trust & Savings Inst. *v.* Carr-Curran Paper Mills Co., 58 N. J. Eq. 59. When the statute makes the lien for water depend upon its use, a lien cannot be imposed on the property if no water is used. Hoboken Mfrs. R. Co. *v.* Hoboken, 76 N. J. L. 122; 68 Atl. Rep. 1098. As to the time when water rents become a lien on newly erected and vacant premises in New York City, see Mandel *v.* Weschler, 128 N. Y. App. Div. 505.

ence so long as the public service corporation has the right to charge them, or until they are reduced or otherwise changed by the local authorities. Upon reduction, the consumer is entitled to receive water at the reduced rates.¹

§ 1324. **Legislative Regulation of Rates.**—The Constitutions of a few of the States contain express provisions reserving legislative control over rates for services of a public nature, and these provisions must be borne in mind in considering the judicial opinions in those States.² But *no express Constitutional reservation is necessary to*

¹ Rogers Park Water Co. v. Fergus, 178 Ill. 571.

² The Constitution of *California*, 1879, Art. xiv, § 1, declares: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city, or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city, or town council, or other governing body of such city and county, or city, or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city, or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city, or town, where the same are collected, for the public use." By another sec-

tion of the same Constitution, it is provided that "In any city where there are no public works owned and controlled by the municipality for supplying same with water or artificial light, any individual or any company duly incorporated for such purpose" shall on certain conditions have the privilege of using the public streets and thoroughfares and of laying down pipes and conduits therein "upon the condition that the municipal government shall have the right to regulate the charges thereof." Const. Cal. 1879, Art. xi, § 19, as amended in 1884.

The Constitution of *Idaho* provides: "The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose." Const. Idaho, 1889, Art. xv, § 6.

The provisions of the *California* Constitution do not affect the rights of *water companies to make valid contracts with consumers* for the supply of water at an agreed price where the rates have not been established by law; their only purpose is to require conformity to established rates after they have been established. *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164; 104 Fed. Rep. 706; 112 Fed. Rep. 228; *Fresno Canal & Irrig. Co. v. Park*, 129 Cal. 437. Similarly in *Idaho*, *Jack v. Grangeville*, 9 Idaho, 291. Under the provisions of the *California* Constitution a municipality has the power to fix rates to be charged for water *as against another city* engaged in supplying such water within the municipal limits, as well as when an individual or water company does so. *South Pasadena v. Pasadena L. & W. Co.*, 152 Cal. 579. Although the

create or preserve the legislative power to regulate public service corporations, and prescribe the reasonable rates or maximum rates, which they may charge for services.¹ In the case of railroad corpora-

franchise conferred by the Constitution upon corporations or individuals only has reference to a supply of artificial light, the right to regulate conferred by the Constitution, is not affected by the use made of the gas. It covers all gas passing through the pipes for *cooking and heating*, as well as for *lighting purposes*. *Denninger v. Pomona Recorder's Court*, 145 Cal. 638.

In *Florida*, it is provided "The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons or property or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures." Fla. Const. 1885, Art. xiv, § 30. This provision of the *Florida Constitution* has been held to subject all statutory authority conferred and all contracts made by water companies after its date, to a reserved power on the part of the legislature to regulate water rates, notwithstanding that the contracts with cities and other municipal bodies may contain a clause fixing the rates to be paid by consumers for water used during the entire contract period. *Tampa v. Tampa Water Works Co.*, 45 Fla. 600; s. c. 47 Fla. 338, aff'd 199 U. S. 241. See further as to the effect of this constitutional provision on stipulations as to rates in contracts and grants of franchises, *post*, § 1326.

¹ *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418. The power of rate regulation is *inherent in the legislature and is not dependent on the reservation of a right of alteration or repeal*, but rests upon the police power of the States. *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 569; *Covington & L. Turnpike R. Co. v. Sandford*, 164 U. S. 578; *Brass v. Stoesser*, 153 U. S. 391; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684; *Parker v. Metropolitan R. Co.*, 109

Mass. 506; *State v. Columbus Gas Light & Coke Co.*, 34 Ohio St. 572, 582; *Zanesville v. Zanesville Gas Light Co.*, 46 Ohio St. 1, 30. This power extends to *individuals* as well as to corporations. *Munn v. Illinois*, 94 U. S. 313; *Budd v. New York*, 143 U. S. 517; *Brass v. Stoesser*, 153 U. S. 391. In *Zanesville v. Zanesville Gas Light Co.*, 47 Ohio St. 1, the company had received its charter prior to the adoption of any constitutional provision reserving the right to alter or amend grants of corporate franchises. The charter itself did not contain any such reservation. The court held that it did not thereby acquire any franchise or right to fix its own rates; that it only had the same rights as a natural person would have; and that the legislative power to regulate rates was not affected.

The legislature may directly exercise the power of rate regulation by statute: *Munn v. Illinois*, 94 U. S. 113 *et seq.*; *Ruggles v. Illinois*, 108 U. S. 526; *Dow v. Beidelman*, 125 U. S. 680; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339; *Budd v. New York*, 143 U. S. 517; *Brass v. Stoesser*, 153 U. S. 391; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649; *Covington & L. Turnpike R. Co. v. Sandford*, 164 U. S. 578; *Smyth v. Ames*, 169 U. S. 466; 171 U. S. 361; *Fitts v. McGhee*, 172 U. S. 516; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684; *Cotting v. Kansas City Stock Yards Co.*, 79 Fed. Rep. 679.

Or the State may confer such power on commissioners or public or municipal authorities: *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers' Loan & Tr. Co.*, 154 U. S. 362, 394, *per Brewer, J.*; *San Diego Land & T. Co. v. National City*, 174 U. S. 739; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167; *Tilley v. Savannah, F. & W. R. Co.*, 5 Fed. Rep. 641; *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866; *Chicago, St. P., M. & O. R. Co. v. Becker*, 35 Fed. Rep. 883; *Cleveland Gas-light & Coke Co. v. Cleveland*, 71 Fed. Rep. 610; *Capital City Gas Co. v. Des Moines*, 72 Fed. Rep. 818, 829; *Milwaukee Elect. R. & L. Co.*

tions it has been pointed out that a corporation maintaining a public highway, although it owns the property it employs for accomplishing public purposes, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may, by legislation, protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad corporation accepting rights and privileges at the hands of the public ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its own benefit without regard to the rights of the public.¹ The principles established by the many decisions of the Supreme Court of the United States *as to the extent and limitations of legislative power over rates* for services of a public character may be thus summarized: The State may establish rates or maximum rates of charges, either immediately by legislative act, or mediately through a commission, but this power is not unlimited, but, like all other legislative powers, is subject to the prohibitions of the Constitution of the United States, and particularly to those of the Fourteenth Amendment and the contract clause. The constitutional limitation in the Fourteenth Amendment is that the rates thus fixed, although they are *prima facie* valid, because presumptively reasonable, are nevertheless void if the party affected thereby can establish in the proper judicial proceeding that they are unreasonable. The question of reasonableness or unreasonableness is in all cases "ultimately a judicial question, requiring due process of law for its determination," — that is, judicial investigation in a suit in the courts

v. Milwaukee, 87 Fed. Rep. 577; *San Diego Land & T. Co. v. Jasper*, 89 Fed. Rep. 274; *San Joaquin & K. R. Irr. Co. v. Stanislaus County*, 90 Fed. Rep. 516; *Wilmington & W. R. Co. v. North Carolina Railroad Com'rs*, 90 Fed. Rep. 33; *Northern Pac. R. Co. v. Keyes*, 91 Fed. Rep. 47; *Cleveland City R. Co. v. Cleveland*, 94 Fed. Rep. 385; *Western Un. Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *Kimball v. Cedar Rapids*, 99 Fed. Rep. 130; *Louisville & N. R. Co. v. McChord*, 103 Fed. Rep. 216; *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1; *Southern Indiana R. Co. v. Indiana Railroad Com'n*, 172 Ind. 113; 87 N. E. Rep. 966.

¹ *Smyth v. Ames*, 169 U. S. 466, 546. In *San Diego Water Co. v. San Diego*, 118 Cal. 556, 584, *Temple, J.*, said, "It is provided in section 19, arti-

cle xi, of the Constitution that any individual or company shall have the use of the streets, for laying down pipes and conduits and making connections therewith, so far as necessary for introducing into and supplying the city and the inhabitants with fresh water, 'upon the condition that the municipal government shall have the right to regulate the charges thereof.' The corporation, therefore, constructed its works and invested every dollar of its capital upon this express condition. The privilege of distributing water for pay is a franchise which might have been withheld altogether. It is really a privilege granted to a private individual to perform a public service for pay. It is granted to all upon this express reservation of the right to regulate charges."

of justice "under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy." It is not competent, therefore, for the State to enact that the rates, fixed either by the legislature or by a commission or municipality, whether fixed *ex parte*, or after notice and investigation, are conclusive or final, for such an act would be unconstitutional, because it denies to the party affected due process of law and by "depriving it of the lawful use of its property it, in substance and effect, deprives it of the property itself, and of the equal protection of the laws, contrary to the express provisions of the Fourteenth Amendment and the fundamental principles of American liberty."¹

The decisions of the Supreme Court, it is believed, establish the constitutional right of a public service corporation to such rates or compensation for services rendered or commodities sold as will pay the actual or reasonable cost of the service or production, the maintenance of the works or plant, including proper allowance for depreciation, and a reasonable return or profit upon the present fair value of the plant or property employed by such corporation in its business, and any rate fixed by the State, or under its authority, which is so low as to prevent such compensation and return, violates the Constitution of the United States, and will be judicially annulled and held to be void.

These principles apply with full force to *public service corporations* organized to *furnish light or water* for the use of a municipality and its inhabitants. It is too well settled to be disputed that the business of such corporations, without regard to any express constitutional reservation, is so affected by a public use that the corporation is subject within constitutional limits to legislative control, and that such legislative control includes the power to prescribe

¹ The principles stated in the text as to the legislative power to regulate the rates to be charged for services of public character are established, among others, by the cases of *Munn v. Illinois*, 94 U. S. 313; *Railroad Commission Cases*, 116 U. S. 307; *Dow v. Beidelman*, 125 U. S. 680; *Georgia R. & B. Co. v. Smith*, 128 U. S. 174; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339; *Budd v. New York*, 143 U. S. 517; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649; *Covington & L. Turnpike R. Co. v. Sandford*, 164 U. S. 578; *Smyth v. Ames*, 169 U. S. 466. These cases relate to the regulation of railroad rates, toll rates or turnpike roads, &c., and they are not examined or considered in detail in this treatise except in so far that they have a direct bearing upon the particular subject now under discussion. Until rates have been prescribed pursuant to legislative authority the corporation rendering the service has the right to fix its own charges provided they are reasonable in amount. *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. 316.

reasonable rates or reasonable maximum rates which may be charged for public services.¹

¹ *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Stanislaus County v. San Joaquin & K. R. Irr. Co.*, 192 U. S. 201; *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, aff'g 155 Fed. Rep. 554; *Tampa v. Tampa Waterworks Co.*, 45 Fla. 600; s. c. 47 Fla. 338, aff'd 199 U. S. 241; *Wilson v. Tallahassee Water Works Co.*, 47 Fla. 351; *Peoples' Gas Light & Coke Co. v. Hale*, 94 Ill. App. 406; *Wagner v. Rock Island*, 146 Ill. 139; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571; *Danville v. Danville Water Co.*, 180 Ill. 235; *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa, 348; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234; *State v. Missouri & K. Tel. Co.*, 189 Mo. 83; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206; *State v. Cincinnati G. L. & C. Co.*, 18 Ohio St. 262; *State v. Columbus Gas Light & Coke Co.*, 34 Ohio St. 572; *Zanesville v. Zanesville Gas Light Co.*, 47 Ohio St. 1; *Brymer v. Butler Water Co.*, 179 Pa. 331; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647; *Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249. In *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 747, it was conceded by the counsel and the court that "the power to limit charges for water sold by a corporation like itself (plaintiff corporation), has been too often upheld to be now questioned."

In discussing the *New York Act of 1906, reducing the price of gas in New York City from one dollar to eighty cents per one thousand cubic feet*, and the like order of the gas commission, Circuit Judge *Lacombe* clearly and forcibly states the constitutional principles involved. "The parties to this suit are all citizens of the State of New York, but the main contention — practically the sole contention — of the complainant is that certain statutes of this State and an order of the gas commissioner are obnoxious to various provisions of the Constitution of the United States and for that reason void. This court, therefore, from which appeal lies direct, without review by any intermediate tribunal, to the Supreme Court of the United States, not only has jurisdiction, but is the appropriate forum, because through a suit brought here a final decision by the ultimate interpreter of that Constitution can be

most quickly obtained. A corporation which undertakes, for its own emolument, to supply gas to the inhabitants of a municipality under charters and franchises from the State which allow it to embark in such industry and invite its stockholders to invest their money therein, is engaged in what is called a 'public service' or a 'public utility,' and therefore is under the supervision, inquisition, and regulation of the State as to the manner in which it conducts its business. If, untrammelled by competition, it charges a price far above all reasonable cost to the helpless consumer, who must pay that price or go without, while it receives an exorbitant return on such of its property as is invested in the enterprise, the State may step in and reduce that price to such sum as will, taking everything into consideration, be a reasonable return upon what has been adventured in the enterprise on the faith of the State's franchises. No one disputes this proposition.

"But in fixing such price the State should itself be fair and reasonable — should certainly stop short of confiscation. If it were established by uncontroverted proof that, in materials, labor, and wear and tear of plant at the lowest conceivable valuation, the actual cost of producing gas of a proper standard in the holders was fifty cents per one thousand cubic feet, it would be confiscation for the State to require the manufacturer to deliver such gas to all consumers at five cents per cubic foot. Such an act of the legislature would be obnoxious to the Constitution of the State, to the Constitution of the United States, and to common rights and justice. There may be persons who dispute this proposition, but it may safely be assumed that it is accepted by every community which lives under law and not under anarchy.

"These are the two extremes, and somewhere between them there lies a dividing line. Who is to determine where that dividing line lies? Under our system of government that question has always been left to the decision of the courts. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466. Every individual who feels himself aggrieved either by the action of some other individual, or

§ 1325. Delegation to Municipalities of Power to regulate Rates.

—Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, *a city or other municipality has no power to regulate the rates* to be charged by water, lighting, or other public service corporations in the absence of express or plain legislative authority to do so.¹ Although not infrequently ordinances granting

of the State or the nation is secured the right to bring his grievance before some court. It may be a court of law or of equity, a court established by a statute or by a Constitution, a State court or a federal court, but somewhere or other there is provided for him a forum to which he can present his case, can support it by proof and have his hearing. That is 'due process of law,' a heritage from long centuries of struggles which this nation and its constituent States have deposited in the cornerstones of their written Constitution. Every one is entitled — sometime, somewhere — to his 'day in court.' The most swollen aggregation of capital, crystallized into an individual by the act of the State or national government which has made it a corporation, is as much entitled to have free access to the courts as is the humblest toiler by night to whom every additional cent, disbursed for the light he works by, means a shrinkage of his food supplies." Consolidated Gas Co. v. Mayer, 146 Fed. Rep. 150. See same case on appeal in the Supreme Court of the United States, 212 U. S. 19.

¹ Mills v. Chicago, 127 Fed. Rep. 731; Jacksonville v. Southern Bell Tel. & Tel. Co., 57 Fla. 374; 49 So. Rep. 509; Lewisville Nat. Gas Co. v. State, 135 Ind. 49 (overruling Rushville v. Rushville Gas Co., 132 Ind. 575); Noblesville v. Noblesville Gas & Imp. Co., 157 Ind. 162; Rushville v. Rushville Nat. Gas Co., 164 Ind. 162; Richmond v. Richmond Nat. Gas Co., 168 Ind. 82; *In re Pryor*, 55 Kan. 724; St. Louis v. Bell Tel. Co., 96 Mo. 623; State v. Missouri & K. Tel. Co., 189 Mo. 183, 202; Wabaska Elect. Co. v. Wymore, 60 Neb. 199.

Statutes giving a city "exclusive control over its public highways, streets, avenues, alleys, and public places" does not confer authority on the city to regulate rates for telephone service. State v. Missouri & K. Tel. Co., 189 Mo. 83. Power conferred on a city to

provide by ordinance "for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any streets or public places in the city," whether the franchises be granted by city or by the legislature, was only intended to regulate use of streets, and does not authorize city to regulate the rates for telephone service. State v. Missouri & K. Tel. Co., 189 Mo. 83. See also Jacksonville v. Southern Bell Tel. & Tel. Co., 57 Fla. 374; 49 So. Rep. 509. Authority conferred upon a city "to provide by ordinance for reasonable regulations for the safe supply, distribution, and consumption of natural gas" does not include power to regulate the price of natural gas to consumers. Lewisville Nat. Gas Co. v. State, 135 Ind. 49; Noblesville v. Noblesville Gas & Imp. Co., 157 Ind. 162; Rushville v. Rushville Nat. Gas Co., 164 Ind. 162 (overruling Rushville v. Rushville Nat. Gas Co., 132 Ind. 575). A statute which gives cities the power "to fix by contract or franchise, the prices" of gas, gives no right to fix the price of gas sold by a company theretofore occupying the streets and supplying under an unrestricted franchise. Richmond v. Richmond Nat. Gas Co., 168 Ind. 82. But although the grant by a city of a franchise to a gas company does not contain any stipulation reserving the right to regulate the price, and although this statute does not, under these circumstances, confer authority on the city to fix such prices by ordinance, if the city enact an ordinance fixing the price and the company expressly accepts such ordinance, the price of gas is fixed by contract within the meaning of the statute, and the company is bound. Noblesville v. Noblesville Gas & Imp. Co., 157 Ind. 162.

Neither the general police power of a city, nor power to provide for lighting the streets and to regulate the opening of the streets to lay pipes and mains,

franchises and privileges contain stipulations with reference thereto for the benefit of the municipality and its inhabitants, such stipulations must generally be regarded as depending upon the power to attach conditions to the exercise of the franchise rather than to a power to regulate and control the reasonableness of charges for public services. But the legislative power to regulate the rates and charges of corporations rendering public services in a community *may be conferred upon such agencies* as the legislature may deem proper, unless such action be prohibited by constitutional limitations or by valid existing contract obligations.¹ It may be delegated to municipalities or to their local boards;² and the fact

nor a statutory provision giving gas companies the right to erect works and lay pipes in the streets "subject to such regulations as any such city may by ordinance impose" nor all of these powers together, authorize the city to regulate gas rates. *Mills v. Chicago*, 127 Fed. Rep. 731.

¹ *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *State v. Cincinnati G. L. & C. Co.*, 18 Ohio St. 262; *Wabaska Elect. Co. v. Wymore*, 60 Neb. 199.

Although the power to regulate rates is generally regarded as legislative in its nature, it is not so inherently and exclusively so as to prevent the legislature from delegating it to a commission or other subordinate body. The exercise of such a delegated power is regarded as the execution of a law and the determination of its application to particular cases; and statutes conferring it are not a delegation of legislative power within the meaning of any express or implied condition to be found in the Constitutions of the United States or the respective States, confining the exercise of legislative authority to Congress and the State legislatures. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Inter-State Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479; *McWhorter v. Pensacola & A. R. Co.*, 24 Fla. 417; *Georgia R. Co. v. Smith*, 70 Ga. 694; *People v. Harper*, 91 Ill. 357; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361; *State v. Chicago, M. & St. P. R. Co.*, 38 Minn. 281; *Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607; *State v. Fremont, E. & M. V. R. Co.*, 22 Neb. 313; *Saratoga Springs v. Saratoga Gas, Elect. L. & P. Co.*, 191 N. Y. 123, s. c. 122 N. Y. App. Div. 203; *Atlantic Express Co.*

v. Wilmington & W. R. Co., 111 N. Car. 463.

² *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, aff'g 155 Fed. Rep. 554; *Freeport Water Co. v. Freeport*, 186 Ill. 179; *Danville v. Danville Water Co.*, 178 Ill. 299; *Danville v. Danville Water Co.*, 180 Ill. 235; *Freeport Water Co. v. Freeport*, 186 Ill. 179, aff'd 180 U. S. 587; *State v. Missouri & K. Tel. Co.*, 189 Mo. 83; *Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249. Authority to fix and regulate prices of water and light construed and held to apply to water and light when furnished by public service corporations as well as when furnished by municipal works. *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358.

The regulation of rates for telephone service within a city is a "municipal affair" within the meaning of the provision of the *California Constitution* giving cities the power to frame their own charters and may be made the subject of a provision therein conferring the power. *Home Tel. & Tel. Co. v. Los Angeles*, 155 Fed. Rep. 554, aff'd 211 U. S. 265. But a contrary view is adopted in *Missouri*, and it is there held that the regulation of prices to be charged by a corporation intrusted with the franchise of a public utility, is not a power incident to or appertaining to the government of the city, and does not follow as an incident to a grant of power by the Constitution of that State to frame a charter for the city government. That power is not conferred by the *Missouri Constitution* on cities which are authorized thereby to frame their own charters. The words of the *Missouri Constitution* stating that a city having a population of more than

that a city has an interest in the rate to be fixed by reason of contracts made by it with the public service corporation is not a sufficient reason for depriving the local authorities of the right to exercise such delegated power.¹ If a city, in addition to the power to regulate rates has by statute the power to impose fines and penalties for the violation of ordinances, it may, by ordinance, *make it a misdemeanor for a water or light company to collect or receive more than the maximum rate fixed by it;*² and the ordinance may be made

100,000 inhabitants "may frame a charter for its own government" means that it may frame a charter for the government of itself as a city, which includes all that is necessary or incident to the government of a municipality, but not all the power that the State has for the protection of the rights and regulation of the duties of the inhabitants of the city as between themselves. Authority to Kansas City to insert in its freeholders' charter the power to regulate the price to be charged for telephone services within the city is not conferred by this constitutional provision. *State v. Missouri & K. Tel. Co.*, 189 Mo. 83.

¹ *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, aff'd 189 U. S. 434. But in *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6, the court, without questioning the power of the legislature itself by direct act to regulate rates in cases not covered by previous contracts or vested rights, held that the legislature could not constitutionally delegate such power to the authorities of a city which is itself a consumer, either in its municipal capacity, or through its inhabitants, without any provision for a judicial investigation of the reasonableness of the rates fixed by such authorities. See also *Cleveland Gaslight & Coke Co. v. Cleveland*, 71 Fed. Rep. 610. In *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 279, aff'g 155 Fed. Rep. 554, where the power to regulate rates was delegated to a city council, it was urged that the city council was not an impartial tribunal in view of the fact that by the charter of the city twenty five per cent of the electors might recall a member of the council and require him to again stand for election. But the court held that the fact that the members of the council were thus directly responsible to the

electors did not disqualify the council from acting as a tribunal to regulate rates. Mr. Justice Moody said: "He [the member] takes part in the rate-making function, under his personal responsibility as an officer, and it cannot be presumed, as matter of law, that the keener sense of dependence upon the will of the people, which this feature of his tenure of office brings to him, will distort his judgment and sense of justice. It would be conceivable, of course, that the members of the legislature themselves might be subjected to the same process of recall, but it hardly would be contended that that fact would lessen the legislative power vested in them by the Constitution and laws of the State." Referring to the fact that the charter of the city also contained a provision that upon petition of fifteen per cent of the voters of the city any ordinance proposed must be submitted to the people and might be by them adopted, and the argument therefrom that the power of rate regulation might be in this manner exercised by the electorate at large, the learned Justice said: "It may well be doubted whether such a result was contemplated by the legislature. There are certainly grave objections to the exercise of such a power, requiring a careful and minute examination of the facts and figures, by the general body of the people, however intelligent, and right-minded. But the ordinance was not adopted in this manner in this case, and it will be time enough for the courts of the States and of the United States to consider, when that is done, whether the objections only go to the expediency of such a method of regulation or reach deeper and affect its constitutionality."

² *Denninger v. Pomona Recorder's Court*, 145 Cal. 629, 638. A fine of three hundred dollars for violation of an ordinance fixing a maximum rate for gas is not unreasonable. *Denninger*

applicable to the agent of the company through whom the collection is made.¹ When the authorities of a city have power to regulate the water rates within the city limits, *annexation of a village by the city* clothes the city authorities with power to reduce the water rates of a corporation which is operating a water system in the annexed territory to conform to the rates in other parts of the city, provided such rates be reasonable.²

The *regulation of rates is governmental* in its nature, and the power is intended to be exercised for the benefit of the inhabitants of the municipality. Consequently, it must be exercised by the body or officials to whom it is entrusted and *cannot be by them delegated to others*.³ The power is not exhausted by the first or any subsequent exercise thereof, but is *continuing in its nature*, and may be exercised from time to time to secure the furnishing of water or light at reasonable rates and to prevent abuses and extortion.⁴ The legislature may provide that a rate fixed by a commission on complaint under power delegated to it *shall remain as established for a reasonable time, e. g., for three years*.⁵ But any provision of the law fixing the

v. Pomona Recorder's Court, 145 Cal. 629.

¹ Denninger v. Pomona Recorder's Court, 145 Cal. 629, 638.

² Rogers Park Water Co. v. Fergus, 178 Ill. 571. Rates fixed by ordinance apply to the city as extended, although a different water rate had been fixed for and was in force in the territory annexed. Des Moines v. Des Moines Waterworks Co., 95 Iowa, 348. The fact that the rates prescribed for a corporation operating in territory annexed to a city are uniform with those charged by the city for water supplied from its own works does not establish the reasonableness of rates when applied to the service of the corporation. And if it appears that such rates do not give an adequate return to the corporation for the service rendered, the ordinance fixing them is invalid. Chicago v. Rogers Park Water Co., 214 Ill. 212.

³ Brummitt v. Ogden Waterworks Co., 33 Utah, 285. A statute authorized an incorporated fire district to contract with a town for a supply of water on such terms as might be agreed; and empowered the fire district to distribute the water throughout the district or authorize it to be done, and to regulate its use and the price to be paid therefor within cer-

tain limits. A contract entered into pursuant to this provision provided that the water rents and charges should be at the same rates and prices as, at the date of the agreement, or at any time during its continuance might be charged by the town to its inhabitants. It was held that this contract delegated the power of the fire district to regulate the water rates to the town, and was unauthorized. Arnold v. Pawtucket, 21 R. I. 15. Where the authority to fix water rates is conferred upon the board of public works but its action does not acquire the force of law until approved by the common council, that method of fixing the rates is exclusive, and the common council can only fix water rates by acting upon the recommendation of the board of public works. State v. Gosnell, 116 Wis. 606.

⁴ Danville v. Danville Water Co., 180 Ill. 235; Rogers Park Water Co. v. Fergus, 178 Ill. 571; Freeport Water Co. v. Freeport, 186 Ill. 179. Power to "fix and determine," when applied to rates for public service, fairly imports a *continuing power* of regulation. Home Tel. & Tel. Co. v. Los Angeles, 155 Fed. Rep. 554, aff'd 211 U. S. 265.

⁵ Saratoga Springs v. Saratoga Gas, Elect. L. & P. Co., 191 N. Y. 123, rev'g 122 N. Y. App. Div. 203.

rate for a prescribed period must be framed in such terms that it shall not discriminate against the public service corporation. Hence, the public service company must be accorded at least a right to review the rate after the prescribed period on the same terms and conditions as the right of review given to those with whom it deals.¹ After a *valid rate has been fixed by competent authority*, the rate so fixed is the limit of compensation which can be exacted by the corporation. It cannot decline to furnish water or light to a consumer at the rates fixed by law and insist that he shall contract therefor at another and a higher rate.² But if the service is not included within the cases for which rates are prescribed by ordinance, the company may fix the rates for such service.³

Power delegated to a municipality to prescribe the reasonable maximum rates of a public service corporation *must be exercised in good faith*, and carries with it the duty of ascertaining that the rates so prescribed are just and reasonable with due regard to the property rights of the corporation.⁴ Irrespective of any law prescribing

¹ A statutory provision that a reasonable rate shall be fixed upon the complaint of consumers and shall remain as established for a term of three years and *indefinitely thereafter until fixed anew on complaint made as provided by the statute*, is unreasonable, unconstitutional, and void as denying the equal protection of the laws within the meaning of the Federal Constitution, when the right to complain and to have the rate revised is confined to the consumers, and the company has no corresponding right to apply for revision at the end of three years. *Saratoga Springs v. Saratoga Gas, Elect. L. & P. Co.*, 191 N. Y. 123, rev'g 122 N. Y. App. Div. 203.

² *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22.

³ *Wilson v. Tallahassee Water Works Co.*, 47 Fla. 351; *Carney v. Chillicothe Water & Light Co.*, 76 Mo. App. 532.

⁴ *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. Rep. 952; *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *Chicago v. Rogers Park Water Co.*, 214 Ill. 212; *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6; *State v. Cincinnati G. L. & C. Co.*, 18 Ohio St. 262.

Under the provisions of the Constitution of *California*, quoted above, the Supreme Court of that State has declared that the intention of the

provision is that the governing body of the municipality upon a *fair investigation and with the exercise of judgment and discretion* shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily without investigation or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. The court declared also that it was the duty of the municipal authorities to give the water company when requested to do so, a reasonable opportunity to be heard, not merely for the purpose of presenting its own evidence, but also of explaining or overcoming, if it could, the evidence presented by others. The fact that a hearing was held behind closed doors from which the company was practically excluded was regarded by the court as of importance in deciding the fairness or reasonableness of the rates in question. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 566. See also *Spring Valley Water Works v. San Francisco*, 82 Cal. 286.

If in the colorable exercise of a power to regulate the price of gas the majority of the members of a council, for a fraudulent purpose, combine to pass an ordinance fixing the price of gas at a rate at which they know it cannot be

a rate, it is the duty of a public service corporation *to serve the public at reasonable rates*. The power to regulate rates is only intended to secure to the public their right to such service, and the power of regulation must be limited to ascertaining and prescribing what are reasonable rates. Neither the legislature, nor any municipal body or agency acting by virtue of legislative authority, can exercise the power to regulate rates arbitrarily, and without reference to what

manufactured and sold without loss, such ordinance, so fraudulently passed, imposes no obligation on the gas company intended to be affected thereby; and in a proceeding to test the validity of the powers of the gas company, the *good faith of the members of the city council* who passed the ordinance may in such a case be inquired into. *State v. Cincinnati G. L. & C. Co.*, 18 Ohio St. 262. *Ante*, §§ 580, 581. When the constitution or statute prescribes the time at which ordinances or resolutions shall be passed prescribing the rates, and it is by statute made the duty of the public service corporation to make a detailed statement of the various facts necessary to a proper conclusion as to the rate that should be allowed, the corporation cannot complain that it has not received any formal notice as to the precise day upon which the rates would be fixed. *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 752. In *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 278, aff'g 155 Fed. Rep. 554, it was contended that ordinances fixing rates for a telephone company were wanting in due process of law in violation of the Fourteenth Amendment of the United States Constitution because the statute under the authority of which the ordinances were enacted did not expressly provide for a notice and hearing before action. As to the necessity of a notice and hearing Mr. Justice *Moody* said: "Rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential and judicial proceedings, and for peculiar reasons, in some forms of taxation (see *Londoner v. Denver*, 210 U. S. 373), would not seem to be indispensable." The court, however, expressly declared that it did not decide the point, because both notice and a hearing were given in the particular case. An ordinance of the city provided that the rate should be

fixed at a regular and special meeting of the city council held during the month of February in each year, and another ordinance required the telephone company to render annually in the month of February to the city council a statement of its receipts, expenditures, and property employed in the business, facts which would be material on the question of fixing rates. The Supreme Court declared that this showed that a sufficient notice and hearing were afforded to the appellant company, if it had chosen to avail itself of them, instead of declining to furnish all information as it did, and that therefore the contention of the appellant on this point had no merit.

A statutory provision that *the act of a commission fixing rates might be based upon reports of its agents and inspectors* appointed to examine the property and works of the company *in connection with other evidence*, was held not to render the statute unconstitutional and invalid, when the statute also required the commission to investigate the cause of any complaint, and inspect the works, system, plants and books of the company, to hold a public hearing after due notice to the company, at which the company might be represented by counsel, and to subpoena and examine witnesses under oath, and that all the evidence of the proceedings must be verified, if required, so that the record thereof may be presented to the court upon a review of the order of commission. The statute contemplated that the reports of the agents or inspectors should be made before or at the hearing so that the company might have knowledge thereof. Under these circumstances the court said that the proceedings of the commission were *quasi-judicial* in their nature. *Saratoga Springs v. Saratoga Gas, Elect. L. & P. Co.*, 191 N. Y. 123, rev'g 122 N. Y. App. Div. 203.

is just and reasonable, both to the public, and to the person or corporation furnishing water or light or rendering any other public service.¹ The rate fixed *must always yield a reasonable return* for the service. For example, a city cannot require a water company to furnish free all water used in the conduct and carrying on of all charitable, religious and educational institutions; an ordinance to that effect is invalid as taking private property for public and private use without just compensation.² Such a provision cannot be justified either on the ground of custom or on the ground that it is an exercise of the police power; the exercise of the police power is confined in general to the regulation of the use of property by the owner and to his conduct in respect of it and does not extend to deprive the owner of remuneration for services.

§ 1326. **Stipulations as to Rates in Ordinances and Contracts.** — When a municipality grants to a water or light company the right to use the city streets to lay its pipes and mains and at the same time contracts for a supply of water or light for its use and for the use of its inhabitants by virtue of valid legislative authority conferred upon it, its power to grant the franchise and to make the contract permits it to *prescribe conditions and regulations* as to the manner in which the powers conferred shall be exercised, so far as such limitations and conditions are not inconsistent with the Constitution and with the statutory authority under which it acts. In the protection of the public interests it may attach such limitations and conditions as have a proper relation to the subject matter of the grant. *Restrictions, limitations or conditions relating to and regulating rates have a proper relationship to the subject matter of the grant*, and may, under proper legislative authority, be made a *matter of stipulation in connection therewith*.³ A maximum rate prescribed by the ordinance,

¹ Chicago, M. & St. P. R. Co. v. 538; Noblesville v. Noblesville Gas Minnesota, 134 U. S. 418; San Diego & Imp. Co., 157 Ind. 162; Muncie Land & T. Co. v. National City, 174 Nat. Gas Co. v. Muncie, 160 Ind. 97; U. S. 739; San Diego Water Co. v. Richmond v. Richmond Nat. Gas San Diego, 118 Cal. 556; Des Moines Co., 168 Ind. 82; Boerth v. Detroit v. Des Moines Waterworks Co., 95 City Gas Co., 152 Mich. 654; State Iowa, 348. See also *ante*, § 1318.

² Chicago v. Rogers Park Water Co., 214 Ill. 212.

³ Blair v. Chicago, 201 U. S. 400, 469, 470; Los Angeles City Water Co. v. Los Angeles, 88 Fed. Rep. 720, 730, aff'd 177 U. S. 558; Logansport & W. V. Gas Co. v. Peru, 89 Fed. Rep. 185; Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; Westfield Gas & Milling Co. v. Mendenhall, 142 Ind.

538; Noblesville v. Noblesville Gas & Imp. Co., 157 Ind. 162; Muncie Nat. Gas Co. v. Muncie, 160 Ind. 97; Richmond v. Richmond Nat. Gas Co., 168 Ind. 82; Boerth v. Detroit City Gas Co., 152 Mich. 654; State Trust Co. v. Duluth, 70 Minn. 257; Long Branch v. Tintern Manor Water Co., 70 N. J. Eq. 71, aff'd 71 N. J. Eq. 790; Pond v. New Rochelle Water Co., 183 N. Y. 330, aff'g 107 N. Y. App. Div. 624; Rochester Tel. Co. v. Ross, 195 N. Y. 429, aff'g 125 N. Y. App. Div. 76.

It has been said that a municipality, under its ordinary general powers, independent of a specific statute, has

when it is made a condition of the franchise, is binding upon the grantee of the franchise, and it cannot escape therefrom.¹ A stipula-

the power, and owes a duty *to protect its inhabitants against extortion* in the price of water supplied by a private corporation furnishing water for public and private consumption, and to compel the corporation to furnish water at reasonable rates. *Long Branch v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, aff'd 71 N. J. Eq. 790. Statutory authority conferred upon a city to erect, or authorize the erection, of water works, to make a grant to another for a specified term, and to authorize the grantee to charge such water rate as may be agreed on, not only for a supply to the city, but also as to private persons, confers authority upon the city to stipulate that water shall be *furnished free of charge* by the grantee *to schools and churches*. This stipulation is binding on the corporation and is supported by a sufficient consideration. Under this stipulation the water company must furnish water free to schools for sanitary purposes, although there were no sewers in the municipality at the time when the contract was made. *Le Mars Indep. School Dist. v. Le Mars City W. & L. Co.*, 131 Iowa, 14. Stipulation that the city should have *water supply for fire purposes free of charge* sustained as valid. *Boise City v. Artesian Hot & Cold Water Co.*, 4 Idaho, 351. Under a stipulation in a franchise grant that the company should furnish water *free of charge to churches*, a church is entitled to water as a motive power for its organ, although there was no water motor for organs in the city when the franchise was granted. *Methodist Episcopal Church v. Ashtabula Water Co.*, 20 Ohio Cir. Ct. 578.

A stipulation in an ordinance of a city granting a lighting privilege that the company shall furnish gas "*at rates as favorable*" as those in a neighboring city, precludes the company from charging rates exceeding those of a company supplying light in the latter city. *Decatur Gas Light & Coke Co. v. Decatur*, 24 Ill. App. 544. But a stipulation regulating the rates by the prices charged in another locality must be *sufficiently definite and certain to be capable of enforcement*. Thus, it has been held that a stipulation in a water works franchise that

the company may charge for water "as much and no more than the average price paid therefor in other cities of the United States having efficient water works operated by private companies" is so indefinite, impracticable and unreasonable that it cannot be sustained. *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa, 348. Similarly, where an ordinance granting a franchise for a water supply required the company to fix the rates for private consumers at prices not higher than the average rate prevailing in the cities of Chicago, St. Louis and Cincinnati, and it appeared that the water rates in those cities were based on such radically different classifications and methods of computation, and such diversity of uses and services, that it was practically impossible to ascertain the average schedule of such rates, it was held that the stipulation was too indefinite and uncertain to be capable of enforcement. *Denver v. Denver Union Water Co.*, 41 Colo. 77. A corporation owned water works in two cities. An ordinance of one city granting water franchises to the corporation provided that the water rates to consumers in that city should not exceed the rates to the citizens of the adjoining city. Thereafter the adjoining city exercised its statutory right to purchase the corporation's plant. It was held that the stipulation in the ordinance that the rate should not exceed the rates in the adjoining city referred only to the acts of the corporation itself, and did not constitute a contract or stipulation that the rates charged by the corporation should not exceed the rates charged by the authorities of the adjoining city after acquisition of the works. *Armour Packing Co. v. Metropolitan Water Co.*, 130 Fed. Rep. 851.

¹ *Manhattan Trust Co. v. Dayton Nat. Gas Co.*, 55 Fed. Rep. 181; *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. Rep. 185; *Muncie Nat. Gas Co. v. Muncie*, 160 Ind. 97; *State Trust Co. v. Duluth*, 70 Minn. 257; *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, aff'g 107 N. Y. App. Div. 624; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206; *Zanesville v. Zanesville Gas Light Co.*, 47 Ohio St. 1, 31;

tion by a water, light or other public service corporation in a contract with a municipality whereby, in consideration of the right to use the streets for its pipes, mains, and appliances, the corporation agrees to supply private consumers and corporations in the municipality with water or light at a rate per annum not exceeding a designated amount, is a *stipulation made for the benefit of the inhabitants* of the municipality and may be enforced by them.¹ These conditions and limitations are intended to operate upon the corporation.²

White Haven v. White Haven Water Co., 209 Pa. 166.

A water company incorporated in 1865 purchased the water works of a borough. The charter of the borough contained a stipulation that it should not charge more than \$10 per annum to any private family, and this stipulation was made part of the contract of purchase. It is held that the water company could *not*, in 1899, by accepting the provisions of the *Pennsylvania* Constitution of 1873 and the corporation Act of 1874 *relieve itself from the limitation on charges to private families*. *White Haven v. White Haven Water Co.*, 209 Pa. 166. *Supra*, § 1309. Franchise stipulations limiting rates are *binding upon the successors* of the contracting corporations. *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, *aff'd* 107 N. Y. App. Div. 624. See also *Grosse Point v. Detroit & L. St. C. R. Co.*, 130 Mich. 363; *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227; *Asbury Park & S. G. R. Co. v. Neptune*, 73 N. J. Eq. 323; 67 Atl. Rep. 790.

¹ *Le Mars Indep. School Dist. v. Le Mars City W. & L. Co.*, 131 Iowa, 14; *Robbins v. Bangor R. & E. Co.*, 100 Me. 496; *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, *aff'd* 107 N. Y. App. Div. 624; *International Water Co. v. El Paso* (Tex. Civ. App.), 112 S. W. Rep. 816. A city also may maintain an action to *restrain* a gas light company from charging private consumers prices in excess of the limit specified in the ordinance permitting the gas company to use the city streets. *Muncie Nat. Gas Co. v. Muncie*, 160 Ind. 97.

A *Canadian* gas light company applied for and obtained a statute extending its powers. The municipality appeared upon the application for the statute and obtained the insertion of certain provisions as to the application of the surplus earnings of the com-

pany with a view to effecting a reduction in the price contingent upon the surplus net profits of the company. By the statute the company was required to set aside certain funds in certain accounts for the purpose of enabling the provisions of the act to be complied with. No pecuniary penalty was imposed upon the company for a violation of the provisions of the act, nor was a right of action conferred thereby on consumers, but the municipal authorities were given power to examine and audit the accounts of the gas company. It was held by the House of Lords that an individual consumer could not, by alleging that he had been overcharged in the past by reason of the failure of the company to comply with the statute, maintain an action in equity to compel a statement of accounts in the manner prescribed by the statute, and that such statement of accounts must be obtained through the municipality pursuant to the provisions of the statute. *Johnston v. Consumers' Gas Co.*, L. R. [1898] App. Cas. 447.

² In *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, referred to *infra*, a *thirty-year contract* for a supply of water contained a provision as follows: "Said company will supply private consumers with water at a rate not to exceed five cents per one hundred gallons." After the company had for a number of years furnished water at the stipulated rate, the city passed an ordinance cutting down the rates which the company had been charging. The company claimed that this stipulation as to rates formed a contract by the city that it should, during the term of the contract, have the right to furnish water at the rates specified. The court was of the opinion that the stipulation was a restriction upon the company and not upon the city, saying: "The trouble at the bottom of the com-

Whether these limitations or restrictions *are binding upon the municipality also, and form a contract* on its part that during the term of the contract the corporation shall have the right to exact charges within the maximum prescribed, is an entirely different question. The municipality having derived its powers from the legislature and contracting for a supply of water or light by virtue of statutory authority, any stipulations which it may enter into limiting or affecting its future powers as to rates must be founded upon express or unmistakable legislative authority. When the legislature has conferred such express or unmistakable authority upon the city, the city may, within the scope of such authority and in the absence of any special constitutional restriction, stipulate what rates may be charged by a water or lighting company for the service rendered to the city and its inhabitants, and may also stipulate that such rates shall not be reduced during the contract period, and in such case such stipulations, when thus authorized, *constitute a valid and binding contract* protected by the Federal Constitution.¹ When the

pany's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174; *Ragan v. Aiken*, 9 Lea (Tenn.), 609. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities cannot complain of them or repudiate them, nor can the company which they have formed. *Rockport Water Co. v. Rockport*, 161 Mass. 279. This consideration answers a portion of the company's argument as to its rights under the Fourteenth Amendment, and makes it unnecessary to consider whether the regulation of water rates is properly to be classed as a police power." See *Knoxville Water Co. v. Knoxville*, 200 U. S. 22.

¹ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 570, aff'g 88 Fed. Rep. 720; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 593; *Detroit v. Detroit Cit. St. R. Co.*, 184 U. S. 368, 382; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453; *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 273, aff'g 155 Fed. Rep. 554; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339; *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. Rep. 185; *Omaha Water Co. v. Omaha*, 147 Fed. Rep. 1, 6; *Bessemer v. Bessemer City Water Works Co.*, 152 Ala. 391; *Leadville Water Co. v. Leadville*, 22 Colo. 297; *Shreveport Traction Co. v. Shreveport*, 122 La. 1; 47 So. Rep. 40; *Griffith v. Vicksburg Water Works Co.*, 88 Miss. 371.

In *Los Angeles v. Los Angeles City Water Works Co.*, 177 U. S. 558, aff'g 88 Fed. Rep. 720, the city leased its water works for a term of thirty years, and granted the lessee the right to lay pipes in the streets and to sell and distribute water to the inhabitants of the city, reserving the right to regulate water rates, provided that they should not be reduced to less than those then charged by the lessee. This contract was subsequently ratified and confirmed by legislative authority, and it was held that the limitation upon the power to regulate water rates in-

price of the service is established either by statute or by a valid and authorized contract with the municipality, whatever price is per-

involved a contractual element which could not be impaired by the subsequent action of the city. A charter provision, even if it be in the nature of a contract, exempting a gas company from legislative regulation of rates, does not extend to the plants or systems of other corporations not possessing the immunity in their own right, upon acquisition or absorption by the former company by consolidation or merger. *People's G. L. & C. Co. v. Chicago*, 194 U. S. 1, s. c. 114 Fed. Rep. 384.

In *Detroit v. Detroit Cit. St. R. Co.*, 184 U. S. 368, it appeared that the statute authorizing the granting of franchises to street railways expressly provided that the rates of tolls which any street railway company might charge *should be established by agreement* between the company and the city where the road was located, and should not be increased without the consent of the city authorities. Franchises were granted under such statute containing the provision that the rate of fare for any distance *should not exceed five cents* in any one case. The franchises ran for a limited period. Before the expiration of this period the city, attempting to exercise an alleged power not expressly conferred to regulate rates, sought to reduce the rates of fare below the stipulated rate. The Supreme Court of the United States held that the city could not do so; that the legislature of the State, unless prohibited by constitutional provisions, might authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contracts; that the language prescribing the maximum rate of fare constituted binding agreements which could not be altered; that whatever might be the power of the legislature to regulate rates of fares under constitutional provisions reserving to the legislature the right to alter, amend or repeal charters and privileges granted, such privilege inhered only in the legislature and could not be exercised by the city without express legislative authority therefor. An ordinance

adopted by the council of a city under a statute which provides that if the council fixes the minimum price at which it requires any gas company to furnish gas for a period not exceeding ten years, and the company assents thereto by written acceptance, it shall not be lawful for the council to require such company to furnish gas at a less price during the period of time agreed on, operates as a proposition to the company, which, if accepted, *precludes the council from lowering the price* during the period named; but if not accepted, the power of the council to regulate the price from time to time is as ample as if the ordinance had not contained any provision as to time. *State v. Ironton Gas Co.*, 37 Ohio St. 45.

The Vicksburg Case: The charter and franchises of the Vicksburg Water Works Co., which had been before the Supreme Court of the United States on two previous occasions, on other points, came before that court for the third time in *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496. The charter of Vicksburg authorized the city to provide "for the erection and maintenance of a system of water works to *supply the city with water*, and to that end to *contract* with a party or parties who shall build and operate the water works." This was the only legislative authority to the city in respect of water. No authority was given in terms to the city to grant an *exclusive right* or limiting the power of the legislature subsequently to regulate or reduce rates. Under this charter provision the city passed the ordinance of November 18, 1886, which was involved in the two previous Vicksburg cases, — 185 U. S. 65; 202 U. S. 453. What was decided in these cases is thus clearly and carefully stated by Mr. Justice Day in the opinion of the court in the last case (206 U. S. 496, 506): "When the case was first here, reported in 185 U. S. 65, while there are expressions in the opinion affirming the validity of the contract and the authority of the city to make it, the issue really decided was as to the jurisdiction of the court as a Federal Court, which was sustained, and the cause remanded for further proceedings. Upon

mitted to be charged must be deemed reasonable and binding upon the consumer.¹

the second hearing of the case, and the appeal here, the opinion shows that the adjudication was regarded as settling the right of the Vicksburg Waterworks Company, under the contract, to carry on its business without the competition of works to be built by the city itself, as the city had lawfully excluded itself from the right of competition; and it was further held, as incidental to that controversy, in passing upon an issue made in the suit, that the Vicksburg Waterworks Company had succeeded to all the right, title and interest of the original contracting party, and that the contract, having been made prior to the Constitution of 1890, was not controlled by its provisions."

The contract of the city with the Vicksburg water company contained an agreement on behalf of the city that the grantees "shall have the right to make such rates and charges for the use of said water as they may determine, provided that such rates and charges shall not exceed fifty cents for each thousand gallons of water." The ordinance by its terms ran for thirty years, and contained an agreement by the city to pay a stipulated rental for certain hydrants for public use. The question in the third case was stated (206 U. S. 508) as follows: "Had the city authority, under the charter of Vicksburg, passed in 1886, to make a binding contract fixing maximum rates for water supplied to private consumers for a definite period, thirty years in the present case?" The court said (page 508): "That a State may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt." Citing *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 7; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674; *Freeport Water Co. v. Freeport*, 180 U. S.

587, 593. By a subsequent act of the legislature, passed in 1904, the city of Vicksburg was empowered to prescribe by ordinance maximum rates and charges. Under this legislative authority the city fixed maximum charges for the use of water less than the maximum rates fixed in the ordinance and contract of 1886. The Supreme Court of the United States decided that the contract rates were valid, and the subsequent action of the city attempting to reduce them was unconstitutional and void. Referring to the decisions in *Mississippi* bearing on the subject the court said: "In the cases generally in this court it will be found that, in determining the matter of contract, the local decisions have been given much weight, and, ordinarily, followed. As this is a Mississippi contract, and the power was exercised under the authority of an act of the legislature of that State, we naturally look to the decisions of the courts of that State, particularly to such as had given construction to similar charters at the time the contract was made, with a view to determining the extent of the power conferred." After reviewing the decisions of the Mississippi court, the opinion of the court, which was unanimous, concludes as follows: "In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg, the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years, and, in the absence of a showing of unreasonableness 'so gross,' as the court of Mississippi has said, 'as to strongly suggest fraud or corruption,' this action of the council is binding, and for the time limited, puts the right beyond legislative or municipal alteration to the prejudice

¹ *Griffith v. Vicksburg Water Works Co.*, 88 Miss. 371; *Brooklyn Union Gas Co. v. New York City*, 188 N. Y. 334, aff'g 115 N. Y. App. Div. 69;

Mt. Vernon v. N. Y. Inter Urban Water Co., 115 N. Y. App. Div. 658; *Brummitt v. Ogden Water Works Co.*, 33 Utah, 285.

But it has been held that *the power to regulate rates is a governmental power, continuing in its nature*, which, if it can be bargained away at all, can only be bargained away by an authorized express stipulation, and if any reasonable doubt exists whether it has been bargained away, or whether the city has power to so bargain it away, the doubt must be resolved in favor of the continued existence of the power to regulate;¹ and because of this principle of the law

of the other contracting party." See also *Griffith v. Vicksburg Water Works Co.*, 88 Miss. 371. Compare *Hutchinson Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385.

In *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339, it was held that *a stipulation in a contract or ordinance granting a privilege to supply water that the grantee should have the unrestrained right to establish rates for the supply of water to private persons as it might deem expedient provided that such rates be general, cannot be changed or modified by the subsequent action of the municipality*. But the contract or ordinance involved in this case was ratified and confirmed by a subsequent act of the legislature. A city had statutory power to contract for the construction and maintenance of water works "on such terms and under such regulations as may be agreed on." It offered a contract by ordinance for twenty-five years to the lowest bidder on the condition that he accept the terms of the ordinance. The ordinance provided that the contractor should furnish water to private consumers during the term at such prices as the contractor and the consumer should agree upon not exceeding certain specified rates. The contractor accepted the ordinance, built the works, and operated them for twenty years. The city authorities then ordered the rates reduced below those specified in the ordinance, and the court held that *the accepted ordinance was a contract*, and that the order reducing the rates impaired its obligation and was void. *Omaha Water Co. v. Omaha*, 147 Fed. Rep. 1.

Charter authority to a city "to make all needful provision by contract, ownership of water works, or otherwise, for the supply of the city and the citizens thereof with water; . . . to regulate and prescribe the quality of water to be furnished, the rates to be charged therefor to the city and to private citizens and consumers

within the city limits," empowers the city to contract with a water company for a term of ten years at maximum prescribed rates and to suspend the charter power to regulate rates during such period. Such contract is *a vested right for the time fixed*, which cannot be impaired; and the court will enjoin the enforcement of an ordinance reducing the rates during the term. *Bessemer v. Bessemer City Water Works Co.*, 152 Ala. 391. An ordinance granting a franchise to a gas light company which provides that the gas company "shall not receive a higher rate than ninety cents" for gas furnished gives the company *a contract right to charge that price*. *Boerth v. Detroit City Gas Co.*, 152 Mich. 654. In *State v. Laclede Gas Light Co.*, 102 Mo. 472, it was held that the power to make and sell gas within a city carries with it as an inevitable incident the power to fix the price of gas thus made and sold; that the regulation of the price of gas by the State or by municipalities created by it is not an exercise of the police power which cannot be abridged by contract; that when an ordinance granting a privilege of furnishing gas within a city has been accepted by the company and the maximum price of gas is fixed therein, the provision fixing the maximum price is within the contract provisions and not within the legislative provisions of the ordinance; and that thereafter *the city cannot reduce the maximum price of gas*.

A contract by a city, pursuant to statute, for a water supply for a term of twenty-five years, which fixes the rates during that term, does not create any special privilege or immunity in violation of a constitutional prohibition of any irrevocable grant of any special privilege or immunity; and neither the contract nor the power to make it is inhibited by such constitutional provision. *Omaha Water Co. v. Omaha*, 147 Fed. Rep. 1, 7.

¹ *Freeport Water Co. v. Freeport*,

cases are to be found which deny the power of the municipality to contract that rates for water and other public service shall remain unchanged during a term of years. But it is believed that a close examination of these cases establishes that they were either founded upon the peculiar facts and circumstances of the particular case, or upon some reserved right by Constitution or statute, which subjected a rate prescribed by contract to future regulation by the legislature, or by the municipality acting under delegated power. The question whether a municipality has *implied authority* as an incident to an express power to contract for a supply of water for public and private use to stipulate that rates shall remain unchanged during the term of the contract has been fully considered in a series of cases, which arose in the State of Illinois, and *the existence of any such implied power has been rejected* by the Supreme Court of that State. That court holds that when a municipality is merely authorized to contract for a supply of water or gas to be furnished by a corporation, the municipality has no power to bind itself by fixing the rate for such supply for an entire or long future period of the contract. If, pursuant to such statutory authority, an ordinance be made granting the right to use the city streets for a term of years and fixing the rates to be charged, the rates so fixed will be regarded as merely declaratory that such rates were reasonable at the time of the grant and until changed in competent form, and the stipulation *will not be deemed a contract which binds the city* to recognize the rates as reasonable and controlling for the entire period.¹ When these Illinois cases came before the Supreme Court of the United

180 U. S. 587, 598; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624; *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358; *Stanislaus County v. San Joaquin & K. R. Irr. Co.*, 192 U. S. 201; *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, aff'g 155 Fed. Rep. 554.

¹ *Danville v. Danville Water Co.*, 178 Ill. 299; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571; *Danville v. Danville Water Co.*, 180 Ill. 235; *Freeport Water Co. v. Freeport*, 186 Ill. 179; *Danville Water Co. v. Danville*, 186 Ill. 326. See also *Cincinnati Gaslight Co. v. Avondale*, 43 Ohio St. 257. *Quære?* Is such a contract binding only on one side, that is, if the contract does not bind the city to pay the stipulated price for the stipulated period if such price is or becomes unreasonably high, is the company

bound to continue to render the service for the stipulated price for the full stipulated term in case such price becomes non-compensatory or unreasonably low?

It has been suggested that a contract binding a city to *the initial rate fixed by a forty-year contract for the full term* of the contract would probably be held to be so unreasonable as to be void. *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa, 348, 358. In *Utah* it has been held that municipalities have no power, in contracting for a supply of water, to fix the rates for a term of fifty years, but a clause in an ordinance and contract fixing the rates, if invalid, may be ignored without affecting the remainder of the contract. *Brummitt v. Ogden Waterworks Co.*, 33 Utah, 285.

States for final review, it was held, by a divided court, that under the statutes conferring authority upon the cities and providing for the organization of water companies, the question whether the power of the city to contract for a supply of water was intended by the legislature to be subject to a continued power of regulation of the rates by the municipalities, was so far involved in doubt that the construction ought to be adopted which was most favorable to the public, and therefore that it must be held that the right to regulate the rates was not affected.¹ Other cases in which it was held that stipulations in contracts with a municipality for a public service which prescribed for a long fixed period the rates of public service to the municipality and its inhabitants did not exempt the

¹ The *Illinois* cases above mentioned in which the Supreme Court of that State held that the power to regulate rates could not be bargained away by a city in the absence of an express or equivalent authority to so do came before the Supreme Court of the United States, and the judgments of the State court were affirmed, although it was not found necessary to assent to all of the reasoning of the State court in that respect. The facts were that in 1882, the government of the city gave the water company an *exclusive* right to supply the city with water for thirty years. Provision was made for the erection of hydrants for which fixed rentals were to be charged and paid. In 1891 a statute was passed authorizing municipalities to prescribe by ordinance maximum rates and charges for the supply of water. In 1896, an ordinance was passed by which the city reduced the rentals of the hydrants and the rates to consumers. When the grant of 1882 was made, cities and villages had authority by statutes enacted in 1872 to contract with incorporated companies for a supply of water for public use for a period not exceeding thirty years, and "to authorize any person or private corporation to construct and maintain the same (water works) at such rates as may be fixed by ordinance and for a period not exceeding thirty years." The general incorporation law of Illinois (also enacted in 1872) declared that the legislature should at all times have power to prescribe such regulations and provisions as it deemed advisable, which should be binding on all corporations formed under the pro-

visions of the Act. The Supreme Court of the United States, following the *Illinois* Courts, expressed the opinion that this general act reserved the power to regulate or provide for the regulation of rates, but did not find it necessary to rely on that ground. It held that, independently of that ground, the power to contract and to authorize water works contained in the water works acts could, without straining, be construed to be distributive; that the words in the statute "fixed by ordinance" might be construed to mean by ordinance once for all to endure during the whole period of thirty years, or by ordinance from time to time as might be deemed necessary; that of the two constructions that must be adopted which is most favorable to the public and not that which would prevent further adjustment of rates to meet changed circumstances; and hence that the ordinance of 1896 reducing rates did not violate any right guaranteed to the water company by the Federal Constitution. This decision was rendered by a bare majority of the court, the dissenting judges holding that the statute conferred upon the city the power to agree upon the sums to be paid for water for the entire period; that the contract so fixed these sums; and that it could not subsequently be impaired by any exercise of legislative authority. *Freeport Water Co. v. Freeport*, 180 U. S. 587, aff'g 186 Ill. 179. See also *Danville Water Co. v. Danville*, 180 U. S. 619, aff'g 186 Ill. 326; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, aff'g 178 Ill. 571.

companies from future regulation of these rates, appear to be *founded upon a right reserved* to the legislature or to the municipality to so regulate and control the rates by constitutional provision, or by a statute antedating the making of the contract which expressly reserved that right or reserved the power to alter or amend, or by some enactment which formed a condition, express or implied, inhering in the charter authority of the company.¹

¹ *Tampa Case*: In *Tampa v. Tampa Water Works Co.*, 45 Fla. 600, s. c. 47 Fla. 338, a city was created after the adoption of a *constitutional provision* declaring that the legislature should be invested with full power to pass laws for the correction of abuses and *to prevent unjust discrimination and excessive charges* by persons and corporations performing services of a public nature. The city made a contract with a water company granting it franchises of an exclusive nature for a *term of thirty years which prescribed the rates* for the public and private supply of water during the entire period covered by the contract. Thereafter a statute was enacted conferring upon any city power to prescribe by ordinance maximum rates and charges for water supply, such rates and charges to be reasonable. It was held that even if it be assumed that the power to contract conferred upon the city was sufficient to enable the city to insert a clause fixing the rates to be paid by individuals for water used during the entire period of the contract, and that the city granted the water company the right to fix the rates to be paid at such sums as it saw proper not to exceed the maximum prescribed by the contract, the statutory authority by virtue of which such stipulations were made, and the contract itself, were subject to the declared and reserved power in the legislature to correct abuses and prevent excessive charges; and that an ordinance of the municipality enacted by virtue of a later statutory authority conferred upon it, reducing the water rates to amounts which were not claimed to be unreasonable, was a valid and proper exercise of the power reserved to the legislature.

When this case came before the Supreme Court of the United States, it was held, by a divided court, that so far as the constitutional provision expressed a power of the legislature, contracts made afterwards were subject

to the possibility of its exercise, as it was exercised by a subsequent statute empowering cities to prescribe by ordinance maximum reasonable charges for water; and that the statute did not impair the obligation of a contract by an ordinance of the city for a supply of water made after the constitutional provision was adopted, but before the statute was enacted. *Tampa Water Works Co. v. Tampa*, 199 U. S. 241. Mr. Justice *Holmes*, who delivered the opinion of the court, said: "It cannot be said that the interpretation adopted [by the State court] is not a possible one. Water companies are corporations performing services of a public nature quite as much as common carriers, and, therefore, are within the words of the clause, which is not confined to common carriers. A natural method of preventing excessive charges is the passage by cities or towns, within which services are performed, of ordinances establishing reasonable rates and punishing non-compliance. Therefore, the power to prevent excessive charges given to the legislature properly was exercised by a law granting cities authority to pass ordinances of the kind supposed. . . . The single question is whether the city of Tampa is bound for thirty years from the date of its agreement to permit certain specified rates to be charged, even if they have ceased to be reasonable. We are not prepared to say that the Supreme Court of Florida was wrong in deciding that it is not bound under the Florida Constitution and laws." In a later case, it was held that although the stipulation in the contract of the city of Tampa was subject to and controlled by the right of the legislature to provide for regulating the rates under the provisions of the *Florida Constitution*, the provisions of the contract as to rates were not void under the law. *State v. Tampa Waterworks Co.*, 56 Fla. 858; 47 So. Rep. 358.

Knoxville Case: In *Knoxville Water*

§ 1327. **The Province of the Court as to Rates.** — A statute or an ordinance of a municipality, or a proceeding by a body created

Co. v. Knoxville, 189 U. S. 434, aff'g 107 Tenn. 647, the water company was incorporated with power to contract with the city and its inhabitants for a supply of water and "to charge such price for the same as may be agreed upon between said company and said parties." The general act under which the company was incorporated provided that it should not interfere with or impair the police or general powers of the municipal authorities; and that *they should have power by ordinance to regulate the price of water supplied by the company.* In 1882 the company contracted for an exclusive privilege for thirty years to construct water works and "to supply private consumers" at not exceeding five cents per hundred gallons. Subsequently, the city passed an ordinance reducing the price of water to private consumers below that rate. In an action to enforce penalties for overcharging the rate fixed by ordinance, it was held that there was no contract on the part of the city to permit the charge named in the contract to continue; and that *the contract having been accepted subject to the provision of the general act reserving the power in the municipal authorities to regulate the price of water*, the ordinance reducing the rates was not void, either as impairing the obligation of a contract or as depriving the company of its property without due process of law.

Owensboro Case: In *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, the ordinance of a city made before it became a city of the third class granted a water company the right to make and enforce as part of the conditions upon which it would supply consumers all needful rules and regulations not inconsistent with the law. Subsequently the city became a city of the third class, and as such had power to provide the city with water by contract or by works of its own, and to make regulations for the management thereof and to fix prices to consumers. It was held that the ordinance granting the company the right to make rules and regulations *must be construed with reference to the law as it might be altered*; and that an ordinance adopted after the city became a city of the third class, but during the life of

the franchise, which fixed the price of water, did not impair the obligation of any contract; and, in the absence of any contention that the rates fixed by the later ordinance were unreasonable, such ordinance did not violate any right protected by the Federal Constitution. See as to Federal jurisdiction, *Owensboro Waterworks Co. v. Owensboro*, 200 U. S. 38; *Des Moines v. Des Moines City R. Co.*, 214 U. S. 179.

Stanislaus County Case: In *Stanislaus County v. San Joaquin & K. R. Irrig. Co.*, 192 U. S. 201, there was no formal contract, but the statute under which the corporation was organized declared that every company organized under it should have power to collect and receive rates which should be subject to regulation by the board of supervisors of the county, "*but shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one half per cent per month upon the capital actually invested.*" Subsequently a statute was enacted providing for the fixing by the board of supervisors of the county of the rates to be collected by water companies which directed that the board in fixing such rates "*shall as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations and corporations so furnishing such water to the such inhabitants, shall be not less than six nor more than eighteen per cent upon the said value*" of the property used in furnishing such water. The board of supervisors fixed a rate to the plaintiff company which, as found by the trial court, would have reduced the income of the company to about six per cent per annum. The court held that the incorporation of the company under the statute first referred to and the construction of its works pursuant thereto, although it enabled the supervisors to conditionally regulate the rates, was not a promise or pledge that the legislature would not itself subsequently alter that authority; that no contract could be implied therefrom that the State might not thereafter authorize the board to reduce them, or that it might not itself do so directly; and that the language of the statute under

by the legislature and acting pursuant to legislative authority, which, in exercising the power of regulating the rates to be charged by a

which the plaintiff was incorporated was not intended to form a contract, but simply amounted to a statement of the then pleasure of the legislature, to so remain until it subsequently altered it.

Los Angeles Case: In *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, aff'g 155 Fed. Rep. 554, a city granted a telephone company a franchise under a statute which authorized the municipality to grant a franchise "to erect or lay telephone wires . . . upon any public street or highway," only upon the conditions prescribed in the act. The conditions enumerated in the statute were that an application to the municipality of which advertisement might be made, describing the character of the franchise to be granted and that it would be sold to the highest bidder, and that a bond must be given by the purchaser to secure the performance of "every term and condition" of the franchise. By proceedings conforming to the statute, a franchise for fifty years was granted by an ordinance which stipulated for certain free service for the city, the payment to it, after five years, of two per cent of the gross receipts, and provided that the charges for services should not exceed specified amounts. The charter gave the city council the power "by ordinance . . . to regulate telephone service and the use of telephones within the city, . . . and to fix and determine the charges for telephones and telephone service and connections." The court held that this charter power did not authorize the city to contract as to the rates to be charged, but that this was a purely governmental power. Mr. Justice *Moody* said, "This is ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordi-

nance 'to fix and determine the charges.' It authorizes the exercise of the governmental power and nothing else. We find no other provision in the charter which by any possibility can be held to authorize a contract upon this important and vital subject." Referring to the provisions of the statute under which the telephone company was organized and under which it derived its franchise, the learned Justice pointed out that the statute provided that franchises "shall be granted upon the conditions in the act provided and not otherwise" and said that this was "an emphatic caution against reading into the act any conditions which are not clearly expressed in the act itself. In view of this language it cannot be supposed that the legislature intended that so significant and important an authority as that of contracting away a power of regulation conferred by the charter should be inferred from the act in the absence of a grant in express words. But there is no such grant." Answering the argument of the appellant company that authority to contract as to rates was implied from the provisions of the act that an application for the franchise must be filed, and, in the discretion of the council, published; that the publication must state "the character of the franchise"; that the city is entitled to a percentage of the receipts; that the grantee must give bond to perform "every term and condition of such franchise"; that no condition shall be inserted which restricts competition or favors one person against another; and that the franchise must be sold to the highest bidder, Mr. Justice *Moody* said "But we are of the opinion that there is no such necessary implication, even if anything less than a clear and effective expression would be sufficient foundation upon which to rest an authority of this nature. The decisions of this court upon which the appellant relies where a contract of this kind was found and enforced, all show unmistakably legislative authority to enter into the contract." After referring to and examining the cases which are elsewhere cited and referred to in this treatise, the opinion proceeds: "All these cases agree that

public service corporation, in effect requires the corporation to *render services without reward, or for a return so inadequate* as to deprive the corporation of the lawful use of its property, and thus, in substance and effect, of the property itself, operates as a *taking of private property for public purposes* without just compensation in violation of the provisions to be found in the Constitution of every State, and also in violation of the provisions of the Federal Constitution against the deprivation of property without due process of law and guaranteeing the equal protection of the laws.¹ The question whether rates violate the contract-clause or

the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made."

In *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 128, it was held that a statutory provision that a city might fix the reasonable rates to be charged for water became a part of every contract entered into by the city after its enactment.

¹ *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 458; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 399; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 657; *Covington & L. T. R. Co. v. Sandford*, 164 U. S. 578, 584; *Smyth v. Ames*, 169 U. S. 466, 526; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, aff'g 74 Fed. Rep. 79; *Cleveland G. L. & C. Co. v. Cleveland*, 71 Fed. Rep. 610; *Capital City G. L. Co. v. Des Moines*, 72 Fed. Rep. 829; *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. Rep. 952; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. Rep. 245; *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *San Diego Water Co. v. San Diego*, 118 Cal. 556; *Leadville Water Co. v. Leadville*, 22 Colo. 297; *Chicago v. Rogers Park Water Co.*, 214 Ill. 212; *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa, 348.

Upon bills in equity by the corporation or by its security holders to enjoin rates, or in *mandamus* by the State officers against the corporation

to enforce rates, the *Supreme Court* of the United States has held the rates *unconstitutional* in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Covington & L. Turnpike R. Co. v. Sandford*, 164 U. S. 578; *Smyth v. Ames*, 169 U. S. 466; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684. In these and like cases the *public has been represented* by having as parties the State officers charged with the duty of enforcing the rates, such as the rate commissioners, the attorney general, or other officials of the State, or of a municipality as representatives of the State acting under delegated authority. *Ex parte Virginia*, 100 U. S. 339; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362.

After an examination of the authorities upon the subject, *Garoutte, J.*, said, in *San Diego Water Co. v. San Diego*, 118 Cal. 556, 580, with reference to the power of the courts to review the reasonableness of rates, "As far as we are given light to see, from the consideration of the doctrine enunciated by the many cases coming from the highest court of the land, it would appear to be immaterial whether this power to fix a schedule of rates is vested in the legislature, or delegated by the legislature to some inferior board or tribunal, or given to such board or tribunal by direct grant from the Constitution. Whether it be done by the express act of the legislature, or by the council or commission, under authority from a higher power, or whether the act of such council or commission in fixing rates be judicial or legislative, are matters outside the question."

Excessive penalties: That a statute

the Fourteenth Amendment or other constitutional provision is a *question of law*, which the party affected has the constitutional

regulating rates may be unconstitutional because it imposes penalties for its violation so enormous as to prevent the public service corporation, or its servants or employees, from resorting to the courts for the purpose of determining the validity of its provisions is well established. Commenting upon a statute which prescribed *cumulative penalties* for every charge of more than a certain sum per head for yarding cattle, where a few days' violation of the statute by merely charging a higher rate would exhaust the entire value of the property in satisfaction of the penalties incurred, Mr. Justice *Brewer*, writing the opinion, in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 100, 102, said: "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? Suppose a law were passed that, if any laboring man should bring or defend an action, and fail in his claim or defense, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defense is not sufficient, if upon him alone there is visited a substantial penalty for a failure to make good his entire claim or defense. . . . Suppose a statute providing that every corporation failing to establish its entire claim or to make good its entire defense should, as a penalty therefor, forfeit its corporate franchise, and that no penalty of any kind except a matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws? . . . A statute, although in terms opening the doors of the courts to a particular litigant, which places upon him as a

penalty for a failure to make good his claim or defense a burden so great as practically to intimidate him from asserting that which he believes to be his rights, is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws."

The judgment appealed from in that case was reversed upon another ground, but the language of Mr. Justice *Brewer* was approved by the Supreme Court of the United States in *Ex parte Young*, 209 U. S. 123, 145, where Mr. Justice *Peckham*, said with reference to the penalties imposed by a statute providing for the regulation of railroad rates: "For disobedience to the freight act, the officers, directors, agents and employees of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offence, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offence. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding \$50,000, or imprisonment in the State prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents or employees willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either State or Federal), for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed.

right to have *determined in the judicial courts*, and this right exists although he had full opportunity to be heard or was heard before the rate commissioners acted.¹ The reasonableness of rates for public services is primarily for the determination of the legislature of the State or some agency of the State acting under statutory authority. But the question whether they deprive the person or corporation rendering the service of its property without such compensation as the Constitution secures, and, therefore, without due

upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. . . . If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418. A law which *indirectly* accomplishes a like result by imposing *such conditions upon the right to appeal* for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may, therefore, be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." As to the invalidity of *statutes imposing excessive penalties* for their violation, see also *Mercantile Trust Co. v. Texas & P. R. Co.*, 51 Fed. Rep. 529, 543; *Louisville & N. R. Co. v. McChord*, 103 Fed. Rep. 216, 223; *Consolidated Gas Co. v. Mayer*, 146 Fed. Rep. 150, 153.

The Supreme Court made a similar ruling in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53, approving, on this ground, the decision below, 157 Fed. Rep. 849, 881, but held in that case that the penalty provisions of the statutes in question were not a necessary or inseparable part of the statutes without which they would not have been passed, and that although these provisions of the statutes were void, the remainder of the statutes was valid. See also *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. Rep. 317.

¹ *Chicago M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *San Diego Land & T. Co. v. Jasper*, 89 Fed. Rep. 274; *Louisville & N. R. Co. v. McChord*, 103 Fed. Rep. 216. In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, the Court held that the fact that the defendant had an opportunity for a hearing before some state board or in the state court did not affect the unconstitutionality of the act, if it amounted to the deprivation of property "without due process of law." The court said: "But a State may not by any of its agencies disregard the prohibition of the Fourteenth Amendment; its judicial authority may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

In an action by a gas company against a city in *Illinois*, to restrain the enforcement of an ordinance fixing the price of gas on the ground that the rate fixed amounted to taking property without compensation and that the ordinance impaired contract rights, when the court finds that the rates so fixed were confiscatory, *relief cannot be denied* to the company upon the ground that it had for a time *violated the Illinois anti-trust law*, by entering into an agreement with a competing company as to the rates to be charged. While the violation of the anti-trust law may subject the company to penalties, the fact that the law has been violated in the past, does not justify the refusal of an injunction after the violation has terminated. *Peoria Gas & Elect. Co. v. Peoria*, 200 U. S. 48.

process of law cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority that the matter may not become the subject of judicial inquiry. And accordingly, it is always within the *power of the court to determine whether a rate fixed by statute, or by statutory authority, is such as to require the person or corporation affected thereby to render service without a fair reward and to result in a practical confiscation or deprivation of his property.* And such confiscation or deprivation begins and exists, we think, whenever the legislative rate falls below the line of reasonableness, that is, whenever the legislative rate denies a reasonable compensation and return, all pertinent elements considered, for the service rendered.¹

But the *judiciary ought not to annul or set aside rates* established under legislative sanction unless they are proved or shown to be such as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just both to the owner and to the public; that is,

¹ Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 399; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 657; Smyth v. Ames, 169 U. S. 466, 526; San Diego Land & T. Co. v. National City, 174 U. S. 739, aff'g 74 Fed. Rep. 79; Spring Valley Waterworks v. San Francisco, 82 Cal. 286; San Diego Water Co. v. San Diego, 118 Cal. 556, 566; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234; State v. Cincinnati G. L. & C. Co., 18 Ohio St. 262.

An *unjust discrimination* in a rate is not disclosed by the mere fact that different rates were fixed for the complaining company and for another company doing business within the city, when it does not appear that the two companies operated in the same territory or afforded equal facilities for communication or rendered the same services. Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 281, aff'g 155 Fed. Rep. 554. Mr. Justice Moody said on this point: "For aught that appears, the other concern may have brought its patrons into communication with a very much larger number of persons, dwelling in a much more widely extended territory, and rendered very much more valuable services. In other words, a just ground for classification may have existed." In Willcox v. Consolidated

Gas Co., 212 U. S. 19, 54, aff'g 157 Fed. Rep. 849, the statutes prescribed a rate of *eighty cents* per one thousand feet to *private* consumers and *seventy-five cents* per one thousand feet to the *city*. In a case involving the question whether the rates prescribed were sufficient to give a reasonable return upon the property of the corporation, it was objected that there was an *illegal discrimination* between the city and the consumers individually, but the Supreme Court declared that it could see no discrimination which was illegal or for which good reasons could not be given. As neither the city nor the consumers found any fault with the discrimination, the only question before the court was whether the total rate yielded by the return was sufficient to give the plaintiff company an adequate return upon its property invested in the business. Mr. Justice Peckham (p. 54) said: "We cannot see from the whole evidence that the price fixed for gas supplied to the city by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return it is not important that with relation to some customers the price is not enough."

judicial interference should not occur unless the case presents clearly such a violation of the rights of property under the form of regulation as fully to satisfy the court that the rates prescribed will have the effect to deny to the company reasonable compensation for its services.¹ Hence, when the rate complained of shows, in any event, a very narrow margin of division between possible confiscation and proper regulation, based upon the value of the property as found by the court, and the question whether the rate is confiscatory or not depends upon opinions as to value which differ considerably among the witnesses and also upon the results in the future of operating under the rate objected to, so that the material fact of adequacy of return is left in much doubt, a court of equity should not interfere by injunction before the public service corporation *has made a fair trial and has tested* the reasonableness of the rate by continuing the business at the reduced rates, and thus has eliminated as far as possible the main doubt arising from opinions as opposed to facts.² But if the rate is so low upon any reasonable basis of

¹ *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 754; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 344; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 399; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Palatka Waterworks v. Palatka*, 127 Fed. Rep. 161; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 260.

² *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 42; *Seaboard A. L. R. Co. v. Alabama Railroad Com'n*, 155 Fed. Rep. 792.

In *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 17, the appeal was heard by the Supreme Court of the United States seven years after the rate complained of had been fixed by ordinance. At the trial the court excluded evidence as to the operations of the company for any period except the year immediately preceding the commencement of the action. It was held that it was error to exclude this testimony, and that the court should have received any competent evidence on the question of the reasonableness which might be obtainable down to the date of the trial. The Supreme Court pointed out a number of matters in which the court below had erred, but

its final conclusion in this case was placed upon the broad ground that inasmuch as the net income in any event would be substantially six per cent, or four per cent after an allowance of two per cent for depreciation, and the evidence left the reasonableness of the rate as applied to the future operations of the company in doubt, the court should deny an injunction without prejudice to a further application after the effect of the rate had been given a practical test. Mr. Justice *Moody* said: "Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation; the inferences were based upon the operations of the preceding year; and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. . . . If hereafter it

valuation of the property employed by the public service corporation that there can be no just doubt as to its confiscatory nature,

shall appear, under the actual operation of the ordinance, that the returns allowed by it operate as a confiscation of the property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee. But as the question now stands there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation."

In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, the court below found that the total valuation of the property of the company was \$59,000,000, upon which the probable return was about five per cent. The Supreme Court of the United States reviewed the decision of the Circuit Court and made certain deductions in the value of certain items of property, with the result that the apparent return was about five and one half per cent. The court pointed out that a reduction in other items of a small amount only would bring the rate to six per cent or more, whilst the increased consumption of gas might possibly bring about the same result. The court below found that in the particular case, with reference to the risk attending the business and the locality where it was carried on, the company was entitled to a return, if it is possible, of six per cent upon the fair value of its property actually used in its business of supplying gas; and the Supreme Court approved this finding. But upon the whole case, and in view of the fact that the margin between confiscation and reasonable regulation in the particular case was very small in any event, the court declared that the matter was so much involved in doubt that the company must be denied redress by injunction until it had attempted to operate under the rates claimed to be confiscatory and actual demonstration showed their true character. In the opinion of the court, Mr. Justice Peckham said: "Where a large amount of the total value of a mass of different properties consists in the value of real estate, which is only ascertained by the varying opinions of expert witnesses, and where the opinions of the plaintiff's witnesses differ quite radically from those of the defendants, it

is apparent that the total value must necessarily be more or less in doubt. It, in other words, becomes matter of speculation or conjecture to a great extent. It may be, as already suggested, that in many cases the rates objected to might be so low that there could be no reasonable doubt of their inadequacy upon any fair estimate of the value of the property. In such event, the enforcement of the rates should be enjoined even in a case where the value of the property depends upon the value to be assigned to real estate by the evidence of experts. But there may be other cases where the evidence as to the probable result of the rates in controversy would show they were so nearly adequate that nothing but a practical test would satisfy the doubt as to their sufficiency. In this case a slight reduction in the estimated value of the real estate, plants and mains, as given by the witnesses for the complainant, would give a six per cent return upon the total value of the property as above stated. And again, increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of the gas furnished. . . . Of course, there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property, but it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow, we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient. . . . Upon a careful consideration of the case before us, we are of the opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or

there should be no hesitation in declaring it to be confiscatory and enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate.¹

Whether the rate fixed deprives or will deprive the company of its property without just compensation is a question to be determined by the court upon an *original independent investigation*, and not by an examination of the proceedings of the body fixing the rate to ascertain what evidence it received and acted upon, and whether that evidence was sufficient to justify the conclusion reached.² But the presumption that the rate fixed is reasonable always attaches until overcome by proofs, whether it be fixed directly by the legislature,³ or by a body or board acting under the authority of the legislature;⁴ and it must be upheld, unless it clearly appears to result in a taking or deprivation of property, namely, that in effect it requires the owner to render the service without due and reasonable compensation all things considered. If such due and reasonable compensation is denied for the use of the property devoted to a public service, this is to that extent a deprivation or taking of

fair doubt that the acts of the legislature of the State of New York are in fact confiscatory. It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court."

Preliminary injunction restraining the enforcement of a railroad rate as unreasonable was denied to permit demonstration of the character of the rate by actual trial. *St. Louis & S. F. R. Co. v. Hadley*, 155 Fed. Rep. 220.

¹ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 42; *Seaboard A. L. R. Co. v. Alabama Railroad Com'n*, 155 Fed. Rep. 792.

² *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 667; *San Diego Water Co. v. San Diego*, 118 Cal. 556; *Redlands, L. & C. D. Water Co. v. Redlands*, 121 Cal. 312. *Practice as to taking evidence* in the Federal Courts in an equity cause to annul rates. *Chicago, M. & St. P. R. R. Co. v. Tompkins*, 176 U. S. 167; *Consolidated Gas Co. v. Mayer*, 146 Fed. Rep.

150; *Ex parte Young*, 209 U. S. 123, 164.

³ *Cotting v. Kansas City Stock Yard Co.*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123, 165; *Louisiana Railroad Com'n v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, rev'g 156 Fed. Rep. 823; *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *Consolidated Gas Co. v. Mayer*, 146 Fed. Rep. 150, 156; *Cedar Rapids Gaslight Co. v. Cedar Rapids (Iowa)*, 120 N. W. Rep. 966.

⁴ *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574 (ordinance of board of supervisors); *Sheward v. Citizen's Water Co.*, 90 Cal. 635; *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa, 348 (city ordinance); *State v. Ironton Gas Co.*, 37 Ohio St. 45.

Where a city council *changes, by ordinance, the rates* to be charged so that the previous rates to small consumers are diminished, and the rates to large consumers are increased, it will be presumed, in the absence of evidence to the contrary, that the previous charges were unequal and unjust, and that the effect of the ordinance is to obviate or prevent improper discrimination. *Wagner v. Rock Island*, 146 Ill. 139.

property without due process of law in violation of the Constitutional rights of the owner, whether natural or corporate, of such property.

It seems to the author proper to add that the underlying question is as to the *reasonableness* of the rate or compensation for the service. Courts deal every day and in every variety of cases, criminal and civil, at law and in equity, with questions of what is reasonable. What for example is reasonable care, what is a reasonable price or value of property or of services are among the most common of judicial inquiries. No tribunal, legislative or administrative, is so well fitted by its nature, machinery, and modes of procedure as are the courts, to determine specific controversies involving such questions. The judges are men of learning and ability, selected or elected because they are such; they sit in public. Every interest has a right and opportunity to be heard. The evidence must be competent. Witnesses are sworn and examined and cross-examined in public. Counsel pro and con aid the court in forming its judgment. The experience of ages attests and establishes the fact that there is no tribunal comparable to the courts for ascertaining the truth and for determining and enforcing the just rights of the parties. It would be a public misfortune of immeasurable extent and gravity to place any narrow or artificial limits upon the extent of judicial power as it exists or as it may be conferred by the legislature to determine such controversies between the parties. Whoever has had to deal with the task of undertaking to delimit the executive, the legislative and the judicial provinces, and defining their respective and exact boundaries, knows how difficult, — in many cases how utterly impossible, — it is to draw the line of demarcation between them. These considerations suggest the wisdom of standing upon the ancient ways, of being guided by experience, and not by theories or generalizations as to what belongs to one department of government and what to another.

In the last resort, constitutional rights are of little worth, in fact are worthless, except as they are protected by the courts, and if the courts abdicate their function, as they surely will if they hold themselves concluded or unduly influenced or controlled by the determination of the legislature or of a commission or municipal council as to what is a reasonable rate or compensation, it will prove a fateful and disastrous blow to the public credit, to private rights and private property. On these foundations, namely, individual freedom, the sacredness of contract, the inviolability of vested rights and private property, and reliance upon the courts to protect and enforce such

rights against all comers, we have builded, and if the goodly structure is to last, it is on these foundations, safe guarded by the judiciary, standing firmly and impartially between the State and the citizen, that it must continue to rest.

§ 1328. **Same Subject; Remedies; General and Federal Jurisdiction in Rate Regulation Cases.** — The *proper and usual mode of relief* against an alleged unconstitutional rate fixed by the legislature or a commission or municipal council, is by a *bill in equity asserting the unreasonableness* of the rate and its conflict with the Constitution of the United States, and also of the State, if such be the fact. The jurisdictions of the Federal and State courts are concurrent, but inasmuch as the United States Supreme Court is the ultimate tribunal in such a case whose decision is binding and conclusive upon all courts, State and Federal, and as a direct appeal lies to the Supreme Court from the Circuit Court, thereby insuring all possible expedition, almost all of the rate regulation cases have been brought originally in the *Federal Court* which is of course a proper, if not the most appropriate forum.¹ The *grounds of the general jurisdiction in equity* are the inadequacy of the remedy at law, irreparable damage and multiplicity of suits.² If the rate is alleged to

¹ No question of discretion or comity affects the power or duty of a Federal Court to take jurisdiction of a suit to enjoin the enforcement of a rate fixed by law, ordinance or order of a commission. Speaking of the right of a party aggrieved to seek redress, Mr. Justice Holmes said in *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 228, "All their constitutional rights depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent." In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 40, Mr. Justice Peckham said: "At the outset it seems to us proper to notice the views regarding the action of the court below [the United States Circuit Court] which have been stated by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticise that court for taking jurisdiction of this case as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal

court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens v. Virginia*, 6 Wheat. [U. S.] 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court, where there is a choice, cannot be properly denied." Citing *In re Metropolitan Railway Receivership*, 208 U. S. 90, 110; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210. See also *Ex parte Young*, 209 U. S. 123, 142.

When the statute affords a remedy to the public service corporation by application to a board or body to correct inadequate rates, relief must be sought by an application to such board or body before invoking the aid of a court of equity by injunction. *San Joaquin & K. R. Irrig. Co. v. Stanislaus County*, 155 Cal. 21; 99 Pac. Rep. 365.

² *Chicago, M. & St. P. R. Co. v.*

be in conflict with the Fourteenth Amendment, the *United States Circuit Court in equity has jurisdiction by reason of the subject matter*, independently of diversity of citizenship.¹ And so also where the

Minnesota, 134 U. S. 418, 459, opinion of Mr. Justice Miller; *Smyth v. Ames*, 169 U. S. 466; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 12; *Ex parte Young*, 209 U. S. 123, 163; *Consolidated Gas Co. v. Mayer*, 146 Fed. Rep. 150.

In *Smyth v. Ames*, 169 U. S. 466, objection was made that the complainant had an adequate remedy at law. The Supreme Court sustained "equitable" jurisdiction on the ground, *inter alia*, of the multiplicity of suits. Mr. Justice Harlan said: "The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree according to the prayer of the bills, would avoid a multiplicity of suits and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation, by which such highway is maintained."

In *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 460, Mr. Justice Miller says that, until the judiciary has been asked to declare the regulation void, the tariff so fixed is the law, and must be submitted to both by the carrier and the party with whom he deals, and adds: "The proper and only mode of relief is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States. . . . Until

this is done, it is not competent for each individual having dealings with the company, or the company itself, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method." He says that a petition for a writ of *mandamus* against the company is an equally appropriate mode of trial; but this remedy can, of course, only be sought by the State. In *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 666, Shiras, J., says: "In such cases the course recommended by Mr. Justice Miller may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding wherein the rights of the public as well as those of the company complaining can be protected"; the State being represented by the rate commission or the attorney general of the State or other officers charged with the making or enforcement of the rates.

¹ *Ex parte Young*, 209 U. S. 123, 144; *Louisiana Railroad Com'n v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, rev'g 156 Fed. Rep. 823; *Spring Valley Water Works v. Bartlett*, 8 Sawyer, 555, 16 Fed. Rep. 615; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339; *Cleveland Gaslight & Coke Co. v. Cleveland*, 71 Fed. Rep. 610; *Capital City Gas Co. v. Des Moines*, 72 Fed. Rep. 818; *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. Rep. 952; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. Rep. 245; *Consolidated Water Co. v. San Diego*, 84 Fed. Rep. 369; *San Joaquin & K. R. Irr. Co. v. Stanislaus County*, 90 Fed. Rep. 516; *Ball v. Rutland R. Co.*, 93 Fed. Rep. 513, 515; *Cleveland City R. Co. v. Cleveland*, 94 Fed. Rep. 385; *Kimball v. Cedar Rapids*, 99 Fed. Rep. 130; *Louisville & N. R. Co. v. McChord*, 103 Fed. Rep. 216; *St. Louis & S. F. R. Co. v. Hadley*, 155 Fed. Rep. 220; *Perkins v. Northern Pac. R. Co.*, 155 Fed. Rep. 445; *Louisville & N. R. Co. v. Alabama Railroad Commission*, 157 Fed. Rep. 944; *Central of Georgia R. Co. v. McLendon*, 157 Fed. Rep. 961; *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 667.

In *Ex parte Young*, 209 U. S. 123,

rate is alleged to be in violation of the *contract clause* or *commerce clause* of the Constitution.¹ Such suits are not suits against a State within the meaning of the Eleventh Amendment to the Federal Constitution, even though the Attorney General and State officials are defendants.²

144, cited *supra*, § 1327, where the adequacy of a railroad rate fixed by a State commission was involved, the Supreme Court sustained the *jurisdiction of the Federal courts*, although no question of diversity of citizenship was involved. Mr. Justice Peckham said, "Jurisdiction is given to the Circuit Court in suits involving the requisite amount, arising under the Constitution or laws of the United States (1 U. S. Comp. Stat., p. 508), and, the question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law, and although that question might incidentally involve a question of fact, its solution nevertheless is one which raises a federal question. See *Hastings v. Ames*, 68 Fed. Rep. 726. The sufficiency of rates is a judicial question, and one over which federal courts have jurisdiction by reason of its federal nature," citing authorities.

Another federal question which may give the Federal courts jurisdiction by reason of its nature, is whether *penalties* are denounced for violation of the statute and orders fixing rates so enormous as to prevent the company or its servants or employees from resorting to the courts for the purpose of determining the validity of such acts. *Ex parte Young*, 209 U. S. 123, 144. See also *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53, s. c. 157 Fed. Rep. 849, 881; *supra*, § 1327.

¹ *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557; *New Orleans v. Citizens' Bank*, 167 U. S. 371; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Louisville & N. R. Co. v. Tennessee Railroad Com'n*, 19 Fed. Rep. 679; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339; *Yale College v. Sanger*, 62 Fed. Rep. 117; *Westerly Water Works v. Westerly*, 75 Fed. Rep. 181; *Mercantile T. & D. Co. v. Collins Park & B. R. Co.*, 99 Fed. Rep. 812; *Little Falls Elect. & W. Co. v. Little Falls*, 102 Fed. Rep.

663; *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. Rep. 711; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. Rep. 258; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1.

To establish the jurisdiction of the Federal court it is only necessary to show that the complainant claims in good faith that the ordinance in question violates the Constitution of the United States. *City R. Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 562, 563. Mr. Justice Brown said: "Jurisdiction depends upon the allegations of the bill, and not upon the facts as they subsequently turned out to be." "All that is necessary to establish the [Federal] jurisdiction of the Court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair." Not only can an appeal be taken *direct* to the Supreme Court of the United States from the final decree of the United States Circuit Court, without an intermediate appeal to the United States Circuit Court of Appeals, but the *Supreme Court can*, upon such an appeal, *pass upon all questions of fact*. *In re Neagle*, 135 U. S. 1, 42; *Dower v. Richards*, 151 U. S. 658, 663; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 179, 180; *Elliott v. Toepfner*, 187 U. S. 327, 334; *Giles v. Harris*, 189 U. S. 475, 486. The decision of the *Federal Supreme Court* upon the validity of the legislation or rate which has been attacked *will be conclusive upon the State courts*. *York v. Conde*, 147 N. Y. 486, 490, 491; *Sibley v. Sibley*, 76 N. Y. App. Div. 132, 135; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190, 205.

² *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413; *Reagan v. Mercantile Trust Co.*, 154 U. S. 418; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 420; *Smyth v. Ames*, 169 U. S. 466; s. c. 171 U. S. 361; *Prout v. Starr*, 188 U. S. 537; *Ex parte Young*, 209 U. S. 123, 149; *Poor v. Iowa Cent. R. Co.*, 155 Fed. Rep. 226; *Perkins v.*

§ 1329. **Power of Judiciary to fix or prescribe Rates.** — The proper province of the judiciary is to try an issue between parties

Northern Pac. R. Co., 155 Fed. Rep. 445; Louisville & N. R. Co. v. Alabama Railroad Com'n, 157 Fed. Rep. 944; Central of Georgia R. Co. v. Alabama Railroad Com'n, 161 Fed. Rep. 925. See also *Pennoyer v. McConnaughey*, 140 U. S. 1; *Scott v. Donald*, 165 U. S. 58; *Chicago M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167; *Smith v. Reeves*, 178 U. S. 436, 444, 445; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79.

The cases on this point are numerous, and their effect is thus summed up in *Smyth v. Ames*, 169 U. S. 466, 518, by Mr. Justice Harlan: "But, to prevent misapprehension, we add that within the meaning of the Eleventh Amendment of the Constitution the suits are not against the State, but against certain individuals charged with the administration of a State enactment, which it is alleged, cannot be enforced without violating the constitutional rights of the plaintiff. It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them, as officers of a State, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the State within the meaning of that amendment." *Fitts v. McGhee*, 172 U. S. 516, does not overrule the prior cases, or impugn the doctrine they establish, namely, that rate regulation suits against State officials charged with the enforcement of the rate law or rate regulation, are not suits against the State within the meaning of the Eleventh Amendment. See *Ex parte Young*, 209 U. S. 123, 156, per Mr. Justice Peckham, where the true effect of *Fitts v. McGhee*, *supra*, is stated.

When a preliminary injunction will be granted. On a proper case made, a preliminary injunction to restrain the putting in force of an alleged illegal rate will be awarded. The rule of the Federal Courts is thus stated in *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. Rep. 952: "It is settled that upon preliminary application for injunction, all that the judge should as a general rule require is a case of probable right and probable danger to that right without the interposition of the court, and his discretion should then

be regulated by the balance of inconvenience or injury to the one party or the other." To the same effect, *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. Rep. 245, where an injunction was granted on the company giving bond to pay a sum equal to the excess of old rate over new rate. So in *Consolidated Gas Co. v. Mayer*, 146 Fed. Rep. 150, on the company paying into court monthly such excess to abide the order of the court. Circuit Judge Lacombe's order for the injunction was carefully framed so as to protect all parties. In *San Francisco Gas & Elect. Co. v. San Francisco*, 164 Fed. Rep. 884, the court also required the excess to be paid into court as a condition of the granting of a temporary injunction. In *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. Rep. 185, a suit was brought by a gas company to set aside, as illegal, the action of the city council in fixing the price of gas in accordance with the terms of an ordinance. A preliminary injunction was granted. On hearing the bill was dismissed for want of equity, but the restraining order was continued in force until final determination of the case by the Circuit Court of Appeals.

Preliminary injunctions were granted in the following rate regulation cases: *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65; *Louisville & N. R. Co. v. Tennessee Railroad Com'n*, 19 Fed. Rep. 679; *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866; *Southern Pac. Co. v. California Railroad Com'n*, 78 Fed. Rep. 236; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. Rep. 245; *Northern Pacific R. Co. v. Keyes*, 91 Fed. Rep. 47; *Cleveland City R. Co. v. Cleveland*, 94 Fed. Rep. 385; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *Kimball v. Cedar Rapids*, 99 Fed. Rep. 130 (suit to restrain putting in force water rates); *Ozark Bell Tel. Co. v. Springfield*, 140 Fed. Rep. 666 (to enjoin execution of ordinance fixing telephone rates). The Circuit Courts, even where they have found, upon final hearing for the defendant and dismissed the complainant's bill, have nevertheless, where the question was reasonably disputable and such a course seemed necessary, continued the injunction to preserve the *status quo* until the Su-

arising out of a past transaction, and, save in exceptional cases, it is not usually conceded to have any power or authority to *regulate future conduct* or the future relations of contracting parties. *In the absence of jurisdiction expressly conferred* authorizing the courts to fix and determine what is a reasonable rate, — if it is competent to confer such jurisdiction, — the *only power* which the court has in the premises *is to enjoin the enforcement of a rate* which it determines to be inadequate and unreasonable; it cannot proceed to perform the legislative function or administrative duty of framing a general tariff or schedule of rates for the public.¹ The *power to prescribe rules of conduct*, such as fixing a scale of rates operative upon the public, *is legislative and not judicial* in its nature, and so far as it is legislative cannot be conferred upon the courts; but the courts can be empowered to ascertain and deal with the reasonableness of rates whenever this is necessary to determine the rights and interests of parties actually before the court.² But although it is

preme Court could hear the case on appeal, and this procedure has been approved by the Supreme Court. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, s. c. 82 Fed. Rep. 850.

In *San Francisco Gas & Elect. Co. v. San Francisco*, 164 Fed. Rep. 884, it was said that a *temporary injunction* against the enforcement of an ordinance regulating gas rates was *binding not only upon the city but also against individual consumers*, although the individual consumers were not parties to the record, when the city, which was made a defendant, was itself a consumer and the total number of consumers was so large as to preclude their being made parties. The court regarded the *consumers as being represented by the municipality*. But in *Richman v. Consolidated Gas Co.*, 186 N. Y. 209, aff'g 114 N. Y. App. Div. 216, the New York Court of Appeals held that a temporary injunction by a Federal court restraining the enforcement of a statute fixing gas rates pending a determination whether it was confiscatory or not, did not bar an action in the State courts by a consumer to restrain the gas company from cutting off gas when the consumer tendered payment at the rate fixed by the statute and offered reasonable security for any further amount.

¹ *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 344; *Smyth v.*

Ames, 169 U. S. 466, 524; *San Diego Land & T. Co. v. Jaspas*, 189 U. S. 439, 466; *Gulf Compress Co. v. Harris*, 158 Ala. 343; 48 So. Rep. 477; *Peoples Gas Light & Coke Co. v. Hale*, 94 Ill. App. 406; *Madison v. Madison Gas & Elect. Co.*, 129 Wis. 249.

² *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 344; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 394, 397; *Interstate Commerce Com'n v. Brimson*, 154 U. S. 447, 474, 499; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 663; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Com'n*, 162 U. S. 184, 196; *Interstate Commerce Com'n v. Cincinnati, N. O. & R. T. P. R. Co.*, 167 U. S. 479, 499, 511; *Interstate Commerce Com'n v. Alabama Midland R. Co.*, 168 U. S. 144; *Western Un. Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *Norwalk St. R. Co.'s Appeal*, 69 Conn. 576; *Cedar Rapids Gaslight Co. v. Cedar Rapids (Iowa)*, 120 N. W. Rep. 966; *State v. Johnson*, 61 Kan. 803; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502; *Nebraska Tel. Co. v. State*, 55 Neb. 627. See also *Honolulu R. T. & L. Co. v. Hawaii*, 211 U. S. 282, 291; *supra*, sec. 1327.

In *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Com'n*, 162 U. S. 184, it was held that the act of Congress *did not empower the Interstate Commerce Commission to fix rates*, and that the carriers, subject to the provisions of the act, as to reasonableness of rates, were left free to fix their own

not, properly speaking, a judicial function to fix or prescribe rates for future public service, yet cases are to be found where some

rates. The question was reconsidered in *Interstate Commerce Com'n v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 499, where the court said: "It is one thing to inquire whether the rates which have been charged and collected are reasonable — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future — that is a legislative act." *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 458; *Reagan v. Farmers' Loan & Tr. Co.*, 154 U. S. 362, 397. Interpreting the act, the court said: "The power given is the power to execute and enforce, *not to legislate*. The power given is partly judicial, partly executive and administrative, *but not legislative*."

A rate commission is "merely an administrative board created by the State for carrying into effect the will of the State as expressed by the Legislature." *Per Brewer, J.*, in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 394. "The courts do not determine whether one rate is preferable to another or what would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work." *Per Brewer, J.*, in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397. "The court has no power to fix rates. It may not declare what rates would be reasonable, and by its decree establish those rates as the rates to be charged. Its power is exhausted on this point when it has duly passed on the reasonableness of the rates as fixed in the ordinance." *Per Curiam*, in *Capital City Gas Co. v. Des Moines*, 72 Fed. Rep. 818.

The Attorney General of the United States in an official communication to the Senate, May 5, 1905, states the true doctrine thus: "Although legislative power, properly speaking, cannot be delegated, the law making body, having enacted into the law the standard of charges which shall control, may entrust to an administrative body, not exercising in the true sense judicial power, the duty to effect rates in conformity with that standard." In *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 8, Mr. Justice *Moody* said, "It happens that in this particular case it is not an act of the legislature

that is attacked, but *an ordinance* of a municipality. Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature, and must be regarded as an exercise of the legislative power."

In *Honolulu R. T. Co. v. Hawaii*, 211 U. S. 282, a corporation was granted the right to construct and operate a street railway for a term of thirty years. The railway was constructed and in operation. In certain streets of its line the company had been running the cars at intervals of ten minutes. It proposed to discontinue this schedule and to establish one with somewhat longer intervals, and had applied to the Superintendent of Public Works for necessary permission in connection therewith. Thereupon the Territory brought a suit in equity for an injunction to prevent the company from running its cars at greater intervals than ten minutes. After a trial, the court found as a fact that the public convenience required the maintenance of the ten-minute schedule and an injunction against the change was accordingly granted. The contention between the parties when the case came before the Supreme Court of the United States was on the question whether the courts of the Territory had jurisdiction in equity to issue the injunction. The Supreme Court declared that the substantial effect of the injunction was to direct the company to operate its cars upon a schedule found to be required by the public convenience, and held that the courts of the Territory had no jurisdiction, in the absence of express statutory authority, so to direct. Mr. Justice *Moody*, who delivered the opinion of the court, after referring to the obligation imposed by the statute under which the company was incorporated to operate as well as to maintain such cars as the public convenience required, said, "The section, however, is not a specific direction to keep in force on the streets covered by the order of the court a defined schedule, with cars running at

courts appear to have exercised, to a greater or less extent, that function.¹ And there is authority to sustain the proposition that

named intervals, and the right of a court to enforce by injunction or *mandamus* such a schedule need not be considered. But the action of the court below went much farther than this, and farther than is warranted by any decision which has been called to our attention. In the absence of a more specific and well-defined duty than that of running a sufficient number of cars to meet the public convenience, the court, in this case, inquired and determined, as matter of fact, what schedule the public convenience demanded, on particular streets, and then in substance and effect, compelled a compliance with that schedule.

And this was done, though, as will be shown, the full power to regulate the management of the railway in this respect was vested by the statute in the executive authorities. In form the order of the court was a mere prohibition against a change of an existing schedule, but its substantial effect was to direct the Transit Company to operate its cars upon a schedule found to be required by the public convenience. The effect of the order is not changed by the fact that the schedule enforced by the order of the court is that upon which the Transit Company was then running its cars. The order of the court was not founded upon the

¹ *New Jersey*. In a suit by a municipality to enjoin a water company from cutting off the supply of water from the municipality because of a dispute as to the rates charged and for the non-payment of arrears, Vice-Chancellor Pitney inquired into and determined the reasonable rates to which the water company was entitled for both municipal and private service, and his decree was affirmed by the Court of Errors and Appeals. *Long Branch v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, aff'd 71 N. J. Eq. 790. But in a later case the same Vice-Chancellor declared that the reasonableness of water rates, as between a city and its consumers generally can only be called in question under the New Jersey practice by *certiorari* to review an ordinance fixing rates. *Woodruff v. East Orange*, 71 N. J. Eq. 419. He distinguished the case before him from his previous decision, saying: "The case is in marked contrast with the case of *Long Branch v. Tintern Manor Water Co.*, 70 N. J. Eq. 71. There the water rates were fixed by the defendant, a private water company, and the question was how much the water company ought to charge in the aggregate, and how that amount should be distributed between the municipality at large and the citizens, and again as between the citizens themselves. Manifestly, this court was the only tribunal which could stand between a private corporation and the municipality and its citizens. Besides the question of jurisdiction of

this court was distinctly *waived* and both parties agreed to submit to it the question of the reasonableness of the water company's charges."

In *Pennsylvania*, a statute authorizes the courts, upon complaint of one or more consumers of deficiency in quality or quantity of water furnished, or of excessive and unreasonable charges therefor, "to dismiss the complaint or compel the corporation to correct the evil complained of" as the evidence may require. Whatever may be the power of the court to fix the extent of the reduction of a particular charge, or to name the maximum charge for the particular service in controversy, the court cannot frame a complete schedule of rates for a water company governing not only the particular service complained of, but services of every kind and nature. *Brymer v. Butler Water Co.*, 179 Pa. 331. In *Leechburg v. Leechburg Water Works Co.*, 219 Pa. 263, a dispute arose between a borough and a water company as to the charge which should be made for *hydrant rentals*. The water company asked a rental of \$3,000 per year, but the borough refused to pay that sum. The borough then filed its bill in equity to restrain the water company from cutting off the water as it threatened to do, and asking the court to fix a reasonable rate. The court fixed the rental at \$1,100 with an additional charge of \$25 per hydrant for each hydrant in excess of fifty. On appeal this decision was affirmed by the Supreme Court of Pennsylvania.

jurisdiction may by statute be conferred upon a court, not only to determine the reasonableness of the rates for past service, or in a case arising out of the enforcement of a regulation which is alleged to deprive the public service corporation of its property, but also as a rule to govern the future relations between the public service and the consumer. The Supreme Court of Massachusetts has held

consideration that the schedule was the one existing, although that was taken into account, but upon the fact that it was the one which the public convenience required. The question to be determined is, whether a court, not invested with special statutory authority nor having the property in its control by receivership, may, solely, by virtue of its general judicial powers, control to such an extent and in such detail the business of a transportation corporation." After referring to the distinction to be found in the cases where it was sought to enforce a specific and clearly defined legal duty, the learned justice further said, "In this case the legislative power of regulation was not entrusted to the courts. On the contrary it was clearly vested [by statute] in the Governor and the Superintendent of Public Works. By that [statute] the Transit Company was itself given authority in the first instance with the approval of the Governor to make reasonable and just regulations regarding the maintenance and operation of the railway through the streets. The operation of a railway consists very largely in the running of cars, and the right of the Transit Company to regulate, in the first instance, the operation of its railway clearly includes the power to decide upon time schedules. But the company cannot finally determine, as it chooses, the manner of operating its road in respect of the time, speed and frequency of its cars. Its primary duty is to operate a sufficient number of cars to meet the public convenience. . . . If the company fails in the performance of the duty its performance is secured in the manner pointed out [by statute]. . . . The precise function, therefore, which was exercised by the courts below is, by the statute, confided primarily to the Transit Company, and ultimately to the discretion of the Governor and Superintendent of Works. The courts have no right to intrude upon this function, and sub-

ject the company to a species of regulation which the statute does not contemplate. If the courts were held to have the powers which were assumed in this case it would lead to great embarrassment in the operation of the railway, and perhaps to distressing conflict. . . . In our opinion, the injunction which was issued in this case, constituting in substance a regulation of the operation of the railway, was, in the first place, not within the limits of the judicial power, and, in the second place, totally inconsistent with the power of regulation, vested unmistakably by the legislature in the executive authorities."

"The power to fix and to regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes of the nature of a governmental power, and also of that of a business power." *Per Sanborn, C. J., in Omaha Water Co. v. Omaha, 147 Fed. Rep. 1, 5.* An action was begun by a city and by individual gas and electric consumers to enjoin a company from charging rates alleged to have been unreasonable and excessive, and to compel it to furnish to all its customers *in the future*, gas and electricity at reasonable rates. There was no stipulation regulating the rates to be charged in the franchise granted by the municipality, nor had the legislature, or the municipality under legislative authority, undertaken, to regulate the rates. It was held that the action could not be maintained for the purpose of fixing future rates as—the courts had no power to do so. *Madison v. Madison Gas & Elect. Co., 129 Wis. 249.* But in granting an application for a preliminary injunction, the court may impose the condition on the company that a maximum charge fixed by the court be not exceeded *pendente lite*. *In re Arkansas Railroad Rates, 168 Fed. Rep. 720.*

that where express statutory authority is conferred upon the court, it may, at the suit of a party aggrieved, not only determine the reasonableness of the rate which is actually charged by the person or corporation rendering the service, but also fix and determine what are reasonable rates so far as the interests before the court are concerned. And hence, the legislature may by enactment provide that the municipal authorities or any persons deeming themselves aggrieved by the price charged for water by any water company, may apply to the court to have the rate fixed at a reasonable sum measured by a prescribed standard, and may confer upon the court the power, after hearing the parties, to establish such maximum rates as the court shall deem proper, which maximum rates shall be binding upon the water company until they shall be revised and altered by the court in any further proceeding. In arriving at the conclusion that this statute conferred judicial power on the courts, the court admitted that upon reading the statute its first impression was that it was an attempt to make out of the court a commission for establishing a legislative rule of conduct, irrespective of any present relation between the parties concerned, and that it was no more competent for the legislature to impose, or for the court to accept, such a duty than if the proposition were to transfer to the court the whole law making power. But upon further consideration, and recognizing its duty to sustain the statute as constitutional if that could be done without straining the meaning of the law, the court reached the conclusion that the statute was valid. It pointed out that the provision in question proceeded upon the footing that a taker of water from water companies has a right to be furnished with water at a reasonable rate, and that it is within the power of the legislature to require them to furnish water to the takers at reasonable rates. It is with relations between actual water takers and the companies that the statute required the court to deal. It did not undertake merely to make the court a commission to determine what rules should govern people not yet in relation to each other, and who might elect to enter or not to enter into relations as they might or might not like the rule which the court laid down; it called upon the court to fix the extent of actually existing rights. It is competent for a court to pass on the reasonableness of a rate, even when established by the legislature, to the extent of declaring it unreasonably low. When the rate is established by the company and it has undertaken to charge the plaintiff a sum which he alleges to be unreasonable and the legislature has in terms referred the dispute to the court, the court has jurisdiction to inquire into the

matter and to award to the complainant any amount exacted from him in excess of a reasonable rate.¹ Although the statute in question directed that the court "shall establish such maximum rates as said court shall deem proper" and declared that such "maximum rates shall be binding upon said water company until the same shall be revised or altered by said court," and that language would suggest that the legislature had in mind the establishment of a rate to be charged to all parties for the use of water for domestic purposes and not merely a rate to be charged to the complaining party, the court declared that it felt bound to assume in support of the act that the legislature was dealing primarily with the rights of the party aggrieved before the court, and only secondarily adopting in advance the rate thus fixed between the parties as a general rate for all.²

§ 1330. What are Reasonable Rates? General Considerations. —

A public service corporation cannot exact a compensation from consumers for the services rendered to them in excess of a reasonable rate,³ and the consumers cannot avail themselves of these services without paying reasonable rates therefor. But the question, What are reasonable rates or compensation? is one of extreme complexity and difficulty. No exact rule can be laid down which is applicable to all cases. *Each case must be decided upon its special facts* as it arises.⁴ The interests of the corporation and of the public in the determination of the question require that it be viewed from opposite standpoints, and two controlling considerations have been laid down representing the opposing interests to which all others are subordinate. *As to the public, a reasonable rate is not higher than the services are worth* to them, not in the aggregate, but as individuals. From the standpoint of the public, the value of the services is to be considered and not exceeded.⁵ *As to the corporation rendering the*

¹ Janvrin, Petitioner, 174 Mass. 514, citing *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397.

² Janvrin, Petitioner, 174 Mass. 514.

³ See *supra*, §§ 1317, 1318.

⁴ *Covington & L. Turnpike R. Co. v. Sandford*, 134 U. S. 578; *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 380. Discussing the question of reasonableness of rates Mr. Justice Brewer well says: "No more difficult problem can be presented than this. There are so many matters which enter into it and must be taken into consideration, before a satisfac-

tory answer can be reached." *Ames v. Union Pac. R. Co.*, 64 Fed. Rep. 165, 173.

⁵ *Kennebec Water Dist. v. Waterville*, 97 Me. 185; *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371. In *San Diego Water Co. v. San Diego*, 118 Cal. 556, 584, *Van Fleet, J.*, referring to the constitutional provisions, above quoted, said: "The consumers of water have rights, and possess equities which must be considered equally with those of the company. They are to be taxed to pay the amount called for by the

*services, a reasonable rate is such as gives it a fair compensation for the services rendered, yielding a fair return to it upon the value of the property as a going concern used for the public at the time it is being used.*¹

These two principles may, it has been argued, lead, under some circumstances, to conflicting results. If public service be rendered at rates not higher than the services in themselves are worth, it may produce less than a fair income or return upon the property used in the service, or no net income at all. If that be the result, the interests of the public are to be regarded as superior to the interests of the corporation, and the right of the latter to a fair rate founded upon the value of the property used by it must yield to the superior right of the public to have the services rendered at a rate which does not exceed the value of the services themselves. The corporation is not compelled at the outset to enter into the undertaking. It must enter, if at all, subject to the contingencies of the business and subject to the rule that its rates must not exceed the value of the services rendered to its consumers. It has accepted valuable franchises granted by the State, — franchises which are ordinarily exclusive for the time being, — franchises which ordinarily debar the public from serving themselves satisfactorily in any other way, — and in return, it must perform the duties to the public which it has voluntarily assumed at rates not exceeding the value of the services to the public taken as individuals, and irrespective of the remunera-

schedule of rates, and these rates in justice to them, should be fixed at the smallest possible amount, taking into consideration what is just and equitable to the owners of the property."

¹ *Smyth v. Ames*, 169 U. S. 466, 546; *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 757; *San Diego Land & T. Co. v. Jasper*, 189 U. S. 439, 442; *Redlands, L. & C. D. Water Co. v. Redlands*, 121 Cal. 365; *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574.

In *Smyth v. Ames*, 169 U. S. 466, where the reasonableness of certain railroad rates was under consideration, the Supreme Court of the United States said: "We hold that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction, must be the fair value of the property used by it for the convenience of the public. . . .

What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." "The rule by which to determine the question [whether a rate is so unreasonable as to be confiscatory] is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just, both to the owner and the public. There must be a fair rate upon the reasonable value of the property at the time it is being used for the public." *Per Mr. Justice Peckham in Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41.

tion which it may itself receive.¹ On the other hand, it is argued, that a rate which is founded upon the intrinsic value of the services in themselves may result in an excessive profit or return to the corporation, and in the payment of dividends which exceed the reasonable expectations of the incorporators. Under such circumstances, again, the rights of the public must be regarded as superior to those of the corporation. A reasonable rate to the public cannot be higher than the services in themselves are worth to the public; but this does not necessarily mean that a public service corporation is entitled to charge as a reasonable rate the full worth of the services to the public. If the attendant results of such a charge are to confer upon the corporation more than a fair return upon the value of the property used for the public at the time it is being used, that fact is sufficient to make the cost of the services to the public more than a reasonable rate and the corporation can only charge such lesser rate as yields a fair return to it for the use of its property.²

But these views must be regarded largely as *the expression of theoretical principles*. In the solution of concrete problems as they actually arise they have but little application or practical value. The existence of divergent interests, on the part of the public and the corporation must be recognized, but *in practice* it has been found that *the principal, if not the sole, inquiry* must be directed to the question, What is a reasonable compensation to the corporation for the services rendered, all things considered, including, *inter alia*, the risks and hazards of the business, the cost of production and the value of its property at the time it is being used for the public? Viewed in the abstract public services of all kinds have a value which can scarcely be calculated. For example, viewed in the abstract, water cannot be valued. It is an absolute necessity, and its value

¹ Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 375, 381. In this case, the court said: "A public service property may or may not have a value independent of the amount of rates which for the time being may be reasonably charged. A public service company may, under some circumstances, be required to perform its services at rates prohibitive of a fair return to its stockholders, considering their property as an investment merely." Citing Smyth v. Ames, 169 U. S. 466; Covington & L. Turnpike R. Co. v. Sandford, 164 U. S. 578; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418; Cot-

ting v. Kansas City Stock Yards Co., 183 U. S. 79.

² In Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 381, 382, the court said, "Profits which in the aggregate exceed a fair return on the company's property and franchises, as already defined in this opinion, do involve unreasonable rates and furnish no criterion of either franchise values or going concern values. The company is entitled, considering only its side of the question, to a fair return based upon the value of its property and franchises, as already stated, and no more. To charge more than necessary to secure such a return would be unreasonable."

has no limit. Speaking abstractly, it is priceless; it is inestimable; to sustain life, it must be had at any price. Considered in the abstract the extreme value of light must be also conceded; and it is rarely, if ever, possible to place a value upon water or light independently of the manner of its production and distribution. With respect to the value of water, a public water service differs from all other kinds of service. In estimating what it is reasonable to charge for a water service, *i. e.*, not exceeding its worth to the consumers, water is to be regarded as a product and the cost at which it can be produced or distributed is an important element of its worth. Leaving out of consideration a profit or return to the persons engaged in the business of producing and distributing it, the cost of production and distribution might be said to be the sole element by which its value is to be determined. The individuals of a community may, with reason, prefer to pay rates which yield a return on the money of other people higher than the actual cost they could serve themselves for, rather than make the venture themselves and risk their own money to loss in an uncertain enterprise. But if they do, then having the right or power through legislation to at any time serve themselves, it is plain that the value of the services in themselves to the public must in its nature be the cost at which water or light can be produced or distributed, plus a fair return or compensation to those who engage in the business. When, therefore, it is said that a reasonable rate to the public is not higher than the services in themselves are worth, the solution of the question must, on that basis, be reached through inquiry as to what it costs, or fairly ought to cost, all legitimate items considered, the public service corporation to produce and distribute it, together with a fair return to it upon the value of the plant and for the risks which it has undertaken, the hazards of the business and the services which it renders. Consequently, in the cases which have arisen the inquiry of the court has been directed to ascertaining whether a rate is sufficient to yield a reasonable return to the corporation, and the abstract value of the services to the public has received little or no consideration from any other point of view. What elements may be considered as entering into the cost of production and operation, what risks and hazards can be considered, and what is a fair profit or return are questions which to a large extent must be determined in individual cases as they arise.

§ 1331. **What are Reasonable Rates? Elements of Value; Property and Franchises.** — When the inquiry is directed to the reason-

ableness of the compensation founded upon a fair return to the corporation upon the value of the property used for the public, the *value of such property is the basis* of that inquiry.¹ But in endeavoring to arrive at that value the question immediately arises upon what basis it shall be reached. A fair criterion is the value as between one who wishes to purchase and one who wishes to sell the plant, — not what could be obtained for it under peculiar circumstances when greater than its fair price could be obtained, — not its speculative value, — not the value obtained from the necessities of another, — but what it would bring at a fair sale when one party wished to sell and the other wished to buy.² But this value should not be fixed upon the plant merely as land and structure. A corporation engaging in a public service has entered upon a business. It is true that the business is subject to various restrictions for the protection of the public, but it is still *a business which may be skillfully or unskillfully managed*, and in which the value of the plant may be affected by the manner in which the business has been built up and developed. In other words, the *plant as a structure* is incident to, and *forms part of a going concern*, and it should be valued upon the basis that it has a value as a part of a *going concern*, which will usually exceed its value as a mere structure.³

¹ San Diego Land & T. Co. v. Jasper, 89 Fed. Rep. 274, aff'd 189 U. S. 439; Seaboard & A. L. R. Co. v. Alabama Railroad Com'n, 155 Fed. Rep. 792; Redlands, L. & C. D. Water Co. v. Redlands, 121 Cal. 365; Cedar Rapids Gaslight Co. v. Cedar Rapids (Iowa), 120 N. W. Rep. 966. In San Diego Water Co. v. San Diego, 118 Cal. 556, 578, Garoutte, J., said: "In the fixing of water rates by a city as contemplated by the Constitution (of California) it is evident that the valuation of the plant is the basic element upon which the whole investigation rests."

² See further, chap. on Eminent Domain, *ante*, as to measure of compensation. The text states the rule laid down with reference to the acquisition of waterworks by a city under the power of eminent domain in Kennebec Water Dist. v. Waterville, 97 Me. 185, 214, and in fixing the reasonable rates to be exacted by the corporation for its services it would seem to be a fair method of arriving at present value.

³ Spring Valley Waterworks v. San Francisco, 124 Fed. Rep. 574; Spring Valley Water Co. v. San Francisco,

165 Fed. Rep. 667; Cedar Rapids Gaslight Co. v. Cedar Rapids (Iowa), 120 N. W. Rep. 966. On this point, see the well considered opinion of Mr. Justice Brewer, on the Circuit, in National Waterworks Co. v. Kansas City, 62 Fed. Rep. 853, 866. The learned Justice said: "On the other hand, the city insists that the franchise has ceased, and that basing the value upon earnings is in effect valuing a franchise which no longer exists, and which the city is not to pay for; that the true way is to take the value of the pipe, the machinery, and real estate, put together into a water works system, as a complete structure, irrespective of any franchise — irrespective of anything which the property earns or may earn in the future. . . . The original cost of the construction cannot control, for 'original cost' and 'present value' are not equivalent terms. Nor would the mere cost of reproducing the water works plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of

Attached to the plant or tangible property is the franchise, or privilege to engage in the business, to exercise the power of eminent

purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets — in other words, the cost of reproduction — does not give the value of the property as it is to-day. A completed system of water works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city, — not only with a capacity to earn, but actually earning, — makes it true that 'the fair and equitable value,' is something in excess of the cost of reproduction. The fact that the company does not own the connection between the pipes in the streets and the buildings — such connections being the property of the individual property owners — does not militate against the proposition last stated; for who would care to buy, or at least give a large price for, a waterworks system, without a single connection between the pipes in the streets and the buildings adjacent. Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. The city, by this purchase, steps into possession of a waterworks plant — not merely a completed system for bringing water to the city and distributing it to pipes placed in the street, but a system already earning a large income, by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. It should pay,

therefore, not merely the value of a system which might be made to earn, but that of a system which does earn."

So, in *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 376 (a case which involved the reasonableness of rates for the purpose of arriving at the value of the property of the water company to furnish a basis for its acquisition by the municipality under the power of eminent domain), the court said with reference to *the value of the plant as a structure and as a going concern*: "As a structure, it has value, independent of any use, or right to use, where it is — a value probably much less than it cost, unless it can be used where it is, that is, unless there is a right so to use it. Nevertheless it has value as a structure. But more than this, it is a structure in actual use, a use remunerative to some extent. It has customers. It is actually engaged in business. It is a going concern. The value of the structure is enhanced by the fact that it is being used in, and in fact is essential to a going concern business. We speak sometimes of a going concern value as if it is, or could be separate and distinct from structure value, — so much for structure and so much for going concern. But this is not an accurate statement. The going concern part of it has no existence except as a characteristic of the structure. If no structure, no going concern. If a structure in use, it is a structure whose value is affected by the fact that it is in use. There is only one value. It is the value of the structure as being used. That is all there is of it." The line of reasoning supports the view that the cost and value of establishing and developing the business as a going concern, namely, an asset or property which may be considered in determining the total investment on which the public service corporation is entitled to earn a reasonable profit. But in *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, the court regarded the fact that the business was established, and a "going concern" as of little or no importance as a basis for estimating profits, although it recognized that it is a material fact in ascertaining the value of the plant for the purposes of sale or

domain, and the right to use for the business of the company the streets and public ways. Do such franchises and rights form a part of the property or plant in determining the value of the property devoted to public use? Unexpired and irrevocable franchises and rights of this character have all the attributes of property and have generally, if not always, been so regarded. And it is such rights and franchises that give value to the securities, the bonds and shares of railways, and other public service corporations. If it should be held that such franchises and rights are not property, or that they are not to be considered in determining the value of the property in fixing rates and that only the value of tangible property can be regarded, a principal element of value of millions of public securities would be destroyed. It has therefore been held and, we think, properly, that such rights and franchises are to be considered, unless it has otherwise been expressly provided, in determining the value of the property or plant that is devoted to the public use.¹ But in the

condemnation. *Sed quære?* See also Cedar Rapids Gaslight Co. v. Cedar Rapids (Iowa), 120 N. W. Rep. 966.

Good will may in certain cases be rejected as a distinct element of value of the property when, as for example, the public service corporation has a monopoly in fact. This was the course adopted by the Supreme Court of the United States in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52, approving on that point, 157 Fed. Rep. 849. Mr. Justice *Peckham* said: "We are also of the opinion that this is not a case for valuation of 'good will.' . . . The complainant has a monopoly in fact and a consumer must take gas from it or go without. He will resort to the 'old stand' because he cannot get gas anywhere else. The court below excluded that item and we concur in that action." But we do not understand that this decision excludes from consideration such increased value as naturally attaches to a plant in operation as a going concern and transacting a prosperous business. This seems to be the view of the Supreme Court of Iowa. See *Cedar Rapids Gaslight Co. v. Cedar Rapids (Iowa)*, 120 N. W. Rep. 966, where the court refused to allow any sum for "goodwill" *eo nomine*, but declared that the physical property must be valued as part of a "going concern," not sepa-

rately, but as an incident attaching to its character. *Post*, § 1333.

¹ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 44, s. c. 157 Fed. Rep. 849, 146 Fed. Rep. 150; *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 667.

Such also is the opinion of *Lacombe*, Circuit Judge, in *Consolidated Gas Co. v. Mayer*, 146 Fed. Rep. 150. His observations on this subject are interesting, and his conclusion, we think, entirely sound, viz., that unexpired franchises and rights of this character are property in the hands of the holder, and their value, whatever it may be, must, among other things, be taken into consideration. The learned judge said: "Under the authorities, in fixing the rate to be charged for 'public service' by private corporations two elements of calculation are of fundamental importance. What is the true present value of the property embarked in the enterprise? And what, in view of the risks of the business, is a fair annual percentage of return thereon? That percentage would not necessarily be the same in every variety of business. The manufacture, storage and delivery of a highly explosive material is a more risky business than is the transforming of flour into bread, or of leather into shoes, and the delivery of such

nature of things, the fair market value of the property cannot be fixed in the same manner as commodities for every day consump-

products. The commission reached the conclusion that eight per cent was a proper return on property invested in the gas business.

"In estimating the value of the property of complainant embarked in the business the commission reached the conclusion that the franchises, under which it has laid mains and is delivering gas and which are a part of its property, should be considered as of no value whatever, although the State through the action of its taxing officers has declared that it is worth several millions of dollars. It is suggested that some of these franchises have expired or lapsed in some way. That proposition need not be considered because it is not asserted that all of them have lapsed. The complainant has taken over the franchises of many different corporations granted at different times. So long as a substantial part of these still remain the argument is not affected, except as to details of result. The reason assigned by the commission for not including the value of the franchises is that 'they were granted by the people without compensation.' That is so; these franchises were granted very many years ago at a time when there seems to have been no intelligent appreciation of the fact that they might become enormously valuable; when reckless improvidence was the rule, and all sorts of franchises were given away without any provision for securing to the State its fair share of unearned increment thereon. Nevertheless when the State offers a franchise to whomsoever will take it without requiring any money return thereon, and for the sole consideration that the taker shall promptly, continuously and fully develop it by the expenditure of his own money, and such offer is accepted and the terms of the agreement carried out by the taker, there results a contract, which — with due consideration of all proper conditions and limitations inherent in the nature of the particular contract — is as much within the protection of the Constitution as are all other contracts. If the State twenty-five or fifty years thereafter should say to the taker: 'We were very improvident in not providing that you should pay us something each year

for this franchise; therefore, hereafter you shall pay us eight per cent annually on \$10,000,000 or \$20,000,000 or we will evict you from the franchise' — it might find itself embarrassed by the provisions of the Constitution in thus undertaking to avoid the results of its own improvidence. A franchise, whatever its value may be, which has not expired or lapsed, or been in some way forfeited, is property in the hands of its holder. There is force in the argument that when the State says: 'We will value this property at several millions of dollars when we tax you on it, but at nothing at all when we fix the rate you may charge for your product in order to receive an eight per cent return on your property' it is seeking to accomplish by indirect methods what it might not be able to accomplish directly." When this case came on for final hearing, the court in substance adopted the foregoing views. *Consolidated Gas Co. v. New York City*, 157 Fed. Rep. 849, 877. *Hough, D. J.*, said: "I conclude therefore that I am compelled to consider franchises not only as property, but as productive and inherently valuable property, and to add their value, if ascertainable, to complainant's capital account, before declaring the rate of return permitted complainant by the statute complained of." When the case came before the Supreme Court of the United States, 212 U. S. 19, 44, 1909, the court declared that it could not be disputed "that franchises of this nature are property and cannot be taken or used by others without compensation. The important question is always one of value."

In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 44, that court held that the value of the franchise as fixed and determined by consolidating corporations for the purpose of consolidation pursuant to an express statute should be regarded as final and conclusive as to the value of the franchises at the time of consolidation. It differed, however, from the trial court in its method of ascertaining the value of the franchise and held, upon its view of the facts, that the fair value of the franchise at the time of the hearing was that fixed by the consolidation agreement, although the consolida-

tion. Water and gas light plants are not bought and sold every day, and the fair market value must be arrived at by some means

tion had been effected more than twenty years previously.

The assessed value of franchises for purposes of taxation does not control in determining their value for the purpose of ascertaining the reasonableness of a rate. Thus in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 51, Mr. Justice Peckham said: "The complainant also contends that the State having taxed it upon its franchises cannot be heard to deny their existence or their value as taxed. The fact that the State has taxed the company upon its franchises at a greater value than is awarded them here, is not material. Those taxes, even if founded upon an erroneous valuation, were properly treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount could be arrived at applicable to dividends, and if such latter sums were not sufficient to permit the proper return on the property used by the company for the public, then the rate would be inadequate. A future assessment of the value of the franchises, it is presumed, will be much lessened if it is seen that the clear profits upon which that value was based are largely reduced by legislative action. In that way the consumer will be benefited by paying a reduced sum (although indirectly) for taxes."

Special franchises represent the right to lay and maintain the mains, rails or structures of the company in the streets of the city, and such franchises are property, in every respect. *Monongahela Nav. Co. v. United States*, 148 U. S. 312; *People v. O'Brien*, 111 N. Y. 1; *People v. Deehan*, 153 N. Y. 528, 532; *Parker v. Elmira, C. & N. R. Co.*, 165 N. Y. 274; *Matter of White Plains Water Com'rs*, 176 N. Y. 239. In *People v. O'Brien*, 111 N. Y. 1, *supra*, the court said, in referring to the Broadway Railway franchises (p. 40) that such franchises "have been uniformly regarded as indestructible by legislative authority and as constituting property in the highest sense of the term." In that case, a right to lay and maintain the tracks of a railroad in Broadway had been conferred upon the Broadway Railroad Company. Subsequently, the charter was, under reserved power, revoked

by the legislature. Meantime, however, the property and franchises of the company had been mortgaged, to secure an issue of bonds. It was held that *the right to amend or repeal* did not give the legislature the right to deprive the company of its franchise to occupy the streets. On the part of the State, it was contended that a franchise of that kind was a mere license or privilege, enjoyable during the life of the grantee only and revocable at the will of the State. To that suggestion, the Court said (p. 41): "We believe this proposition to be not only repugnant to justice, and reason but contrary to the uniform course of authority in this country." See further as to this important case, *ante*, § 1266. In *People v. Deehan*, 153 N. Y. 528, 532, the court said: "Such a franchise is property that cannot be destroyed, taken from it, or rendered useless by the arbitrary act of the village authorities in refusing the permit to place the conductors under the streets." In *Parker v. Elmira, C. & N. R. Co.*, 165 N. Y. 274, 280, the court said that a franchise is "entitled to the same protection from invasion as any other species of property."

And on like principles it is held that a corporation cannot be deprived of its franchises, in condemnation proceedings, without just compensation. *Monongahela Nav. Co. v. United States*, 148 U. S. 312; *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *Matter of White Plains Water Com'rs*, 176 N. Y. 239. In the case of the *Monongahela Navigation Company*, it appeared that Congress had passed an Act, authorizing the United States to acquire by condemnation proceedings a lock and dam constructed by the Navigation Company pursuant to authority derived from the State of Pennsylvania, which had authorized the company to collect tolls for the use of the lock. A provision was inserted in the Act of Congress, that, in estimating the sum to be paid, nothing should be allowed for the franchise of collecting tolls. The Attorney General attempted to sustain this provision under the broad commerce-clause of the Constitution, giving the Government absolute power to control all navigable streams. But

other than by simply asking the question for what price the plant would sell. In arriving at the value all the elements must be taken into consideration; all the facts having relation to the history of the corporation, the cost of construction, betterments upon its property, the cost of reproducing the works, the existence of other sources of supply, the return upon its capital which it has hitherto earned, should all be considered and receive such weight as to the court shall seem proper.¹ From all these various elements and others which we proceed to notice, and any others which may affect the particular case, it is the duty of the tribunal fixing the rate, or of the court reviewing its reasonableness, to determine, among other things, *what is the fair value of the property used for the public at the time it is being used, and upon which value the owner is, among other things, entitled to a fair return.*²

It is a consideration not to be overlooked that when private capital is invited to embark in the construction of works of public utility, it inevitably takes the sole risk that the enterprise may not pay, that is, that the property may not be worth what it cost, or yield a fair return on such cost. As the company stands to take the loss, it is just and reasonable that if the property increases in value, the company is entitled to have such increased value considered among other things in determining the sum on which it is entitled to make a reasonable profit or have a reasonable return for the use of property devoted to the public service.

§ 1332. What are Reasonable Rates? Cost of Construction. — An element of primary importance for consideration is and probably

the Supreme Court held that even that great power would not authorize the Federal Government to take even a franchise to take tolls without making just compensation for it. On the question whether a city must pay for the franchise of a public service corporation when it acquires its property by condemnation or under a reserved power to purchase, see *ante*, §§ 1312, 1313.

¹ In *Smyth v. Ames*, 169 U. S. 466, 546 (a very carefully considered case), speaking of the elements by which the reasonableness of rates to be charged by a railroad company is to be ascertained, the Supreme Court, evidently upon great deliberation, said: "In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the pres-

ent as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property." The *earnings* of the company in the past may also be taken into consideration in determining the reasonableness of the rate. *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. Rep. 185.

² If at the time when the rate is established there has been an *increase in the value of the property* beyond the cost to the company, the company is entitled to the benefit of such increase as a general rule. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52.

always will be the *cost of constructing the works*, or the amount really and necessarily invested in the enterprise. The courts have uniformly held that this is one of the principal matters to be taken into consideration.¹ The cost of construction does not merely mean the original cost of constructing the works up to the time of the first operation. The cost of betterments and improvements made to the works subsequently thereto, which are in the nature of permanent improvements and additions, must be taken into consideration and their present value added to the original cost.² And it has been held that it is the duty of the company to *make reasonable provision for increased demands* upon its service in the future, and reasonable

¹ *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 757; *Stanislaus County v. San Joaquin & K. R. Irr. Co.*, 192 U. S. 201; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 260; *Kennebec Water Dist. v. Waterville*, 97 Me. 185; *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206. Where the property and plant of the corporation have been sold by judicial process, *e. g.*, under foreclosure, the opinion has been expressed that the price realized at such sale is evidence and possibly more important evidence of value than the original cost of the property. *San Diego Land & T. Co. v. Jasper*, 189 U. S. 439, 443. See also *Dow v. Beidelman*, 125 U. S. 680.

² In *San Diego Water Co. v. San Diego*, 118 Cal. 556, 572, *Van Fleet, J.*, says: "In cases of the present character under the head of operating expenses the company is entitled to charge for keeping the plant in its normal condition; and the sinking of new wells, the building of new reservoirs, the erection of additional buildings, and the substitution of larger and better pipe (to the extent of the difference), do not come under the head of operating expenses, but should be charged to construction account. If this were not so, a water plant inferior in all things in a few years could be transformed into a water plant superior in everything, at the expense of the consumer. This would be an advantage to the owner and a burden to the rate payer neither contemplated nor justified by the law."

In *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 217, the court declared that in arriving at the cost of construction or structure value, *consideration*

should be had to the present efficiency of the system, the length of time necessary to construct the same *de novo*, the time and cost needed after construction to develop such new system to the level of the present one in respect to business and income and profits, if any, which by its acquirement as a going concern would accrue to a purchaser during the time required for such development of business and income. It said that these elements were not controlling, that their weight and value depend upon the varying circumstances of each particular case and for the purpose of arriving at the present value through a consideration of the original cost of construction, these matters should be taken into account, because a plant as such already equipped for business is worth more if the business be a profitable one than the mere cost of construction. In *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 383, the court declared that *interest on the money expended during construction* is a proper element of cost, saying: "A fair rate, usually the prevailing rate of interest, upon the money invested in the plant during construction and before completion, is as much a part of the cost of construction, as is the money itself which is expended for materials and labor." See also *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 757. In considering the value of betterments and improvements, it makes no difference that *money earned by the corporation* and available for division among the stockholders as dividends, *is used to pay for the improvements*, and stock issued to the stockholders in lieu of cash. *Brymer v. Butler Water Co.*, 179 Pa. 331.

expenditures for construction to provide for the increase should be included in the cost of the works upon which the public service corporation is entitled to a return. But this allowance for increased service must be carefully limited and kept within bounds.¹ But the original cost of the works is not conclusive, even for the purpose of determining their value at the time of original construction. It is competent evidence, but it is not necessarily a controlling criterion. It is subject to inquiry as to whether the works were built prudently and whether they were built when prevailing prices were high so that actual cost in such respects may exceed present value.²

¹ *Long Branch v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 77, 85, aff'd 71 N. J. Eq. 790.

² *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 207. In *Stanislaus County v. San Joaquin & K. R. Irr. Co.*, 192 U. S. 201, 214, the court said: "The original cost may have been too great; mistakes of construction, even though honest, may have been made, which necessarily enhanced the cost; more property may have been acquired than necessary or needful for the purpose intended. Other circumstances might exist which would show the original rates much too large for fair or reasonable compensation at the present time." In *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 375, the court pointed out that in considering the cost of construction other qualifying elements must also be taken into account, saying: "It is true that the fair value of the property used is the basis of calculation as to reasonableness of rates, but this is not the only element of calculation. There are others, as for instance, the risks of the incipient enterprise, on the one hand, and whether all the property used is reasonably necessary to the service, and whether as a structure it is unreasonably expensive, on the other. For a simple illustration, suppose that a five hundred horse power engine was used for pumping when a one hundred horse power engine would do as well. As property to be fairly valued the larger engine might be more valuable than the smaller one, yet it could not be said that it would be reasonable to compel the public to pay rates based upon the value of the unnecessarily expensive engine."

In the same case (p. 379), the court further said: "In determining what

would be a fair return, undoubtedly the amount of money actually and wisely expended is a primary consideration. Actual cost bears upon reasonableness of rates, as well as upon the present value of the structure as such. It thus bears upon what is a fair return upon the investment, and so upon the value of the property. In estimating structure value, prior cost is not the only criterion of present value, and present value is what is to be ascertained. The present value may be affected by the rise or fall of prices of materials. If in such way the present value of the structure is greater than the cost, the company is entitled to the benefit of it. If less than the cost, the company must lose it. And the same factors should be considered in estimating the reasonableness of returns."

In *San Diego Water Co. v. San Diego*, 118 Cal. 556, 572, *Van Fleet, J.*, discussing the question of the cost of the plant, said: "It does not follow that in every case the company will be entitled to credit for all of its current expenditures, or to receive a compensation based on the entire cost of its works. Reckless and unnecessary expenditures not legitimately incurred in the actual collection and distribution of the water furnished, or in the acquisition, construction, or preservation of so much of the plant as is necessary for that purpose, cannot be allowed." In the same case, *Garoutte, J.*, said (p. 578): "The original cost of construction is simply an item to be considered in fixing the present valuation. It is a circumstance strong or weak, entering into the final conclusion of the municipality upon the question."

And the inquiry as to the cost must be limited to the property actually employed in collecting and distributing the water or light. Property which has been acquired for that purpose but the use of which has been abandoned cannot be taken into consideration.¹

§ 1333. **What are Reasonable Rates? Cost of Reproduction of Works.** — Another element of importance in determining the present value of the works is the *cost of reproducing the plant* at the present time.² But it has been suggested that this element should be confined to the cost of reproducing a plant *similar to that actually in existence*, and that the inquiry should not be extended to include the cost of reproducing a system of water works serving the same end, but on a different plan.³ But the cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years; in considering this element of value due allowance must be made for depreciation.⁴ The cost of reproduction is not to be regarded as the limit of value. The value of the property, which is the controlling factor, is its value as a going concern, and not merely as structures independently of the business. Therefore, the cost of reproduction does not necessarily give the value of the property as it is at the present time. If well managed and yielding a proper return to the stockholders, the cost of reproduction will usually be less than the fair value.⁵

¹ Spring Valley Water Co. v. San Francisco, 165 Fed. Rep. 667; Cedar Rapids Gaslight Co. v. Cedar Rapids, (Iowa), 120 N. W. Rep. 966. In San Diego Water Co. v. San Diego, 118 Cal. 556, 572, *Van Fleet, J.*, said: "Nor can the investment on which the company is entitled to base its compensation be held to include property not now actually employed in collecting or distributing the water now being supplied, however useful it may have been in the past, or may yet be in the future. It is the money reasonably and properly expended in each year in collecting and distributing the water which constitutes the current expenses which may be allowed; and it is the money reasonably and properly expended in the acquisition and construction of the works actually and properly in use for that purpose, which constitutes the investment on which the compensation is to be computed."

² Smyth v. Ames, 169 U. S. 466, 546; Cedar Rapids Water Co. v. Cedar

Rapids, 118 Iowa, 234, 260; Kennebec Water Dist. v. Waterville, 97 Me. 185, 208.

³ Kennebec Water Dist. v. Waterville, 97 Me. 185, 216. In this case the court, in answer to the contention that the cost of reproducing a system of works upon another plan but capable of furnishing the same service should be considered, said, "We think the inquiry along the line of reproduction should, however, be limited to the replacing of the present system, by one substantially like it. To enter upon a comparison of the merits of different systems, to compare this one with more modern systems, would be to open a wide door to speculative inquiry and lead to discussions not germane to the subject."

⁴ Knoxville v. Knoxville Water Co., 212 U. S. 1, 10. As to depreciation in works see *post*, § 1336.

⁵ In Kennebec Water Dist. v. Waterville, 97 Me. 185, 208, 215, it was pointed out that in connection with the cost of reproduction must be taken

§ 1334. **What are Reasonable Rates? Risks and Incidents of Business; Other Sources of Supply.** — A further element for consideration in determining the value of the property devoted to public use is the *risk attached to the original enterprise* and the reasonably just expectations which those who made the investment had in mind when so investing.¹ The construction of a water or light plant is an

into consideration the fact that the plant is a going concern in determining the present value of the property used by the corporation. To consider merely the question of the cost of reproducing the works, leaves out of account the fact that the plant rendering the service is a "going concern" and it seeks to substitute one of the elements of value for the measure of value itself. The mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets — in other words, the cost of reproduction — does not give the value of the property as it is to-day. A completed system of water works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning in consequence thereof the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city — not only with a capacity to earn, but actually earning — makes it true that the "fair and equitable value" is something in excess of the cost of reproduction. *Supra*, § 1331.

¹ *Stanislaus County v. San Joaquin & K. R. Irr. Co.*, 192 U. S. 201; *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 205, 209.

Speaking of the element of risk in the enterprise as affecting the reasonableness of the rates, the court said, in *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 205, — a case where the reasonableness of the rates arose in connection with the compensation to be paid for the franchises and property of the water company upon condemnation by the city, — "There is another matter which we think may fairly be considered in connection with the reasonableness of the rates. We think something may be allowed in this respect for the risks of the original en-

terprise, if there were any. It is common sense that they who invest their money in hazardous enterprises may reasonably be entitled, for a time at least, to larger returns than would be the case if the success of the undertaking were assured from the beginning. The plaintiff concedes that such risks may be considered in valuing the franchise. But inasmuch as the value of the franchise depends *chiefly* upon the net income which may be produced by its exercise at reasonable rates, as has already been stated, it follows, we think, that the reasonableness of the rate may be affected by the degree of risk to which the original enterprise was naturally subjected. This does not mean unforeseen or emergent risks, but such as may have been justly contemplated by those who made the original investment. We use the word *chiefly* because we apprehend that a franchise, even of an unprofitable business, might have a temporary value for some purposes. But that condition does not seem to exist in this case. The element of risk, however, is not controlling. It is only one element. It is to be fairly considered in connection with the other elements named. To say just how much allowance should be made, and for how long a period, requires the exercise of a careful, conservative, and discriminating judgment. If allowance be sought on account of this element of original risk, we think it will be permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable, and thus has already received compensation for this risk."

These views seem to meet with support in the opinion of the Supreme Court of the United States in *Stanislaus County v. San Joaquin & K. R. Irr. Co.*, 192 U. S. 201. In that case, the statute under which the corporation was organized conferred power to collect and receive rates which should be subject to regulation by the board

enterprise involving hazard; and those who invest their money in a hazardous enterprise of that nature are reasonably entitled, for a time at least, to larger returns than would be the case if the success of the undertaking were assured from the beginning. But the risks which may be considered are such as may have been justly contemplated at the time of the investment; and inquiry would seem to be permissible whether the company has already been compensated for the risk so undertaken by receiving income in the past at rates in excess of what would otherwise have been reasonable. According to some decisions, another element for consideration is the manner in which the enterprise has been conducted, whether skillfully or negligently, whether well or badly. A public service corporation is engaged in a business with the ordinary incidents of a business, and the character of the management leaves its imprint upon the property, making it more or less valuable according to the skill with which the business has been conducted.¹ The *existence*

of supervisors of the county, "but which shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one half per cent per month upon the capital actually invested." A statute enacted subsequently to the construction of the works by the corporation authorized the supervisors to reduce the rates, but not below a minimum of six per cent per annum. In considering the reasonableness of the reduction, *Peckham, J.*, said: "Water rates which might have been perfectly reasonable at the time of the passage of the Act of 1862, although amounting to one and one-half per cent per month upon the capital actually invested, might in the course of years become exceedingly burdensome to those who used the water and amount to a very unreasonable compensation to the company for the water it sold. Irrigation by means of corporations formed to supply water was in its infancy in 1862 in California, and the risks necessarily taken in the organization of such companies and the prosecution of their work were then not only very large but also extremely uncertain in character. Consequently a rate of compensation was proper at that time which in the course of years and the accumulated experience as to the necessary cost of such works, and of their successful operation including the consideration of the risk attendant upon their operation, would make a water rate, as

provided by the Act of 1862, a very unreasonable overcharge."

That the risk attached to the business is an element in determining a reasonable return is expressly held in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 49, where the court says: "The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference, than can be obtained from an investment in Government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated."

¹ The manner in which the enterprise is conducted necessarily affects the value of the services, and if well conducted enhances their value both to the consumer and to the corporation. But it also affects the present value of the plant, which is one of the controlling elements, in determining the reasonableness of the rates. In *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 379, it is said: "Those who engage in a public service cannot be put upon quite the same level as those who make mere invest-

of other and possibly cheaper sources of supply is also an element which must always receive consideration in determining the value of the property. As a matter of fact a public service corporation usually enjoys a practical monopoly, and the value of the property employed by it in the public service is always enhanced by reason thereof. As the practical monopoly tends to increase the value, so the fact that there are in existence other sources of supply which are available to the community should be considered as tending to reduce the value of the property and plant of the corporation.¹

ments. They are not like the depositors in a savings bank, whose right to draw out is limited to precisely what they have put in, with its earnings. They are, on the contrary, engaged in a business, with the ordinary incidents of a business, with some of the hazards and the hopes of a business. To be successful they must be wise and prudent, thrifty and energetic. These virtues, if they have them, they impress upon the property, making it more valuable than it would otherwise have been. Is it to be said that they can have no return for skill and good management? We do not think so."

¹ In discussing the question of the reasonable charge for a water service as affected by the assumed existence of nearer and cheaper sources of supply than the one in use by a public service corporation, the court said in *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 386: "When the worth of a public service of this kind to the public or the customers is spoken of, necessarily one of the elements to be considered is the expense at which the public or customers, as a community, might serve themselves were they free to do so, and were it not for the existence of the practically exclusive franchises of the supplying company. . . . In the aspect now being considered, the worth of a water service to its customers does not mean what it would cost some one individual, or some few individuals to supply themselves, for one may be blessed with a spring, and another may have a good well. It means the worth to the individuals, in a community taken as a whole. It is the worth to the customers as individuals, but as individuals making up a community of water takers. In the very nature of things, a water system is

usually intended to supply a somewhat compactly settled community, or a community whose geographical limits are somewhat restricted. As a matter of fact in this State such systems usually supply villages, or the more compact portions of cities. The necessity does not exist for extending such systems beyond these limits, and the expense would be practically prohibitive. Such a community must in general stand as a whole. The rates for such a system are generally and properly uniform, although the expense of supplying some, as those nearer the source of supply, is actually less than that of supplying those at the outermost limits. Still the benefits are uniform and uniform rates are reasonable. Now such a community is, we think, entitled to the benefit of such natural and sufficient facilities for procuring pure water as exist in its vicinity. Communities are in every respect entitled to the benefit of existing natural advantages. It therefore seems to be reasonable that a public water service company undertaking to supply a community with water is bound to do so wisely and economically. It is bound to take advantage of practicable natural facilities. If there is more than one source of supply, other things being equal, the community is entitled to have the least expensive one used. So long as the company enjoys practically exclusive franchises, so long it must afford the community the benefit of the conditions which nature has provided for them. For instance, if water can profitably be served from a nearer source of supply, at a certain rate, the company ought not to be permitted to charge a higher rate based upon the expense of bringing it from a farther and more expensive source."

§ 1335. **What are Reasonable Rates? Elements of Value of Property; Capitalization and Bonded Indebtedness.** — A further element tending to show the value of the property used for the public which may be considered in determining whether rates are reasonable, is the *capitalization of the corporation and its bonded indebtedness*. The courts have always been careful to declare that no single element is in itself to be regarded as conclusive on the question of value. Any fair consideration of the question of value involves, among other things, an examination into the past history of the corporation, the return which it has received in the past, and the success which has attended its efforts to serve the public. For that purpose the capitalization and bonded indebtedness are proper matters for consideration. But the community, or the State, usually has little to say in determining the amount of capital or the indebtedness of a corporation. These matters are left to the discretion and judgment of the incorporators, and the nominal capitalization or bonded indebtedness of the corporation is fixed by a variety of considerations, which preclude their being accepted as a certain or decisive criterion of the value of the property, and the Supreme Court of the United States has declared that a rate fixed at such an amount as to yield a return upon the capitalization and indebtedness of the corporation, and fixed upon that basis only, ignoring the rights of the public, is unjust to the public, because it makes the interest of the corporation the sole criterion of reasonableness.¹ Other courts

¹ *Smyth v. Ames*, 169 U. S. 466; *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 260. See also *Cedar Rapids Gaslight Co. v. Cedar Rapids (Iowa)*, 120 N. W. Rep. 966.

Market value of stock and bonds as evidence of value for purposes of taxation, see *State Railroad Tax Cases*, 92 U. S. 575, 605, in which Mr. Justice Miller said: "It is obvious, therefore, that when you have ascertained the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, of its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

In *Smyth v. Ames*, 169 U. S. 466, 543, it was contended that a railroad company was entitled to exact such charges for transportation as will

enable it at all times not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all these ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. The court however ruled against this broad contention, saying: "It is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exaction, and makes the interest of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because con-

have gone further and have held that the capital and bonded indebtedness of a corporation have no materiality whatever in de-

structed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if the rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rate as may be required for the purpose of realizing profit upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rate that may be reasonably charged."

In *Covington & L. Turnpike R. Co. v. Sandford*, 164 U. S. 578, 596, the same court discussed the same phase of the question, saying: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only

persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and the stockholders. But that involves an inquiry as to what is reasonable and just to the public. . . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the services rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

In *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 757, the court after enumerating various items, such as the cost, operating expenses, annual depreciation, and profit to the corporation, which must be taken into consideration in determining what is a reasonable rate, said: "Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may

termining the value of the property used for a public service.¹ But the correct view would seem to be that the amount of the capital and the bonded indebtedness of the corporation should be taken into consideration, if only for the purpose of informing the court as to the past history of the enterprise, the risks originally attending it, and the degree of success which has rewarded its efforts in the past. In this view, capital and bonded indebtedness are of some weight, and they should not be entirely excluded from consideration.²

have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

In *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 11, all or substantially all the preferred and common stock as well as bonds of the water company was issued to contractors for the construction of the plant, and the nominal amount of the stock issued was clearly in excess of the true value of the property furnished by the contracts. The court declared that bonds and preferred and common stock issued under such conditions afforded neither measure of, nor guide to, the value of the property.

¹ With reference to bonded indebtedness of the corporation, *Garoutte, J.*, said, in *San Diego Water Co. v. San Diego*, 118 Cal. 556, 578: "As to the amount of the bonded indebtedness, or the amount of interest annually accruing thereon, we fail to see their materiality in determining the value of the plant, or the sum total of revenue to be raised from the sales of water. It is not a question in which ratepayers are concerned, whether the water company has no outstanding indebtedness or is floundering under a bonded debt which threatens to sink it any moment. If the municipality is required to establish a scale of rates which will produce a revenue sufficient to pay interest upon outstanding bonds, this provision of the Constitution would not only be a perpetual guaranty to the bondholders for the payment of their annual interest, but a constant incen-

tive to additional issues of bonds. Such conditions were never contemplated by anybody. It is the duty of the municipality, when it has arrived at a determination as to the valuation of the plant to determine the necessary outlay for the ensuing year; then to determine what would be a reasonable, just, and fair compensation to the company, based upon the valuation of the plant, and thereupon to fix a schedule of rates which will produce that sum of money. If there be outstanding bonds, the company may apply its income to the payment of interest thereon. If there be no outstanding bonds, this income may pass to the pockets of the stockholders in the shape of dividends declared. A municipality must fix a fair and just rate for the water, based upon the valuation of the plant, and when it has done this, its duty has been performed, and the revenue collected under such rates is the property of the company, to do with as it seems best." These views are followed as controlling in *Redlands, L. & C. D. Water Co. v. Redlands*, 121 Cal. 312. In *Redlands, L. & C. D. Water Co. v. Redlands*, 121 Cal. 365, *Harrison, J.*, after citing and referring to *San Diego Water Co. v. San Diego*, 118 Cal. 556, and *Smyth v. Ames*, 169 U. S. 466, said: "Under the principles determined by these cases, the amount of the capital stock paid into the plaintiff by its stockholders as well as the amount of its bonded and floating debt and the interest payable thereon become immaterial factors in the question."

² See *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206; *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 667. In *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574, 592, *Morrow, C. J.*, speaking of capitalization as represented by stock and bonds, said: "It is doubtless true that in many cases these elements

No certain, precise, and definite criteria of reasonableness can be formulated covering all cases, but the Supreme Court cannot, we think, be said to have yet decided that the rates charged are an unjust burden to the public if such rates are only sufficient to afford a fair return upon the actual and real value of the property at the time it is being used for the public. As we understand the decisions, the Supreme Court has, we think, decided that a company is constitutionally entitled to receive a sum for the commodity furnished or service rendered equal to the reasonable and necessary cost of such commodity or service plus a reasonable net profit or return.

§ 1336. **What are Reasonable Rates? Cost of Operation, including Maintenance and Depreciation.** — Any inquiry into the reasonableness of rates necessarily involves, among other things, the consideration of the *cost of operating* the works or plant.¹ And a part of these necessary expenses is the reasonable *cost of repairs and of maintaining the works* and plant in good working order and condition.² In connection with the cost of repairs and of maintaining the works, the ordinary, usual, and inevitable *general depreciation of the works* from year to year over and beyond repairs, maintenance, and ordinary renewals, is a proper matter for consideration in estimating or determining profits or in ascertaining the sum which is a fair return to the company upon the value of the plant and the cost of production or service.³ In most, if not all cases there is a gradual and sure

may be excessive or fictitious, and represent speculative, rather than real or substantial, values. But there may be cases where both stock and bonds represent in the market a present actual value in the property of the corporation, and a value which could not be otherwise very well established. In such a case, what objection can there be to giving the evidence such consideration as, under all the circumstances, it deserves? It seems to me there can be none." In this case, on an application for a preliminary injunction, the court took into consideration the price which the stock was selling at on the market.

¹ *Smyth v. Ames*, 169 U. S. 466, 546; *San Diego Land & T. Co. v. National City*, 174 U. S. 737, 757; *Contra Costa Water Co. v. Oakland*, 165 Fed. Rep. 518; *Brymer v. Butler Water Co.*, 179 Pa. 331.

² *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 757; *San Diego Water Co. v. San Diego*, 118 Cal. 556.

³ *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 407, *per Brewer, J.*; *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 757; *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866, 879; *Southern Pac. Co. v. California Railroad Commission*, 78 Fed. Rep. 236, *per McKenna J.* *Contra Costa Water Co. v. Oakland*, 165 Fed. Rep. 518; *Cedar Rapids Gaslight Co. v. Cedar Rapids (Iowa)*, 120 N. W. Rep. 966. In *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 667, the court declared that depreciation from natural causes and the cost of replacement of depreciated property should be provided and allowed for out of the income, but that the cost of replacing property which had been destroyed through the company's fault or negligence could not be charged against the income as a current expense.

In *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 10, 13, *depreciation was considered as a matter to be reck-*

annual general depreciation owing to wear, tear, exposure, and changes in the art, which is not made good by repairs and ordinary

oned with *in determining the capital value* of the property. Mr. Justice *Moody* said on this point: "The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, stand-pipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case," in determining the value of the property used for public service. In the same case, in discussing the allowance to be made annually for depreciation as a charge against income, the learned Justice said: "A water plant with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of its earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company, to make such a provision, but it is its duty to its bond and stock holders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued, the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance be-

tween present value and bond and stock capitalization,—a tendency which would inevitably lead to disaster, either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property they employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

But under some circumstances at least the public service corporation may be obliged to assume the burden of showing that sums collected for depreciation have not been added to the capital upon which dividends are paid. Thus in *Louisiana Railroad Com'n v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 424, rev'g 156 Fed. Rep. 823, a telephone company brought a suit to enjoin the enforcement of a rate fixed by the commission. The telephone company claimed, and was allowed by the court, in computing its annual earnings, a sum for depreciation, but the books of the company left it in doubt whether this sum had been expended in extensions and additions, or carried into the capital account. The Supreme Court held that it was obligatory on the company to show that no part of the money raised by rates to consumers to pay for depreciation was added to capital upon which a return was to be made in the way of dividends in the future. Mr. Justice *Peckham* said: "It was obligatory upon the complainant to show that no part of the money raised to pay for depreciation was added to capital, upon which a return was to be made to stockholders in the way of dividends in the future. It cannot be left to conjecture, but the burden rests with the complainant to show it. It certainly was not proper for the complainant to take the money, or any portion of it, which it received as a result of the rates under which it was operating,

maintenance and ordinary renewals, and where this is the case such excess of depreciation over and beyond repairs, maintenance, and

and so to use it, or any part of it, as to permit the company to add it to its capital account, upon which it was paying dividends to shareholders. If that were allowable, it would be collecting money to pay for the depreciation of the property, and, having collected it, to use it in another way, upon which the complainant would obtain a return and distribute it to its stockholders. *That it was right to raise more money to pay for depreciation than was actually disbursed for the particular year there can be no doubt*, for a reserve is necessary in any business of this kind, and so it might accumulate, but to raise more than money enough for the purpose and place the balance to the credit of capital upon which to pay dividends cannot be proper treatment. The court below said it was impossible to find out from the books how much of this had been done, and it treated the fact as one to be explained by the commission and not by the complainant. In other words, while this fact was a material one, the *onus* was placed upon the commission, and not the complainant, to show it. We think, on the contrary, that the obligation was upon the complainant."

In a case involving the reasonableness of a railroad rate, it has been said that *expenditures for additions to construction and equipment* should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year. *Illinois Central R. Co. v. Interstate Commerce Commission*, 206 U. S. 441. In *Cotting v. Kansas City Stock Yards Co.*, 82 Fed. Rep. 839, 850, 855, *Thayer, C. J.* says: "At the same time, as buildings, pens, pavements, and other similar structures deteriorate in value somewhat from year to year, even where they are repaired in the ordinary way, it is eminently proper, in estimating any profits, to set aside annually out of the gross income a certain sum to cover such depreciation." Allowance for "ordinary improvements" proper in order to ascertain net earnings. *Union Pacific R. Co. v. United States*, 99 U. S. 402, 421, 422. *Massachusetts*, by statute, requires all municipal lighting plants

to set aside five per cent of their total investment annually for depreciation. The rate of depreciation fixed in the recent report on the proposed municipal electric light plant of New York City is seven and one half per cent on the total investment exclusive of real estate.

In *California*, however, the courts have rejected items of depreciation as a matter for which no separate allowance is to be made in determining whether a rate for water supply is fair and reasonable. Thus, in *San Diego Water Co. v. San Diego*, 118 Cal. 556, 574, *Van Fleet, J.*, said: "With regard to the question of the depreciation of the plant by use, it is sufficient to say that ordinary repairs should be charged to current expense, that substantial reconstruction or replacement should be charged to the construction account, and that depreciation should not otherwise be considered." *Garroute, J.*, said with respect to the same subject: "The theory of the plaintiff in this regard seems to be that the life of a plant of this character may be approximated at thirty years, and that a sinking fund of one-thirtieth of its value should be collected from the ratepayers annually and laid aside to be handed to the stockholders upon the sad occasion of its demise, as an alleviating salve to their sorrow. But such a thing is all wrong, for it results in the consumers of water buying the plant and paying for it in annual instalments. Consumers of water cannot be charged with cost of construction. They are only to pay a fair interest upon such cost; and as we look at this matter, if this three and one-half per cent is not stowed away in the vaults as a sinking fund to make glad the hearts of the stockholders upon the expiration of the thirty years, which theory cannot be tolerated for a moment, then it must go into the plant as cost of construction, and, therefore, not chargeable against the consumers. The result of such expenditure is only to increase the valuation of the plant, and to thereby draw from the consumers an income upon the amount of the investment. If improvements are made in the plant, the cost of these improvements should be charged against the construction ac-

renewals, ought, we think, to be considered when the inquiry is what has been the company's profits or what is a fair and reasonable return or profit to the company upon the value of the property used in the public service and for the services rendered by the Company.

Owing to the difficulty of distinguishing between maintenance and depreciation, because one runs into the other, the expedient and most practicable way in many, if not all, cases would seem to be, not to undertake to find or state a separate percentage or amount for each, but to make a proper annual allowance for general depreciation including repairs and ordinary maintenance. Such depreciation is, we think, including such maintenance, as well as repairs, a just charge against the cost of operation or cost of service, and is a proper charge upon income and ought therefore to be considered in determining the cost or value of the commodity furnished or service rendered and in determining the profits of the company or the amount upon which it is entitled to have a reasonable return, and such we believe is the general understanding.¹

§ 1337. What are Reasonable Rates? Net Profit or Return to Corporation. — All the foregoing and any other proper elements having received consideration, the question is whether the rate yields a

count. If repairs are made upon the plant as it stands, as, for example, a new pipe substituted for an old piece of the same size and quality, such charge should be considered operating expenses." These views were followed as controlling and settled in *Redlands, L. & C. D. Water Co. v. Redlands*, 121 Cal. 312.

In the foregoing extracts the learned judges in *California* seem to deny or ignore the existence of such a thing as depreciation separate and apart from repairs and ordinary maintenance, or if it be admitted that such depreciation does exist, the judges seem to hold that it should be made good by new capital; whereas the author thinks it is indisputable that such depreciation does in many, if not in all, cases exist in fact, and when it does so exist it is right and just to all concerned that the annual amount thereof should not ordinarily be capitalized, but be regarded as part of the cost of service or as one of the necessary expenses of operating the plant and conducting the business. The views of the judges in *California* are perhaps influenced by the special provisions of the Constitution of the State, quoted above.

In *San Diego Land & T. Co. v. Jasper*, 189 U. S. 439, 446, it was contended that there should have been an allowance for depreciation over and above an allowance for repairs. But so far as the question before that court was concerned, that is, whether the rate prescribed amounted to confiscation of the property of the water company, the court said that there was no sufficient evidence that the allowance of six per cent on the value of the property as fixed by the public board prescribing the rate in addition to what was allowed for repairs was confiscatory. See also s. c. 89 Fed. Rep. 274. In *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 260, the court refused to permit any deduction to be made from the apparent profits "for a restoration or rebuilding fund" in addition to operating expenses, repairs, and other ordinary charges.

¹ And such is the opinion of the Supreme Court of the United States, which is clearly stated by Mr. Justice *Moody* in the late case of *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 13, 14.

*fair and reasonable net profit or return to the corporation upon the value of the property used for the public service at the time it is being used.*¹

¹ *Cotting v. Kansas City Stock Yards Co.*, 82 Fed. Rep. 839, 850; *Contra Costa Water Co. v. Oakland*, 165 Fed. Rep. 518; *San Joaquin & K. R. Irrig. Co. v. Stanislaus County*, 155 Cal. 21; 99 Pac. Rep. 365; *Leadville Water Co. v. Leadville*, 22 Colo. 297; *Montezuma County v. Montezuma Water & Land Co.*, 39 Colo. 166, 173; *Long Branch v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, aff'd 71 N. J. Eq. 790.

In *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 746, 757, Mr. Justice Harlan says: "What the company is entitled to . . . is a fair return upon the reasonable value of the property at the time it is being used for the public." In *Smyth v. Ames*, 169 U. S. 466, 546, the court says: "We hold . . . that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public." In *Northern Pacific R. Co. v. Keyes*, 91 Fed. Rep. 47, 52, *Amidon, J.*, says: "The fundamental question in all cases like these is, Will the rates prescribed by the State pay the expenses of doing the . . . business and leave to the carrier a reasonable compensation upon the fair value of the property which it employs in performing the service?" In *Brymer v. Butler Water Co.*, 179 Pa. 331, *Williams, J.*, says: "A system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable."

Elements of reasonable compensation: The State cannot require a railroad corporation to "carry persons or property without reward," *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 331; and property of one individual may not be wrested from him for the benefit of the public, "without compensation," *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362. The basis of computation must be "the fair value of the property used . . . for the convenience of the public," *Smyth*

v. Ames, 169 U. S. 466, 546, *supra*; its "value as a producing factor," *Mathews v. North Carolina Corp. Com'rs*, 106 Fed. Rep. 7; the "value of the property as it is to-day," *National Waterworks Co. v. Kansas City*, 62 Fed. Rep. 853; that is to say, the same measure of value as observed in taking of property by eminent domain, the owners in each case being protected by the same constitutional provisions. *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 567; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. Rep. 245; *Wallace v. Arkansas Cent. R. Co.*, 118 Fed. Rep. 422.

Increased consumption at the reduced rate prescribed by statute, ordinance, or order is apparently to be considered by the court in determining the gross return to the company, and in case of doubt, the fact that the effect of the reduced rate upon consumption is problematical, is a feature which may have weight with the court in determining it to require that the reduced rate be put to a practical test before it can be declared confiscatory. Thus, in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 50, 51, Mr. Justice Peckham said: "In this case a slight reduction in the estimated value of real estate, plant, and mains as given by the witnesses for the complainant, would give a six per cent return upon the total value of the property as above stated. And again, increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished. . . . Of course there is always a point below which a rate could not be reduced and at the same time permit the proper return upon the value of the property, but it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary may increase them. The question of how much an increased consumption under a less rate will increase the earnings of the complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test." But where *increased business cannot be done without a proportionate increase of the ex-*

The basis upon which this net profit or return should be computed has received discussion,¹ and it has been suggested that the rate of interest which might ordinarily and fairly be expected upon the investment in question is a fair and reasonable criterion to be applied.²

pense, *e. g.*, as was found in one case in the operation of a telephone system, a bill by the public service corporation will not be dismissed without prejudice for a practical test, but for any errors on the part of the trial court, it will be remanded for a new trial—at all events, when the evidence tends to show that the higher rates are reasonable and that the lower rates would be unreasonably low. *Louisiana Railroad Com'n v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, rev'g 156 Fed. Rep. 823.

Discount to consumers for prompt payment, voluntarily offered, and not required by the statute, ordinance, or order regulating the rates, cannot be deducted from the gross receipts of the company for the purpose of determining the return which will be produced by the modified rate. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 11, 12.

¹ In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 48, Mr. Justice *Peckham* remarks: "There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality. Among other things, the amount of the risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them."

² In *Brymer v. Butler Water Co.*, 179 Pa. 331, *Williams, J.*, said: "Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, *not less than the legal rate of interest.*" But what "their property will earn" depends very largely upon the rates which may be charged.

In *San Diego Water Co. v. San Diego*, 118 Cal. 556, 570, it was pointed out that the water works involved in that case were acquired and constructed for the use of the public, and that, in a sense, the public might be said to be the real owner and the company only the agent of the public to administer their use; that the State has taken the use of money reasonably and properly expended by the company in acquiring its property and constructing its works; and that it is for that use that it must provide just compensation. In view of this consideration, *Van Fleet, J.*, said with reference to the fair net return or profit to the corporation: "What revenue money is capable of producing is a question of fact, and, theoretically at least, susceptible of more or less exact ascertainment. Regard must be had to the nature of the investment, the risk attendant upon it, and the public demand for the product of the enterprise. It would not, of course, be reasonable to allow the company a profit equal to the greatest rate of interest realized upon any kind of investment, nor, on the other hand, to compel it to accept the lowest rate of remuneration which capital ever obtains. Comparison must be made between this business and other kinds of business involving a similar degree of risk, and all the surrounding circumstances must be considered. An important circumstance will always be the rate of interest at which money can be borrowed for investment in such a business; and, where the business appears to be honestly and prudently conducted, the rate which the company would be compelled to pay for borrowed money will furnish a safe, though not always conclusive, criterion of the rate of profit which will be deemed reasonable. In ordinary cases, where the management is fair and economical, it would be unreasonable to fix the rates so low as to prevent the company from paying interest on borrowed money at the lowest market rate obtainable; and, even then, some allowance or margin should be made for any risk to which the company

But when a rate fixed by statute or ordinance is attacked upon the ground that it is not reasonable or adequate and amounts to a confiscation or deprivation of property of the public service corporation, it must be remembered that the function of the court is not to fix what is a reasonable rate in its view, but only to determine whether the rate as fixed amounts to such confiscation or deprivation. Where, pursuant to a statute, the local tribunal fixed a rate which *yielded a return of six per cent* upon the then value of the property used, the Supreme Court of the United States declined under the circumstances to hold that such rate amounted to a deprivation of property within the prohibition of the Federal Constitution.¹ The courts cannot

may be exposed, over and above the risk taken by a lender."

In *San Diego Land & T. Co. v. National City*, 174 U. S. 739, 757, this element is stated as "a fair profit to the company over and above such charges (for operating expenses, maintenance, &c.), for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis." Speaking of the right of public service corporations to remuneration for services rendered, the court said, in *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Me. 371, 379: "They are entitled to charge reasonable rates. Reasonable is a relative term, and what is reasonable depends upon many varying circumstances. An equivalent to the prevailing rates of interest might be a reasonable return, and it might not. It might be too high or might be too low. It might be reasonable, owing to peculiar hazards or difficulties in one place to receive greater returns there, than it would in another upon the same investment."

Rates of interest should be considered in determining whether rates are reasonable. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 260. It has been said that a railroad company is entitled to *earn an annual income of six per cent* upon its investment when its railroad is properly built and properly managed. *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. Rep. 317.

¹ In *Stanislaus County v. San Joaquin & K. R. Irr. Co.*, 192 U. S. 201, the corporation had been organized and its works constructed at a time when the statute prescribing that rates should not be reduced to a figure which would not permit the cor-

poration to earn a return of one and one half per cent per month upon the capital invested. Subsequently a statute was passed authorizing the board of supervisors, upon whom the power to regulate was conferred, to prescribe a rate which would yield a return of only six per cent per annum. Pursuant to this authority, the board of supervisors fixed a schedule of rates which was intended to yield a return of only six per cent per annum. The Supreme Court of the United States held that it could not say that the statute and the proceedings thereunder denied to the corporation a fair return upon its investment, and that therefore it could not be held that the proceedings of the board of supervisors were void as depriving the corporation of its property without just compensation, saying: "It is not confiscation nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it one and a half per cent a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, we think that a law which reduces the compensation theretofore allowed to six per cent upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it."

In *Willcox v. Consolidated Gas Co.*,

be said definitely to have settled what is a fair return or the exact method of determining what is a fair return in all cases. This is, perhaps, impracticable, since no two cases are exactly alike. But leaving out of view exceptional cases, the company is ordinarily, we think, justly and constitutionally entitled to have the nature of the business including its hazards taken into the account, and to charge such rates as will yield a net return upon the present value of the plant employed in the public service at least equal to the then current rates of interest or returns on investments of the kind under consideration.

The adequacy of the rate to afford a full return on the investment or value of the plant may be affected by considerations which have reference to the *limited amount of business done at the time*. Thus, it may be that the corporation is only furnishing water or light to the extent of one half of the capacity of its plant, and under such circumstances it would seem that the fact that the business of the corporation is not so great as to enable it upon the business actually done to earn a full return upon the value of the property used does not necessarily or *per se* make the rate confiscatory.¹ This result

212 U. S. 19, 49, s. c. 157 Fed. Rep. 849, the Supreme Court approved the determination of the trial court that, under the circumstances of the particular case, a rate which would permit a return of six per cent would be enough to avoid the charge of confiscation for the reason that a return of such an amount was the rate ordinarily sought and obtained on investments of that degree of safety in the city of New York. In *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 667, it was held that water rates which enabled the company to earn an *income of five per cent net* on the value of the property employed in the public service after all taxes, operating expenses, &c., were deducted, was neither unreasonable nor confiscatory. See to the same effect, *Cedar Rapids Gas-light Co. v. Cedar Rapids (Iowa)*, 120 N. W. Rep. 966. In *Long Branch v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, *aff'd* 71 N. J. Eq. 790, the court held that the *proper rate at the start* upon newly constructed water works which were expected to supply a quickly growing population, *should be five per cent*.

Rates which, after resolving all doubtful questions against the company, do not yield as an annual net

return, more than 4.4 per cent on the value of the property necessarily employed in the public service, or 3.3 per cent on its stock after deducting fixed charges were held, on motion for a preliminary injunction, to establish a *prima facie* case of unreasonableness amounting to a taking of property without just compensation. *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574. Where the present value of the property appeared to be between \$400,000 and \$500,000, it was held that rates which yielded 5½ per cent on a valuation of \$400,000, 4½ per cent on a valuation of \$500,000, or 6½ per cent on the total amount of stock and bonds, could not be regarded as so unreasonable as to be confiscatory. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234. In *Cotting v. Kansas City Stock Yard Co.*, 79 Fed. Rep. 679; 82 Fed. Rep. 839, 850, a legislative rate which allowed *five and three quarter per cent* on the value of the property for profit after all expenses and depreciation was sustained, and *Foster, J.*, suggests (79 Fed. Rep. 684) the legal rate of interest as the test. See also *Milwaukee Elect. R. & L. Co. v. Milwaukee*, 87 Fed. Rep. 577.

¹ Thus in *San Diego Land & T. Co.*

would seem to be supported by a number of considerations. The limit of the rate to the public is the value of the services to the public, not as a community, but as individuals. The company can only ask and expect a return upon such property as is reasonably necessary for the public service, and the company rather than the public should bear the loss necessarily incident to an unutilized and unnecessary investment in property or plant.

§ 1338. **Liability of Municipality for Water and Light furnished; Implied Contracts.** — The rules governing the *liability of a municipality for water and light furnished* for its use, under a contract, express or implied, do not differ essentially from those which govern its liability under other contracts.¹ A municipality is not liable for water or light furnished to it or for its use if it has no authority whatever to contract for it.² If it has no authority to enter into an express contract for a supply of water, it is impossible to imply a contract under which it can be held to be liable.³ And a municipi-

v. Jasper, 189 U. S. 439, 446, where the question was as to the reasonableness of the rates for irrigation prescribed by the board of supervisors, it appeared that the supervisors in determining the rates assumed that the amount of water available for outside irrigation was enough for a return of six thousand acres, and they fixed the rates as if the company supplied six thousand acres, although such was not the fact. The court held that the fixing of the rates upon this basis did not violate any constitutional right of the water company, saying: "Of course, the amount actually received for the water actually furnished was correspondingly less than the receipts as estimated by the supervisors upon their assumption. If there were no force in any of the arguments for the appellees which we have passed by, the result of this mode of estimate might be that the appellant did not get six per cent on the total value of its plant. But here again we have to distinguish between Constitution and statute. If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two thirds of the contemplated number should pay a full return. The only ground for such a claim is the statute

taken strictly according to its letter. But when a case is brought here on a constitutional ground which wholly fails, we certainly shall not be astute to support it upon another which we could not consider apart from the failing foundation, and which has nothing to commend it but the letter of the law. The statute of California no doubt was contemplating the case of water works fully occupied within the area which they intended to supply. It hardly can have meant that a system constructed for six thousand acres should have a full return upon its value from five hundred, if those were all that it supplied. At all events, we will not be the first to say so. If necessary to avoid that result, we should assume that only a proportionate part of the system was actually used and useful within the meaning of the statute."

¹ As to the general doctrine of the liability of the municipality, under implied contracts, see *ante*, §§ 793, 794, 795. A municipality contracting with a water company as a corporation is *estopped to deny the corporate character* of the water company. *Greenville v. Greenville Water Works Co.*, 125 Ala. 625.

² *South Covington Dist. v. Kenton Water Co.*, 117 Ky. 489.

³ *East Newark v. New York & N. J. Water Supply Co.*, 67 N. J. Eq. 265,

pality is not liable if water or light is supplied without any request, express or implied, by the city or its authorized officers or agents.¹ An implied contract to pay for light will not arise under circumstances which indicate that the services were rendered or the property was used and enjoyed without any intention to exact compensation.² But when a city has *general power to contract* for a supply of water or light, and such *supply is furnished and accepted* by the city, the city *becomes liable* to pay therefor upon an *implied promise*.³ Accordingly, in an action against the municipality to

aff'd 68 N. J. Eq. 783. And it has been held not to be liable if, by its charter, its power to contract is limited to a particular mode, and it fails to follow the prescribed method. *Woodside Water Co. v. Long Island City*, 23 N. Y. App. Div. 78; aff'd 159 N. Y. 558; *People v. Sisson*, 75 N. Y. App. Div. 138, aff'd 173 N. Y. 138; *Broderrick v. St. Paul*, 90 Minn. 443. A water district, established by a town board pursuant to statute, included the whole town, which was eighteen miles long and six miles wide. The contract was made for a water supply for two villages only in such town, the villages containing eighty per cent of the inhabitants and about forty per cent of the taxable property. It was held that, inasmuch as the statute required that the territory supplied with water under the contract should correspond in area with the territory designated as the water supply district, the contract was invalid; that the corporation making the contract was bound at its peril to know the limitations upon the authority of the town board; and the fact that it supplied water under the contract created no claim against the town. *People v. Sisson*, 75 N. Y. App. Div. 138, aff'd 173 N. Y. 606.

¹ *State Trust Co. v. Duluth*, 104 Fed. Rep. 632. See also *St. Paul Gas-light Co. v. St. Paul*, 78 Minn. 39. If, after a contract for lighting has expired, the company continues to furnish electric light notwithstanding the city's refusal to accept and pay for the same, the city is not liable therefor. *Alpena Electric Light Co. v. Alpena*, 130 Mich. 413.

² Where, through a mistaken interpretation of a contract, the lighting company furnishes, and a city accepts, the benefit of a greater number of lights than is called for by the con-

tract, and the action of the parties is founded upon a mistaken belief that the compensation provided for by the contract includes the entire number furnished, the city is not liable therefor until notice from the gas company and a demand for payment of the additional lights. *Brush Electric Light & Power Co. v. Montgomery*, 114 Ala. 433. If a water company exercises its right to revoke an offer to furnish water to a city gratuitously and the city thereafter continues to use water with notice that it will be expected to pay rental therefor, the city will be liable for the water which it has used. *Spring Brook Water Co. v. Pittston*, 203 Pa. 223. Under a contract by which a water company agrees to supply water free of charge "for all public buildings and offices of said city," public school buildings within the city are not public buildings of the city, when the school district is an independent corporation and the city neither builds, owns, nor controls the school houses. *National Water Works Co. v. School Dist.*, 23 Mo. App. 227. See also *Albuquerque Water Supply Co. v. Albuquerque*, 9 N. Mex. 441.

³ *Austin v. Bartholomew*, 107 Fed. Rep. 349; *Brush Elect. Light & Power Co. v. Montgomery*, 114 Ala. 433; *Higgins v. San Diego Water Co.*, 118 Cal. 524, 555, s. c. 131 Cal. 294, 296; *Dawson v. Dawson Waterworks Co.*, 106 Ga. 696; *East St. Louis v. East St. Louis G. L. & C. Co.*, 98 Ill. 415; *Aurora Water Co. v. Aurora*, 129 Mo. 540; *East Newark v. New York & N. J. Water Supply Co.*, 67 N. J. Eq. 265, aff'd 68 N. J. Eq. 783; *New Jersey Suburban Water Co. v. Harrison*, 72 N. J. L. 196; *North River Elect. L. & Power Co. v. New York City*, 48 N. Y. App. Div. 14; *Kennedy v. New York*, 99 N. Y. App. Div. 588; *Port Jervis Water Works Co. v. Port Jervis*, 151

recover the value of water or light furnished, the regularity or validity of an ordinance or proceeding under which the water or light was furnished does not become material, if the city had general authority to contract therefor; its acceptance of the benefits of the service rendered is, under such circumstances, sufficient to imply a promise to pay therefor irrespective of the regularity or validity of the method of contract.¹ The *acceptance of water* furnished to a city, which is

N. Y. 111; Spring Brook Water Co. v. Pittston, 203 Pa. 223.

A lighting company having furnished lights exceeding the contract number, demanded payment therefor. On payment being refused, it requested the city to designate the lights to be removed to reduce the number to that contracted for. The city refused to permit the removal of any of the lights. It was held that the city was liable for the extra lights from the time of refusing to permit their removal upon an implied contract to pay for them. Brush Electric Light & Power Co. v. Montgomery, 114 Ala. 433. A charter provision prohibiting the making of any contract until a definite amount of money shall have been appropriated for the liquidation of all pecuniary liability of the city under such contract, cannot ordinarily be made applicable to contracts for a supply of water or gas covering a term of years made pursuant to a general authority to provide a supply of water, or to provide for lighting the streets and public grounds. It is a sufficient compliance with such charter provision if the city, in each of its annual appropriations, sets aside a sufficient sum to cover its obligation for light or water accruing during the year. Denver v. Hubbard, 17 Colo. App. 346; Leadville Ill. Gas Co. v. Leadville, 9 Colo. App. 400. See also Carlyle Water L. & P. Co. v. Carlyle, 31 Ill. App. 325, 339; Danville v. Danville Water Co., 180 Ill. 235; Cain v. Wyoming, 104 Ill. App. 538. See *ante*, §§ 211, 790.

A city contracted with a water company for fifteen fire hydrants for a term of ten years, and "to take any additional number of fire hydrants" at a specified annual rental. It was held that an order by the city for additional hydrants implied an agreement to pay therefor for the remainder of the ten years, and that the city could not rescind its order at pleasure. State v. Philipsburg, 23 Mont. 16. Where a

town passed an ordinance granting a water works franchise and contracting for a hydrant service for the benefit of an unincorporated village within the town limits, and the village was afterwards incorporated as a city, it was held that the city was liable for the hydrant rentals as the successor of the town. Washburn Water Works Co. v. Washburn, 129 Wis. 73.

¹ Illinois Trust & Savings Bank v. Arkansas City Water Co., 67 Fed. Rep. 196; Greenville v. Greenville Water Works Co., 125 Ala. 625; Baxter Springs v. Baxter Springs Lt. & Power Co., 64 Kan. 591; East St. Louis v. East St. Louis G. L. & C. Co., 98 Ill. 415; Marion Water Co. v. Marion, 121 Iowa, 306; Frankfort v. Capital Gas & Elect. Lt. Co. (Ky.), 96 S. W. Rep. 870; State v. McCarty, 62 Minn. 509; Tyler v. Jester (Tex. Civ. App.), 74 S. W. Rep. 359; Brenham v. Brenham Water Co., 67 Tex. 542.

Irregularity in the enactment of an ordinance consisting in failure to express the subject of the ordinance in the title as required by the city charter does not affect the right of the company to recover for water actually supplied. Marion Water Co. v. Marion, 121 Iowa, 306. An ordinance granted a franchise or privilege for electric lighting purposes in violation of the provisions of the Kentucky Constitution which requires the sale of all franchises to the highest bidder. The ordinance also provided for a supply of light to the city. It was held that notwithstanding the invalidity of the ordinance, the city was liable for the light furnished at its reasonable value, and as the contract price was not attacked as unreasonable, a recovery at that rate was sustained. Providence v. Providence Elect. L. Co., 122 Ky. 237.

A water works company was held entitled to recover for water furnished a city, although the contract was void because of the invalidity of the franchise contained therein. Nicholas-

sufficient to establish performance of the contract by the water company, is not a mere occasional use by the city of the water actually furnished; the mere receipt and consumption of water do not necessarily imply acceptance; there must be a fair opportunity for examination and rejection before acceptance can be inferred from receipt.¹

It has been said that *performance of the agreement* on the part of the company to furnish water or light is an essential consideration or condition upon which the city's promise to pay is based, and inasmuch as the injury to the city on a breach thereof cannot be measured, performance by the company is a condition precedent to a recovery for water or light actually furnished, and in the absence of such performance there can be no recovery whatever unless the city has so acted as to justify a presumption of acceptance, consent, or waiver.² But this rule has not received uniform acceptance, and

ville Water Co. v. Nicholasville (Ky.), 36 S. W. Rep. 549, 38 S. W. Rep. 430. A provision in an electric light contract that it *should not be assignable without the consent* of the municipality does not preclude a recovery by the contracting party, although he has sold and removed his own plant, and has procured the light to be furnished from the plant of another company, in the absence of a stipulation that he should erect and maintain a plant of his own. *Colorado City v. Townsend*, 9 Colo. App. 249. If a city has *acquiesced* for a number of years in the furnishing of light by the assignee of a contract, the city cannot defeat liability for water furnished on the ground that the contract was incapable of assignment. *Austin v. Bartholomew*, 107 Fed. Rep. 349.

If a company has erected its plant with the full assent of the city authorities, and the water supplied has proved to be adequate in quality and quantity, and the city has accepted it without any objection, the city is, in an action to recover the stipulated price to be paid for water furnished, estopped from pleading as a defense *informality in the assent of the local authorities to the franchise* and the omission to appoint inspectors to report on the water supply. *Cunningham v. Cleveland*, 98 Fed. Rep. 657. An agreement contained in an ordinance granting a franchise that the company will furnish to the city for street lighting electric lights of specified power at a certain price per light

is an agreement to furnish all such lights as the city may in reason deem necessary and demand. So held in view of the fact that, in the nature of things, the size and extent of a city do not ordinarily warrant the installation of a second plant. Hence, an agreement by the company to furnish such lights as the city might in reason deem necessary and demand lies at the very foundation of the promise by the city to pay the price therefor. *Kaukauna Electric Light Co. v. Kaukauna*, 114 Wis. 327. When the contract between the municipality and the water company contains a provision that the *works should be tested* by the municipality before a supply should be accepted by it, and makes provision for repairing breaks in the pipes, &c., and such test has been made and the works have been used, the municipality cannot plead, as a defense to an action for hydrant rentals, that the pipes laid did not comply with the contract, or that they were subject to breakage. *Grand Junction Water Co. v. Grand Junction*, 14 Colo. App. 424.

¹ *Winfield Water Co. v. Winfield*, 51 Kan. 104. See also *Skowhegan Water Co. v. Skowhegan*, 102 Me. 323.
² *Kaukauna Electric Light Co. v. Kaukauna*, 114 Wis. 327.

Where the company sues upon contract for the stipulated price or consideration, it was held that it could not recover upon *quantum meruit*. *Winfield Water Co. v. Winfield*, 51 Kan. 104. See also *Winfield v. Winfield Water Co.*, 51 Kan. 70. Where

other decisions hold that although conditions precedent must be performed to justify a recovery on a contract and a partial performance is not sufficient, yet when the contract has been performed in a substantial part, and the city has voluntarily accepted and received the benefit of the part performance, knowing that the contract was not being fully performed, the *city is thereby precluded from relying upon the performance of the residue as a condition precedent to its liability* to pay for what it has received, and may be compelled to rely upon its claim for damages in respect of the defective performance. Accordingly, when the city has received water or light which does not come up to the stipulated quality or quantity, and has accepted the benefit thereof under such circumstances as to show that it knew, or ought to have known, that the contract was not being fully performed, its remedy is to recoup the damages suffered by it as a partial defense in an action upon the contract.¹

the ordinance provides that, in consideration of the grantee of the franchise erecting water works to supply the city and its inhabitants with water, the city agrees to rent a specified number of hydrants, — even if it be the duty of the city to furnish the hydrants and to designate the places where they shall be attached to the mains, — the company cannot recover the stipulated rental, if no hydrants have actually been attached to the mains, and it is not shown that the company ever requested the city to furnish the hydrants or direct where they should be placed. *Ellensburgh Water Supply Co. v. Ellensburgh*, 13 Wash. 554. If a lighting contract provides that the company shall furnish such lights as the city "*may designate*" to be placed at such points as it "*may direct*," it was held, construing the contract, that no recovery for light furnished can be had against the city if it not only fails to designate the number and location of the lights, but also repudiates the contract and so notifies the company. *El Paso Gas, Elect. Lt. & P. Co. v. El Paso*, 22 Tex. Civ. App. 309.

In *State Trust Co. v. Duluth*, 70 Minn. 257, it was held that a provision in an ordinance that if there be a *deficiency of the supply of good and wholesome water* for domestic and other purposes for a period exceeding sixty days, during such failure of supply all water rentals shall be suspended, should be construed as only suspend-

ing the water rentals of those to whom the inadequate or improper service was furnished. Hence, if the water company furnished to the city through its fire hydrants a proper supply of water for fire protection purposes, the fact that the supply to private consumers was of a quality not suited for domestic purposes, is no defense to an action against the city to recover the rentals of fire hydrants. In an action against a city for electric light furnished, a *pro rata* recovery was sustained under a contract provision that in case for any reason lamps were not lighted and lights not furnished during any of the times specified, a rebate *pro rata* according to the time they were not lighted should be made. *Kennedy v. New York City*, 99 N. Y. App. Div. 588. Provision of water works ordinance that upon failure to furnish to the inhabitants water fit for drinking and domestic purposes the municipality might give the company notice of such failure, and upon default of the company to rectify the conditions, the municipality should be relieved from paying hydrant rentals until rectification sustained as a valid provision for stipulated and liquidated damages, and held not to provide for a forfeiture, but to exempt the municipality from liability to pay hydrant rents during such period. *Illinois Trust & Sav. Bank v. Pontiac*, 112 Ill. App. 545, aff'd 212 Ill. 326.

¹ *St. Charles v. Stookey*, 154 Fed.

If a city continues to accept water knowing that it does not comply with the quality stipulated for by the ordinance or contract, it cannot thereafter refuse to make *any* payment therefor; its acceptance imposes upon it the obligation to pay the reasonable value of the water used;¹ and if it accepts and pays for water supplied, any defense or counter-claim growing out of the defective quality or quantity of the water supplied is waived by the acceptance of the water and payment therefor, and cannot be asserted as a defense to an action for future supplies.²

An *examination, test, and acceptance by the city of the works and plant*, as sufficient for the purposes of the contract, *estops the city* from thereafter claiming that the works are not sufficient and adequate to comply with the contract, or that they are improperly constructed.³

Rep. 772; Omaha Water Co. v. Omaha, 156 Fed. Rep. 922; Greenville v. Greenville Water Works Co., 125 Ala. 625; Creston Waterworks Co. v. Creston, 101 Iowa, 687; Burlington Water Works Co. v. Burlington, 43 Kan. 725; Wiley v. Athol, 150 Mass. 426; Sykes v. St. Cloud, 60 Minn. 442; Aurora Water Co. v. Aurora, 129 Mo. 540; Lamar Water & Elect. L. Co. v. Lamar, 140 Mo. 145; Joplin Waterworks Co. v. Joplin, 177 Mo. 496.

The *measure of damages* which may be recouped is the *difference between the value* of the supply actually furnished and that called for by the contract estimated with reference to the use for which it was furnished. Wiley v. Athol, 150 Mass. 426. See also Sykes v. St. Cloud, 60 Minn. 442. In *New Jersey* if light is supplied, whether the lights supplied were in compliance with the contract or not, the *law implies a contract to pay their reasonable value*, and a recovery therefor can be had under the common accounts in *assumpsit*. Central Elect. Co. v. Woodbridge Street Lighting Dist., 71 N. J. L. 403; Wentink v. Freeholders of Passaic, 66 N. J. L. 65. If a contract between a borough and a water company provides that the water for the borough shall be drawn from certain designated land, and it turns out that there is not sufficient water on the land designated to supply the borough, the borough is *liable for the water actually used*, although it falls short of the contract quantity. United States Water Works Co. v. Du Bois, 176 Pa. 439. The use of four-inch mains for connecting with hydrants

instead of six-inch mains as required by the contract is not a substantial compliance with the contract which will enable the water company to recover in a suit for hydrant rentals. Belfast Water Co. v. Belfast, 92 Me. 52.

A water company sued to recover the amount of hydrant rentals, &c., as agreed upon in a contract. The municipality denied that the plaintiff company had performed its contract. The jury returned a verdict for less than the contract price, and the court sustained the verdict, saying that although the common law required full performance in order to sustain a recovery, yet this stringent rule had been relaxed in most jurisdictions even in courts of law, and that now the plaintiff can *recover the fair value of the services* where there has been only a *partial performance*. Skowhegan Water Co. v. Skowhegan, 102 Me 323. *Interest* held not to commence to run until commencement of suit on demand of water company which was unliquidated because of company's failure to fully comply with the contract. Harrodsburg Water Co. v. Harrodsburg (Ky.), 89 S. W. Rep. 729.

¹ Burlington Water Works Co. v. Burlington, 43 Kan. 725; Central Elect. Co. v. Woodbridge St. Lighting Dist. 71 N. J. L. 403.

² Alpena City Water Co. v. Alpena, 130 Mich. 518; Monroe Water Works Co. v. Monroe, 110 Wis. 11.

³ Grand Junction Water Co. v. Grand Junction, 14 Colo. App. 424,

But *examination, test, and acceptance* of the works does not affect the right of the city to *insist on the full performance of conditions* which are *continuing* in their nature. If the contract for the furnishing of water contains a stipulation that it shall be filtered and makes provision for compelling the company in the future to furnish water of a stipulated quality, the acceptance of water in the past which does not comply with the contract does not waive the right of the city to insist upon compliance with the stipulations of the contract in the future.¹ When a municipality has made a contract, express or implied, for a continuing supply, such *contract can only be terminated* by corporate action, *e. g.*, by the act of the city council or other officer who is authorized to make the contract.² If the city refuses to accept further service, the remedy of the company is, ordinarily, by action for breach of the continuing contract.³

¹ Illinois Trust & Savings Bank *v.* Pontiac, 112 Ill. App. 545, aff'd 212 Ill. 326. *Engineer or chief of fire department* of city held not to have power, under charter and ordinances of city, to *wave conditions* of contract as to fire pressure. Cedar Rapids Water Co. *v.* Cedar Rapids, 117 Iowa, 250.

² Greenville *v.* Greenville Water Works Co., 125 Ala. 625. Where the ordinance or contract requires a lighting company to furnish all such lights as the city may, in reason, deem necessary, and the city, after demanding that additional lights be furnished, has waited a reasonable time (some three months) until the company's purpose not to furnish them became clear, paid for lights actually furnished meanwhile, then passed a resolution declaring the contract ended, and notified the company that it would no longer accept or pay for lights furnished by it, and thereafter did not accept or voluntarily receive further service from the company, the company is not entitled to recover for lights which continued to burn without any power on the part of the city to prevent it. Kaukauna Electric Light Co. *v.* Kaukauna, 114 Wis. 327. An unaccepted offer by the company to enter into a new contract with the city is not an agreement by the company to rescind the existing contract. Ephrata Water Co. *v.* Ephrata, 20 Pa. Super. Ct. 149.

On the expiration of a twenty-year contract for a supply of water to a city, the company continued for a time to supply water at the rate pre-

scribed by the contract. It then gave notice that it would only furnish water at a higher rate. The city did not respond to this notice. Monthly bills rendered by the company were passed by the city at the old rate. It was held that no new contract was made by the action of the company in giving notice and by the use of the water by the city. The court treated the continued service after the end of the preceding year as the commencement of a new contract for one year which could not be affected by the action of either party during that year. The demand in suit was not for an entire year's service. Appleton Waterworks Co. *v.* Appleton, 132 Wis. 563.

³ Wabaska Elect. Co. *v.* Wymore, 60 Neb. 199; Newport *v.* Newport Light Co. (Ky.), 21 S. W. Rep. 645. A city ordinance required a gas company to furnish and a city to use certain gas lamps, for a term of ten years, and provided that if the city might desire, after three years, to use electric light in the "business section" it might discontinue all or any of the gas lamps in that section. It was also provided that the city might, at pleasure, discontinue, "temporarily or permanently," a portion of the lamps without liability therefor. It was held that outside of the business section the city could not discontinue the use of gas lamps for the purpose of substituting electric or any other kind of lights, and that, if it attempted to do so, it remained liable to the gas company under the contract. Capital City Gaslight Co. *v.* Des Moines, 93

§ 1339. **Ultra Vires; Executed and Executory Provisions.** — In considering the validity and effect of contracts for water and light extending over a term of years it is necessary to bear in mind the distinction between those *parts of the contract which are executed and those which are merely executory*. If a municipality has power to contract for a supply of water or light, and if water or light has been furnished and has been accepted by it, such acceptance is sufficient to create an implied promise to pay therefor irrespective of the validity or invalidity of specific provisions of the contract. And hence, when suit is brought merely for the purpose of recovering from a city compensation for water, gas, or electricity furnished in the past, the liability of the city thereunder can usually be determined without taking into consideration those features of the grant or contract which may affect its future validity. Even if the contract is *ultra vires* so far as concerns the executory part of it, it may nevertheless be good so far as it has been executed on the part of the company and the city has without objection enjoyed its benefits. The result is precisely the same as if the company had furnished the city with water or light at the city's pleasure.¹ Therefore, in an action to recover water or light already furnished, the court will not consider the question whether the contract has been made for an *unauthorized term of years*,² or because the ordinance and con-

Iowa, 547. Before the expiration of a contract by which a city had obligated itself to pay for lighting for a term of years, the city notified the company to discontinue. In an action by the company it was held that the company's remedy was by an action for damages for breach of the contract, and not by an injunction to restrain the alleged illegal act of the municipality. *Wabaska Elect. Co. v. Wymore*, 60 Neb. 199. An ordinance granting a gas light franchise provided that the company should furnish gas "for all the public lamps of the city, and light, extinguish, and keep the same in good repair" at a specified rate. It also provided that the common council should "have the right at all times to regulate the times of lighting and extinguishing the street lamps, and of determining the quantity of gas to be consumed by the city." It was held that the city had the right to refuse to take any gas; that there was no contract by it that it would take and use gas; and that an action for damages for its failure to take gas would not lie. *Gas Light*

& Coke Co. v. New Albany, 156 Ind. 406. Where a city refused to continue to accept street lighting and ordered the company to discontinue before the contract had expired, it was held that the city was not liable to the company for gas supplied notwithstanding its refusal and order to discontinue, and that the remedy of the company was by an action for damages for breach of the contract. *Newport v. Newport Light Co.* (Ky.), 30 S. W. Rep. 606.

¹ *Montgomery v. Montgomery Water Works Co.*, 79 Ala. 233; *Greenville v. Greenville Water Works Co.*, 125 Ala. 625; *East St. Louis v. East St. Louis G. L. & C. Co.*, 98 Ill. 415; *State v. McCardy*, 62 Minn. 509. See *ante*, § 1338. See Index, *Action and Liability — Assumpsit*.

² *Ill. Trust & Savings Bank v. Arkansas City Water Co.*, 67 Fed. Rep. 196; *Montgomery v. Montgomery Water Works Co.*, 79 Ala. 233; *Dawson Water Works Co. v. Carver*, 95 Ga. 565; *Carlyle Water, L. & P. Co. v. Carlyle*, 31 Ill. App. 325; *East St. Louis v. East St. Louis G. L. & C. Co.*,

tract purport to grant an *exclusive privilege* to the company,¹ or to grant a *monopoly, contrary to the law*.² Even where the contract relating to a supply of water has been held to be void and incapable of ratification, the court nevertheless held that, if general power to contract for a water supply exists, the city is liable on a *quantum valebat* for the reasonable value of the water supplied.³ In short, all those provisions which have exclusive reference to the validity of the franchise as distinguished from the power to contract for and receive a supply of water are disregarded in an action which simply involves the liability of the city for past services.⁴

§ 1340. **Liability for Property destroyed by Fire.** — As a part of the governmental machinery of the State, municipal corporations legislate and provide for the customary local conveniences of the people, and in exercising such functions the corporations are *not called upon to respond in damages* to individuals, either for omissions to act, or for neglect and lack of skill in the mode of exercising the powers conferred on them for public purposes and to be exercised at discretion for the public good. For injuries arising from the corporation's failure to exercise its public legislative and police powers, and for the manner of exercising those powers, there is no remedy

98 Ill. 415; *State v. Great Falls*, 19 Mont. 518. See *ante*, § 1307. Stipulation as to the *method of fixing the price* of light, though void, held not to inhere in the contract for the light so inseparably as to render an otherwise valid contract void. *Davenport Gas & El. Co. v. Davenport*, 124 Iowa, 22.

¹ *Greenville v. Greenville Water Works Co.*, 125 Ala. 625; *Valparaiso v. Valparaiso City Water Co.*, 30 Ind. App. 316; *State v. Great Falls*, 19 Mont. 518; *Monroe Water Works Co. v. Monroe*, 110 Wis. 11. See also cases cited *ante*, § 1308.

² *Tyler v. Jester*, 97 Tex. 344; *Brenham v. Brenham Water Co.*, 67 Tex. 542, 566.

³ *Higgins v. San Diego*, 118 Cal. 524; *Nicholasville Water Co. v. Nicholasville (Ky.)*, 36 S. W. Rep. 549; 38 S. W. Rep. 430. A city made an agreement to pay a stipulated monthly rental for a water works plant on condition that the lessor should construct a railroad between certain points. The city had no authority to expend corporate funds in aid of railroads, and the contract was void in its inception. The lessor never constructed

the railroad. It was held that the fact that the railroad had never been constructed or that compliance of that clause of the agreement had been waived by the city did not permit the recovery of rents under the agreement, but that, as the city had a general power to contract for water supply, it was liable on a *quantum valebat* for the reasonable value of the use of the plant. *Higgins v. San Diego*, 118 Cal. 5240.

⁴ When a city has authority to contract for a supply of water, in an action for hydrant rentals, it is no defense that the city made other stipulations therein beyond its authority. *Valparaiso v. Valparaiso City Water Co.*, 30 Ind. App. 316. Where the ordinance granting a franchise to an electric lighting company stipulated that the grantee should give a bond to indemnify the city for all damages by reason of the privileges granted, the city cannot set up, in an action for compensation for lights furnished, the failure to give the bond upon demand or a breach of the conditions relating to the franchise. *Kaukauna Electric Light Co. v. Kaukauna*, 114 Wis. 327.

for damages against the municipality, nor can an action be maintained unless expressly given by statute for damages resulting from the failure of its officers to discharge properly and efficiently their official duties.¹ The *protection of all buildings in a city or town from destruction or injury by fire* is for the benefit of all the inhabitants and for their relief from a common danger, and municipalities are usually authorized by statute to provide and maintain fire engines and to supply water for the extinguishment of fires. These statutes generally do not impose any duty, and, when availed of, the task undertaken is discretionary in its character. The grant of such power must be regarded as exclusively for public purposes and as belonging to the municipal corporation, when assumed, in its public, political, or legislative character. A city, therefore, does not, by accepting or acting under such a statute, and building its water works, enter into any contract with or assume any implied liability to the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained. There is no implied contractual or other relation between the city and the public within its boundaries with respect to the construction of water works which makes the city liable for a failure to exercise reasonable care and diligence in respect to their maintenance. Accordingly, when it has been sought to hold municipal corporations for the *loss and destruction of buildings through the inadequacy of the municipal water supply to protect them, or to extinguish fires*, the courts have usually held that the *municipality is not liable*. The fact that water rates or rents are paid by the inhabitants of the city does not create an implied liability in such a case. These rates or rents are but a mode of taxation and a part of the general scheme for the purpose of raising revenue with which to carry on the work of government.² Within these principles it has been held that there

¹ *Edgerly v. Concord*, 62 N. H. 78; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46. The general law on this subject is discussed in §§ 1626, 1642, 1643, *et seq.*, *post*, with which this section is to be compared and considered.

² *David v. Montgomery*, 51 Ala. 139; *Ukiah v. Ukiah Water & Imp. Co.*, 142 Cal. 173; *Torbush v. Norwich*, 38 Conn. 225; *Jewett v. New Haven*, 38 Conn. 368; *Wright v. Augusta*, 78 Ga. 241; *Holloway v. Macon Gaslight & W. Co.*, 132 Ga. 387; 64 S. E. Rep. 330; *Peck v. Sterling Water Co.*, 118 Ill. App. 533; *Brinkmeyer v. Evansville*, 29 Ind. 187;

Robinson v. Evansville, 87 Ind. 334; *Aschoff v. Evansville*, 34 Ind. App. 25; *Vanhorn v. Des Moines*, 63 Iowa, 447; *Patch v. Covington*, 17 B. Mon. (Ky.) 722; *Sandusky v. Central City*, 22 Ky. Law Rep. 669; *Terrell v. Louisville Water Co.*, 127 Ky. 77; 105 S. W. Rep. 100; *Hone v. Presque Isle Water Co.*, 104 Me. 217; 71 Atl. Rep. 769; *Tainter v. Worcester*, 123 Mass. 311; *Heller v. Sedalia*, 53 Mo. 159; *Edgerly v. Concord*, 59 N. H. 78; *Wild v. Patterson*, 47 N. J. L. 406; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, *rev'g* 80 Hun, 162; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Grant v. Erie*, 69 Pa. St. 420; *Black*

is no liability by a city for loss sustained by fire where the wrongful act charged was *neglect in cutting off water from a hydrant*, but for which the fire might have been extinguished;¹ or in *failing to keep the reservoir in repair* whereby the supply of water became inade-

v. Columbia, 19 S. Car. 412; *Ancrum v. Camden Water, L. & I. Co.*, 82 S. Car. 284; *Cooke v. Paris Mountain Water Co.*, 82 S. Car. 235; *Foster v. Lookout Water Co.*, 3 Lea (Tenn.), 42; *Greenville Water Co. v. Beckham* (Tex. Civ. App.), 118 S. W. Rep. 889; *Mendel v. Wheeling*, 23 W. Va. 233; *Atkinson v. Newcastle Waterworks*, L. R. 2 Exch. Div. 441, rev'g L. R. 6 Exch. 404. Perhaps one of the grounds of the rule of non-liability for property destroyed by fire is the dangerous nature of the opposite doctrine and the vast, ruinous, and immeasurable pecuniary liability which its adoption would carry with it.

In *Springfield Fire & Marine Ins. Co. v. Keeseville*, 148 N. Y. 46, 57, (which was an action against a municipality for damages for destruction of property by fire which could have been prevented by due care on the part of the municipality in respect of its water works,) *Gray, J.*, in an able discussion of the contention that as the city sold water to its inhabitants it acted in a private corporate character in building and maintaining its water works, and was therefore impliedly liable for negligence, makes the following weighty observations: "The fallacy, as it seems to me, which affects the argument that the municipal corporation can be made liable for the non-user of its power, consists in that it fails to appreciate the true nature of the function which the corporation performs. It adds to its political machinery for the purpose of benefiting and of protecting its inhabitants. There is nothing connected with the work, which is not of a governmental and public nature. It is in no sense a private business, and the authority to construct the works was given to it by the legislature, not at its own particular instance or application, but because it was one of the political subdivisions of the State, and, as such, was entitled to exercise it. How could it justly be said that the maintenance of the water work system, any more than of a fire department, was a matter of private corporate interest? Is it not for all the inhabitants and for their good

and protection? No interest was designed to be subserved, other than that of adding to the powers of a community carrying on a local government. If that is true, the alternative is that being for public purposes and for the general welfare and protection, the defendant assumed a governmental function and comes under the sanction of the rule which exempts government from suits by citizens."

As to implied municipal liability for tortious acts causing damage to others when the municipality exercises the powers and duties ordinarily performed by trading or private corporations receiving the tolls or profits, see *post*, §§ 1671, 1673, and notes. The fact that the city has taken a contract from the water company to protect the city from liability for neglect of the company does not enable a property owner to recover from the city. *Vanhorn v. Des Moines*, 63 Iowa, 447. In *admiralty* there seems to be an exception to the rule stated in the text. Thus, where a fire boat owned by a municipality and employed at the time in extinguishing a fire collided with and damaged another vessel, it was held that the city was liable *in personam* for the maritime tort, notwithstanding the fact that the fire boat was engaged in attempting to extinguish a fire at the time. This decision was rendered upon the ground that, in maritime law, the public or governmental nature of the service upon which a vessel is engaged at the time affords no immunity to the municipal corporation from liability *in personam*. *Workman v. New York City*, 179 U. S. 552, rev'g 67 Fed. Rep. 347, s. c. 63 Fed. Rep. 298. See *ante*, § 993, where this case and other similar cases are discussed. In *Aiken v. Columbus*, 167 Ind. 142, the city was held liable without any express statute for *negligence* in the management of its lighting system (owned by the city for public and so-called commercial purposes), whereby the plaintiff's intestate was killed. *s. p. Richmond v. Lincoln*, 167 Ind. 468.

¹ *Tainter v. Worcester*, 123 Mass. 311.

quate,¹ or because the *pipes were inadequate* or out of order,² or because the *officers and members of the fire department were negligent* in the performance of their duties.³ It has been doubted whether, if a duty had been imposed upon the municipality, and not a mere discretionary authority conferred upon it, negligence in constructing or maintaining the water works would have constituted a good cause of action.⁴ In England, where a statutory duty was imposed upon a water company to keep its pipes at all times charged with water at a certain pressure and to allow all persons at all times to use the same for extinguishing fires without compensation, it was held that no action lay against it by an owner of property to recover damages for the destruction of his premises by fire upon the ground that the company had failed to discharge the duty imposed upon it by statute.⁵

The question of the *liability of a water company furnishing water to a municipality and its inhabitants* under an ordinance or contract, to respond in damages to a resident owner of property destroyed by fire, on account of the failure of the water company to fulfil its contract with the city to furnish an adequate supply of water at a stipulated price for the extinguishment of fires, has many times received the consideration of the courts, and the weight of authority is that the *contracting company is not chargeable with any greater liability than the city itself*; that the contract is between the city and the water company only; and that there is no privity of contract between the individual citizen, though a taxpayer, who contributes to the fund disbursed by the city in the payment of hydrant rentals for fire protection, and the water company, which will enable the

¹ *Grant v. Erie*, 69 Pa. St. 420; *which fire-plugs or hydrants were attached, at all times charged with water at a certain pressure, and to allow all persons to use them for extinguishing fire without compensation; and to supply to residents who had paid or tendered the water rate sufficient water for domestic purposes. Statutory penalties were provided for neglect of any of these duties. The court appears to have considered that the duty to furnish a supply of water for use in extinguishing fires was a public duty for a breach of which a private individual had no cause of action in the absence of a provision of the statute conferring it, and that the only remedy against the company for a breach of its duty was an action to recover the statutory penalty.*

post, § 1660.

² *Mendel v. Wheeling*, 28 W. Va. 233.

³ *Torbush v. Norwich*, 38 Conn. 225; *Jewett v. New Haven*, 38 Conn. 368; *Robinson v. Evansville*, 87 Ind. 334; *Yule v. New Orleans*, 25 La. Ann. 394; *Fisher v. Boston*, 104 Mass. 87; *Heller v. Sedalia*, 53 Mo. 159; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Hayes v. Oshkosh*, 33 Wis. 314.

⁴ *Grant v. Erie*, 69 Pa. St. 420.

⁵ *Atkinson v. Newcastle & G. Waterworks Co.*, L. R. 2 Exch. Div. 441, *rev'g* L. R. 6 Exch. 404. In this case the company was bound by statute to maintain certain fire-plugs or hydrants; to furnish the municipality a sufficient supply of water for certain public purposes; to keep pipes to

property owner to recover damages so sustained.¹ But in *Kentucky*, *North Carolina*, and *Florida*, the courts have reached a different

¹ *Boston Safe Deposit & Trust Co. v. Salem Water Co.*, 94 Fed. Rep. 238; *Metropolitan Trust Co. v. Topeka Water Co.*, 132 Fed. Rep. 702; *Lovejoy v. Bessemer Waterworks Co.*, 146 Ala. 374; *Ukiah v. Ukiah Water & Imp. Co.*, 142 Cal. 173; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; *Fowler v. Athens City Water Works Co.*, 83 Ga. 219; *Holloway v. Macon Gaslight & W. Co.*, 132 Ga. 387; 64 S. E. Rep. 330; *Bush v. Artesian Hot & Cold Water Co.*, 4 Idaho, 618; *Galena v. Galena Water Co.*, 229 Ill. 128, 133, aff'g 132 Ill. App. 332; *Peck v. Sterling Water Co.*, 118 Ill. App. 533; *Fitch v. Seymour Water Co.*, 139 Ind. 214; *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59; *Becker v. Keokuk Water Works*, 79 Iowa, 419; *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan. 12; *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. 1091 (overruling *Planters Oil Mill v. Monroe Waterworks & L. Co.*, 52 La. Ann. 1243); *Hone v. Presque Isle Water Co.*, 104 Me. 217; 71 Atl. Rep. 769; *Wilkinson v. Light, Heat & Water Co.*, 78 Miss. 389; *Howson v. Trenton Water Co.*, 119 Mo. 304; *Metz v. Cape Girardeau Waterworks & E. L. Co.*, 202 Mo. 324; *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Houck v. Cape Girardeau Waterworks & E. L. Co.* (Mo. App.), 114 S. W. Rep. 1099; *Eaton v. Fairbury Water Works Co.*, 37 Neb. 546; *Ferris v. Carson Water Co.*, 16 Nev. 44; *Wainwright v. Queens County Water Co.*, 78 Hun (N. Y.), 146; *Smith v. Great South Bay Water Co.*, 82 N. Y. App. Div. 427; *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 30; *Akron Water Works Co. v. Brownless*, 10 Ohio Cir. Ct. 620; *Blunk v. Dennison Water Supply Co.*, 71 Ohio St. 250; *Beck v. Kittanning Water Co.* (Pa.), 11 Atl. Rep. 300; *Thompson v. Springfield Water Co.*, 215 Pa. 275; *Anerum v. Camden Water, L. & I. Co.*, 82 S. Car. 284; *Cooke v. Paris Mountain Water Co.*, 82 S. Car. 235; *Foster v. Lookout Water Co.*, 3 Lea (Tenn.), 42; *House v. Houston Waterworks Co.*, 88 Tex. 233; *Greenville Water Co. v. Beckham* (Tex. Civ. App.), 118 S. W. Rep. 889; *Nichol v. Huntington Water Co.*, 53 W. Va. 348; *Britton v. Green Bay & Ft. H. Waterworks Co.*, 81 Wis. 48.

In an action by a water company against a city to recover for water supplied, there is no principle which will permit the city to set off or recoup damages sustained by private persons, citizens, and property owners on account of property destroyed by fire by reason of the insufficiency of the water supplied by the company to extinguish fires. *Montgomery v. Montgomery Water Works Co.*, 79 Ala. 233. Among the reasons advanced by some of the cases for holding that there can be no recovery against a water company for property of citizens destroyed by fire are that a city is *not authorized to indemnify its inhabitants* against any losses that may result from a negligent fire service, and what it cannot do directly, it cannot do indirectly. Not being permitted to assume such a liability, it cannot hire some one else to assume it in its place. *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. 1091; *Becker v. Keokuk Water Works*, 79 Iowa, 419; *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan. 12; *House v. Houston Waterworks Co.*, 88 Tex. 233.

A recovery against the water company has been denied in some of the cases, notwithstanding the fact that the company had stipulated in the ordinance or contract with the municipality that it would pay all damages to any citizen of the city by reason of a failure on the part of the company to supply a sufficient amount of water or a failure to supply the same at the proper time or by reason of any negligence of the water company. In *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan. 12, where there was such a stipulation, the reasoning of the court was to the effect that as the city was not liable to the citizen, the company was not liable; that the contract was between the city and the water company only; and that the municipality had no power to make a contract of indemnity for the benefit of its citizens. In *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118, where there was a similar stipulation, the court held that the citizen and consumer was not entitled to the benefit of the stipulation, because the city owed no duty to him to stipulate with the company that the consumer might recover dam-

conclusion, and have held that an *inhabitant of a city* who has suffered loss by fire by reason of the water company's breach of its contract with the city to furnish water for fire protection *may*, as a party for whose benefit the contract was made, *have an action against the water company*.¹ But even in these jurisdictions there can be no recovery against the water company unless its failure to furnish the amount of water contracted for at the stipulated pressure was the direct and proximate cause of the destruction of the plaintiff's property by fire.²

ages. See also *Vanhorn v. Des Moines*, 63 Iowa, 447; *Becker v. Keokuk Water Works*, 79 Iowa, 419.

¹ *Mugge v. Tampa Water Works Co.*, 52 Fla. 371; *Woodbury v. Tampa Water Works Co.*, 57 Fla. 243; 49 So. Rep. 556; *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340; *Duncan v. Owensboro Water Co. (Ky.)*, 12 S. W. Rep. 557; *Duncan's Executors v. Owensboro Water Co. (Ky.)*, 15 S. W. Rep. 523; *Graves County Water Co. v. Ligon*, 112 Ky. 775; *Lexington Hydraulic & Mfg. Co. v. Oots*, 119 Ky. 598; *Shelbyville Water & Lt. Co. v. McDade*, 122 Ky. 639; *Gorrell v. Greensboro Water Supply Co.*, 124 N. Car. 328; *Jones v. Durham Water Co.*, 135 N. Car. 553; *Fisher v. Greensboro Water Supply Co.*, 128 N. Car. 375.

In *Paducah Lumber Co. v. Paducah Water Supply Co.*, *supra*, it was said that it was not necessary to consider whether a municipal corporation can be made liable for the destruction by fire of the property of its individual inhabitants. These decisions have been repeatedly criticized by other courts as contrary to the weight of authority. See *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kans. 12; *Bush v. Artesian Hot & Cold Water Co.*, 4 Idaho, 618; *Howsmon v. Trenton Water Co.*, 119 Mo. 304; *Britton v. Green Bay & Ft. H. Waterworks Co.*, 81 Wis. 48; *House v. Houston Waterworks Co.*, 88 Tex. 233; *Fitch v. Seymour Water Co.*, 139 Ind. 214. A provision of the contract or ordinance that a failure of the company to comply with its provisions with reference to the efficiency of the supply, shall, at the option of the city, defeat the company's right to water rentals, and if continued for thirty days may be made a ground for terminating the contract, is not an *exclusive penalty for*

the breach so as to preclude a recovery by the property owner. *Lexington Hydraulic & Mfg. Co. v. Oots*, 119 Ky. 598.

Priority, under North Carolina statute, of judgment against water company for negligence, *e. g.*, failure to furnish an adequate supply of water for fire purposes, over mortgage made by corporation, see *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, s. c. 115 Fed. Rep. 184. The judgment against the water company in this case was that rendered in *Fisher v. Greensboro Water Supply Co.*, 128 N. Car. 375, cited *supra*.

² *Owensboro Water Co. v. Duncan's Adm'x (Ky.)*, 32 S. W. Rep. 478; *Woodbury v. Tampa Waterworks Co.*, 57 Fla. 243; 49 So. Rep. 556. But stipulations in the contract requiring the company to keep all the fire hydrants supplied with water and maintain them in effective working order except during the time of repairing or removing any hydrant which has become ineffective by accident or other cause than wilful negligence on the part of the company, do not make the company liable for a failure to furnish a sufficient supply of water by reason of any accident of any character to the water plant except the act of God or the public enemy. The obligation of the contract simply is that the company shall furnish an ample supply of water for all purposes and at all times, unless prevented by an accident to the plant which by ordinary prudence could not have been anticipated or foreseen and provided against. *Springfield Fire & Marine Ins. Co. v. Graves County Water & Light Co.*, 120 Ky. 40. If it appears that the apparatus of the fire department was insufficient for the quantity and force of water actually supplied, the property owner cannot recover, as it is impos-

Different considerations may apply when the loss is sustained by a person or a municipality as a property owner having a direct contract with the water company to furnish water for fire protection to specific property. It has however been held that where the contract with a water company for water for fire protection was made by the municipality merely for general fire purposes by virtue of its general authority to conserve the public good for the benefit of the city and all its inhabitants, and the protection of any specific property was not contemplated, the municipality, in the event of loss of its property by fire, bears the same relation to the company as any other property owner within its limits, and cannot recover from the company for failure to furnish water under sufficient pressure at the time of the loss.¹ When a private consumer has a direct contract with a water company to furnish water to its private pipes or hydrants for fire protection, the company has, in a few cases, been held liable for the destruction of the property by fire through neglect on its part to fulfil the terms of its contract.²

sible to say that the failure to supply the stipulated quantity was the proximate cause of the loss of his property. *Owensboro Water Co. v. Duncan's Adm'x* (Ky.), 32 S. W. Rep. 478.

¹ *Ukiah v. Ukiah Water & Imp. Co.*, 142 Cal. 173. But in *Gorrell v. Greensboro Water Supply Co.*, 124 N. Car. 328, it is said that if city buildings are destroyed by fire through the failure of the company to furnish water for their protection as provided by the contract, the city could recover. In *Milford v. Bangor R. & E. Co.*, 104 Me. 233; 71 Atl. Rep. 759, a complaint alleged that a town hall had been burnt, that the town had a contract with a water company which provided for a supply of water for fire purposes by hydrants, &c., and the town asked a judgment against the water company for the damages sustained. A demurrer to the complaint was overruled because the court considered that a good cause of action was stated, the complaint containing allegations of a specific duty under the contract, and of a breach thereof.

² *New Orleans & N. E. R. Co. v. Meridian Waterworks Co.*, 72 Fed. Rep. 227; *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240. See also *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, where the recovery was sustained

not only under the contract between the city and the water company, but also because the plaintiff corporation had a contract with the water company by which, in consideration of rental paid for the use of two hydrants on its property, the water company had agreed to furnish water directly to it.

Where a water company entered into a contract to furnish water to the owner of a factory with a pressure sufficient for fire purposes, it was held that the contract obligation was absolute, and that the company could not excuse its default on the ground that a break in its pipes had occurred without any fault on its part. *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240. But where the contract between the company and the consumer contains a stipulation that the company shall not be liable under any circumstances for a failure in the supply of water from any cause whatever, the consumer cannot recover from the water company, though the failure of supply was due to the company's negligence. *Buchanan & Smock Lumber Co. v. East Jersey Coast Water Co.*, 71 N. J. Law, 350.

An oral contract between a water company and the owner of a building by which the company in consideration of the erection of a standpipe by the owner and the payment of a yearly sum

§ 1341. **Diversion of Sub-Surface Waters by Municipal Water Works.** — It has long been recognized as the general common law rule that *surface waters and percolating waters*, not flowing in any known, definite, and recognized water-course, form a part of the soil itself and belong to the owner of the soil. The owner of the soil may therefore appropriate them by wells, ditches, and other methods, although his acts may result in reducing the supply of a stream or drain a neighbor's well; and any loss or damage which an adjoining owner sustains by reason of the act is *damnum absque injuria*.¹ But the cases in which the rule was laid down arose in the use of land for the ordinary purposes to which it may be devoted. The abstraction of the surface or sub-surface water was not carried out for the purpose of storing it and then distributing it to the inhabitants of a community in return for rates or other compensation. Different considerations apply *when a city, by the operation of a water system, consisting of wells and pumps on its own land, drains the contiguous territory and thus diverts and diminishes the flow of water to and underneath adjoining property.* If the result of its

in addition to regular meter rates agrees to supply and furnish such standpipe at all times with a full, adequate, and sufficient supply of water, with sufficient pressure at all times for use in the extinguishment of fires, is a contract which cannot be fully performed within a year *within the statute of frauds*, and is invalid. *Metropolitan Trust Co. v. Topeka Water Co.*, 132 Fed. Rep. 702. The owner of property cannot recover for its loss under a contract made by his tenant with the water company to keep the building supplied with water for domestic, sanitary, and fire purposes. *Nicol v. Huntington Water Co.*, 53 W. Va. 348.

¹ *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Ellis v. Duncan*, 21 Barb. (N. Y.) 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520; *Delhi v. Youmans*, 45 N. Y. 362; *Phelps v. Nowlen*, 72 N. Y. 39; *Barkley v. Wilcox*, 86 N. Y. 140; *Bloodgood v. Ayers*, 108 N. Y. 400; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Acton v. Blundell*, 12 Mees. & W. 324; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Frazier v. Brown*, 12 Ohio St. 294; *Wheatley v. Baugh*, 25 Pa. 528. See Index, *Surface Water*. In *Frazier v. Brown*, 12 Ohio St. 294, the principle applicable to percolating waters

and the reasons therefor are explained as follows: "The reasoning is briefly this: In the absence of express contract, and of positive authorized legislation, as between proprietors of adjoining lands the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth, and this mainly from considerations of public policy. 1. Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible. 2. Because any such recognition of correlative rights would interfere to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility." As to the property rights of riparian owners in percolating waters forming part of the subterranean flow of a river, see *Los Angeles v. Pomeroy*, 124 Cal. 597.

acts is to diminish the flow of water in a natural surface stream on the land of another, it is answerable in damages under the rule that no one may divert or obstruct the actual flow of a stream for his own benefit to the injury of another.¹ If the *result of the operation of municipal waterworks is to tap the sub-surface water* stored in the land of an adjacent owner and in all the contiguous territory and to lead it to the land of the city and by merchandizing it to prevent its return, whereby the value of the land of such owner is impaired for agricultural purposes, the city is liable to him in trespass for the damage occasioned thereby.² In so holding, the Court of Appeals of New York declared that it did not intend to depart from the ordinary rule applicable to adjoining proprietors. In the absence of contract or positive statutory enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It also said that it was not unreasonable,

¹ Van Wycklen v. Brooklyn, 118 N. Y. 424; Smith v. Brooklyn, 160 N. Y. 357, aff'g 32 App. Div. 257; s. c. 18 N. Y. App. Div. 340. In Erickson v. Crookston Waterworks, P. & L. Co., 100 Minn. 481, s. c. 105 Minn. 182, it appeared that the artesian works of the defendant company were properly constructed, but that the use of artificial power had lowered the head of the plaintiff's artesian well, so that he had to resort to artificial power to obtain water therefrom. The court held that the water company had no right by artificial means to draw the pressure of the supply to a lower level, thus depriving the plaintiff of the natural benefit of his artesian well and that plaintiff was entitled to an injunction and damages. As to the constitutional power of the State to protect and preserve underground supplies of water against abstraction by artificial means to the injury of the property owners and the State, see *ante*, § 1295, note.

In Katz v. Walkinshaw, 141 Cal. 116, it was held that the owner of lands upon which there is *percolating water* has the right to a reasonable use thereof, but he cannot rob the soil by artificial means for the purpose of transporting the water to a distance and selling the same to the manifest injury of his neighbors. See also generally as to the right of the owners of property to appropriate percolating

waters, Cohen v. La Canada Land & Water Co., 142 Cal. 437; Newport v. Temescal Water Co., 149 Cal. 531; Barton v. Riverside Water Co., 155 Cal. 509; 101 Pac. Rep. 790; Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687; Stillwater Water Co. v. Farmer, 89 Minn. 58, s. c. 92 Minn. 230; Pence v. Carney, 58 W. Va. 296.

An action was brought against a city for *diverting water from a flowing artesian well* belonging to the plaintiff. The city had sunk four wells about a block away from plaintiff's well, and a flow was secured from each. The city then applied pumps, &c., and when the pumps were in use, the plaintiff's wells ceased to flow, but resumed flowing when the pumping ceased. It was held that the city was liable to the plaintiff in damages. This case was tried and decided on the theory that there was an appropriation of a subterranean stream or water course. Willis v. Perry, 92 Iowa, 297. See also, as to subterranean streams, St. Amand v. Lehman, 120 Ga. 253; Barclay v. Abraham, 121 Iowa, 619. As to the abstraction of *waters of a surface stream* by tunnelling beneath the same, see McClintock v. Hudson, 141 Cal. 275; Montecito Val. Water Co. v. Santa Barbara, 144 Cal. 578; Johnson v. Gould, 60 W. Va. 84.

² Forbell v. New York City, 164 N. Y. 522, aff'g 47 N. Y. App. Div. 371.

so far as it was apparent to it, that the owner should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, held for purposes of pleasure, abode, productiveness of soil, manufacture, or for whatever else the land may serve; he may consume it, but must not discharge it to the injury of others. But to fit up the land of the municipality with wells and pumps of such pervasive and potential reach that from their base the city can tap the water stored in all the region thereabout, and lead it to its own land, and by merchandizing it, prevent its return, is, however reasonable it may appear to the city and its customers, unreasonable as to others whose lands are thus clandestinely sapped, and their value impaired, and they are entitled to redress. For a trespass so committed, the rule of damages is the extent to which the fee, rental, or usable value of the premises has been diminished by the acts complained of.¹ It is not a case where the loss of profits may be recovered as such,² but where the land is put to a use for which the water abstracted is necessary, *e. g.*, to raise vegetables and produce, or as a market garden, the owner of the land should be allowed to prove all the facts in regard to the manner of conducting his business thereon before and after the trespass, which are calculated to give the court or jury a correct general idea of the condition of the land and its productive value, including the quantity of produce produced in different years, and the expense to which the owner has been put in procuring the respective crops, — not as a means of establishing the amount of profit which the owner has derived or would have derived from the land but for the trespass, but as a means of giving to the court information as to the fee or rental value of the land.³

¹ *Westphal v. New York City*, 75 N. Y. App. Div. 252; *Dinger v. New York City*, 101 N. Y. App. Div. 202; *Reisert v. New York City*, 174 N. Y. 196, rev'g 69 N. Y. App. Div. 302.

² *Dinger v. New York City*, 101 N. Y. App. Div. 202; *Reisert v. New York City*, 174 N. Y. 196.

³ *Reisert v. New York City*, 174 N. Y. 196, rev'g 69 N. Y. App. Div.

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